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No. 95062-8

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CESAR BELTRAN-SERRANO, individually, and BIANCA BELTRAN,  
as guardian ad litem for CESAR BELTRAN-SERRANO,

Plaintiffs/Petitioners,

vs.

CITY OF TACOMA, a political subdivision of  
the State of Washington,

Defendant/Respondent.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of  
Washington State Association for Justice Foundation

## TABLE OF CONTENTS

	<b>Page</b>
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUES PRESENTED	3
IV. SUMMARY OF ARGUMENT	4
V. ARGUMENT	6
A. The Public Duty Doctrine Is A Focusing Tool Used By Courts To Ascertain Whether A Duty Imposed By An Enactment Is Owed To A Particular Plaintiff, And The Doctrine Is Inapplicable To Claims Brought Under The Common Law.	6
B. Negligence Claims Arising Out Of The Unreasonable Use Of Deadly Force May Be Grounded In Existing Doctrines Recognized Under Washington Law, And Where The Claims Are Asserted Against The Officer’s Employer, Those Claims Can Be Based Both On Vicarious and Direct Liability Theories.	9
1. Washington law recognizes a duty of reasonable care to prevent harm arising from one’s own acts of misfeasance, where the acts involve an unreasonable risk of harm stemming from the foreseeable conduct of third parties.	9

2. In Washington, employers have a duty to train employees in the proper use of instrumentalities related to work and should be liable in tort for injuries proximately caused by a failure to reasonably train, regardless of whether the employee was acting in the scope of employment.

14

C. Whether The Use Of Deadly Force May Give Rise To An Assault And Battery Claim Should Be Irrelevant To Whether A Plaintiff Can Assert A Negligence Claim Arising Out Of The Same General Set Of Facts, And To Best Deter Deadly Force By Police Officers, Washington Law Should Permit A Common Law Claim For Negligent Police Practices That Includes Consideration Of Conduct Preceding The Use Of Deadly Force.

18

VI. CONCLUSION

20

Appendix

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Amrine v. Murray</i> , 28 Wn. App. 650, 626 P.2d 24 (1981) .....	19
<i>Anderson v. Soap Lake Sch. Dist.</i> , ___ Wn.2d ___, 423 P.3d 197 (2018) .....	14, 15, 16, 17
<i>Babcock v. State</i> , 160 Wn.2d 596, 809 P.2d 143 (1991) .....	16
<i>Brownfield v. City of Yakima</i> , 178 Wn. App. 850, 316 P.3d 520 (2014) .....	15
<i>Campbell v. City of Bellevue</i> , 85 Wn.2d 1, 530 P.2d 234 (1975) .....	7
<i>Chambers-Castanes v. King County</i> , 100 Wn.2d 275, 669 P.2d 451 (1983) .....	9
<i>Garnett v. City of Bellevue</i> , 59 Wn. App. 281, 796 P.2d 782 (1990) .....	9
<i>Gilliam v. Dep't of Soc. &amp; Health Servs.</i> , 89 Wn. App. 569, 950 P.2d 20 (1998) .....	15, 16
<i>Halvorson v. Dahl</i> , 89 Wn.2d 673, 574 P.2d 1190 (1978) .....	7
<i>Hayes v. County of San Diego</i> , 305 P.3d 252, 57 Cal.4th 622 (2013) .....	13
<i>In re Det. of Reyes</i> , 184 Wn.2d 340, 358 P.3d 394 (2015) .....	8
<i>Joyce v. State, Dep't of Corr.</i> , 155 Wn.2d 306, 119 P.3d 825 (2005) .....	7

<i>Kelso v. City of Tacoma,</i> 63 Wn.2d 913, 390 P.2d 2 (1964) .....	6
<i>King Cty. v. Vinci Constr. Grands Projets, Law</i> 188 Wn.2d 618, 398 P.3d 1093 (2017) .....	8
<i>LaPlant v. Snohomish County,</i> 162 Wn. App. 476, 217 P.2d 254 (2011) .....	15
<i>LaPlante v. State,</i> 85 Wn.2d 154, 531 P.2d 299 (1975) .....	8
<i>Mason v. Bitton,</i> 85 Wn.2d 321, 534 P.2d 1360 (1975) .....	7
<i>Munich v. Skagit Emergency Comm. Ctr.,</i> 175 Wn.2d 871, 288 P.3d 328 (2012) .....	8
<i>Niece v. Elmview Grp. Home,</i> 131 Wn.2d 39, 929 P.2d 420 (1997) .....	17
<i>Petersen v. State,</i> 100 Wn.2d 421, 671 P.2d 230 (1983) .....	8
<i>Robb v. City of Seattle,</i> 176 Wn.2d 427, 295 P.2d 212 (2013) .....	passim
<i>Savage v. State,</i> 127 Wn.2d 434, 899 P.2d 1270 (1995) .....	6, 20
<i>Steinbock v. Ferry Cty. Pub. Util. Dist. No. 1,</i> 165 Wn. App. 479, 269 P.3d 275 (2011) .....	11
<i>Stewart v. State,</i> 92 Wn.2d 285, 597 P.2d 101 (1979) .....	8
<i>Strachan v. Kitsap County,</i> 27 Wn. App. 271, 616 P.2d 1251 .....	16

<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992) .....	8
<i>Washburn v. City of Federal Way</i> , 178 Wn.2d 732, 310 P.3d 1275 (2013) .....	9, 11, 12, 13

**Statutes**

Laws of 1961, ch. 136 § 1 .....	6
Laws of 1963, ch. 159 § 2 .....	6
RCW 4.92 .....	19
RCW 4.92.090 .....	6, 8
Washington State Constitution, Art. 2, § 26 .....	6

**Rules**

CR 8(e)(2) .....	19
CR 11 .....	19

**Other Authorities**

<i>Restatement (Second) of Torts</i> § 302 (1965) .....	10, 11, 18
<i>Restatement (Second) of Torts</i> § 302A (1965) .....	10, 11
<i>Restatement (Second) of Torts</i> § 302B (1965) .....	passim
<i>Restatement (Second) of Torts</i> § 317 (1965) .....	17
<i>Restatement (Third) of Torts</i> § 41 (2012) .....	17

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

The 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 redress under the civil justice system, including an interest in the right to bring an action in tort for victims of the unreasonable use of deadly force.

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

This case involves claims of negligence and assault and battery asserted against the City of Tacoma arising out of the shooting of Cesar Beltran-Serrano by a Tacoma police officer. The case is on direct review from a partial summary judgment order dismissing the negligence claims. The facts are drawn from the Commissioner's Ruling Granting Review and the parties' briefs. *See* Ruling Granting Review at 1-2; Beltran-Serrano Op. Br. at 2-12; City Resp. Br. at 2-9; Beltran-Serrano Reply Br. at 2-3.

The following facts, construed in the light most favorable to Beltran-Serrano, are relevant to this review. Tacoma Police Officer Michel Volk (Volk) was driving while on duty when she saw Beltran-Serrano "wandering aimlessly" in an area known for frequent panhandling. Volk had no reason to believe he was engaged in criminal activity or posed any

threat, but apparently stopped to advise him of panhandling laws. He was unkempt and appeared to be homeless. Volk asked if he spoke English and he shook his head, so she called for backup from a Spanish-speaking officer, who was less than a five minute drive from their location.

Volk began questioning Beltran-Serrano in English. He became confused and agitated, retreating in an attempt to get away from her. Volk chased him, and used her taser in an effort to subdue him. The taser was ineffective; Beltran-Serrano remained on his feet, removed the taser tags, and became increasingly flustered and fearful. When Beltran-Serrano started to run, Volk dropped her taser and pulled out her handgun, shooting him four times. He was severely injured, but survived the shooting.

Beltran-Serrano filed his complaint, alleging assault and battery and multiple theories of negligence, including vicarious liability for the unreasonable use of force and direct liability for negligent training and supervision. He provided eyewitness testimony corroborating his account of the incident. Additionally, city employees testified that Tacoma police are trained to recognize mental illness, as well as how to de-escalate such encounters, but Volk claimed to have limited knowledge of these procedures and did not follow them in her contact with Beltran-Serrano. Plain-

tiff presented expert testimony opining that Volk's conduct needlessly created a dangerous situation and escalated it to one involving deadly force.

The City moved for summary judgment as to the negligence claims, arguing the Public Duty Doctrine barred his claim, the City had no duty to Beltran-Serrano to use reasonable care in its use of deadly force, and the negligent training and supervision claims were not sustainable because Volk was acting in the scope of her employment at the time of the shooting. The trial court dismissed Beltran-Serrano's negligence claims and certified questions for discretionary review. The Commissioner granted review and retained the case in the Washington Supreme Court.

### **III. ISSUES PRESENTED**

- (1) Whether the Public Duty Doctrine applies to claims brought under common law doctrines recognized in Washington?
- (2) Whether the duty to prevent foreseeable harm stemming from one's own affirmative acts of misfeasance encompasses a duty to prevent harm resulting from foreseeable third party conduct?
- (3) Whether a claim against an employer alleging injuries proximately caused by the employer's negligent training requires proof the employee was acting outside the scope of employment?
- (4) Whether the fact that excessive force may give rise to an assault and battery claim should bar a plaintiff from asserting a related negligence claim under existing common law doctrines recognized in Washington?

#### IV. SUMMARY OF ARGUMENT

In 1961, the State of Washington waived sovereign immunity for its tortious conduct, exposing it to liability to the same extent as if it were a private entity. The waiver applies regardless of whether the conduct undertaken is governmental or proprietary. One of the broadest waivers in the country, it has been interpreted to make the State presumptively liable in all cases in which the Legislature has not indicated otherwise.

Following enactment of the waiver, the Public Duty Doctrine was adopted by the Court as a focusing tool to examine whether a duty owed by government is owed to an individual or class of persons, or to the public in general. The rule reflects the verity that one must owe a legally recognized duty to the particular plaintiff to give rise to an action in tort. Hence, when a duty arises out of a statute, regulation, or ordinance, the Doctrine is used to ascertain whether it is owed to the individual plaintiff. Where an action is based on government conduct that fits within the scope of an existing common law cause of action, the Public Duty Doctrine is inapplicable, as recognized common law doctrines apply to government actors to the same extent as if they were private entities.

Existing common law doctrines in Washington recognize a duty where one's own acts of misfeasance lead to an unreasonable risk of harm.

One who engages in an act of misfeasance that he or she knows or should know involves an unreasonable risk of harm to another through the reasonably foreseeable conduct of a third person has a duty to act reasonably to protect against such harm. Where an employee's breach of this duty is asserted against an employer, the employer may be vicariously liable for the employee's negligence if she was acting in the scope of employment.

Theories of direct liability against an employer, including negligent supervision and training, may also be advanced. Where direct and vicarious liability theories are not redundant, a plaintiff should be permitted to separately plead negligent training claims against an employer related to acts undertaken by the employee acting within the scope of employment.

Regardless of the negligence theory at issue, persons injured or killed by the unreasonable use of deadly force must be permitted to assert independent negligence claims that include consideration of pre-shooting conduct. While assault and battery may also be sustainable, the actions preceding deadly force must be a focus of policies implementing proper training of officers in order to prevent dangerous circumstances from arising. A primary aim of tort law is to deter harmful conduct, and it is in influencing the steps prior to the use of force, before it becomes unavoidable, that tort law may have its greatest deterrent effect.

## V. ARGUMENT

### A. **The Public Duty Doctrine Is A Focusing Tool Used By Courts To Ascertain Whether A Duty Imposed By An Enactment Is Owed To A Particular Plaintiff, And The Doctrine Is Inapplicable To Claims Brought Under The Common Law.**

The Washington State Constitution, Art. 2, § 26, provides “[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.” (Brackets added). Until 1961, the Legislature retained sovereign immunity, barring actions arising out of its own tortious conduct. *See Kelso v. City of Tacoma*, 63 Wn.2d 913, 916, 390 P.2d 2 (1964). It eventually changed course and waived sovereign immunity. *See* Laws of 1961, ch. 136 § 1 (codified as RCW 4.92.090). As amended by Laws of 1963, ch. 159 § 2, the waiver statute provides: “The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.” RCW 4.92.090.<sup>1</sup>

The statute is “one of the broadest waivers of sovereign immunity in the country.” *Savage v. State*, 127 Wn.2d 434, 444-45, 899 P.2d 1270 (1995). It provides that government is liable to the same extent as private entities and applies whether conduct is governmental or proprietary. It

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<sup>1</sup> The full text of the current version of RCW 4.92.090 is reproduced in the Appendix.

“functions as a promise that the State and its agents will use reasonable care while performing its duties at the risk of incurring liability.” *Joyce v. State, Dep't of Corr.*, 155 Wn.2d 306, 309, 119 P.3d 825, 827 (2005).

What is now recognized as the Public Duty Doctrine emerged in an effort to address the concern that duties may be imposed by government enactments for the benefit of the public good, and may not create a duty for the benefit of individuals or classes of persons. *See Campbell v. City of Bellevue*, 85 Wn.2d 1, 9-10, 530 P.2d 234 (1975) (recognizing a “duty enacted for the benefit of the public at large imposes no liability on the part of a municipality running to individual members of the public”); *Mason v. Bitton*, 85 Wn.2d 321, 325, 534 P.2d 1360 (1975); *Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978). In *Mason*, the Court explained: “Whenever a duty is imposed by statutory enactment, a question of law arises as to which class of persons is intended to come within the protection provided by the statute.” 85 Wn.2d at 325.

In 2012, a majority of this Court confirmed the Doctrine applies only to duties mandated by an enactment, and not to common law claims:

Although we could have been clearer in our analysis, the only governmental duties we have limited by application of the public duty doctrine are duties imposed by a statute, ordinance, or regulation. This court has never held that a government did not have a common law duty solely because of the public duty doctrine.

*Munich v. Skagit Emergency Comm. Ctr.*, 175 Wn.2d 871, 887-88, 288 P.3d 328 (2012) (Chambers, J., concurring).<sup>2</sup>

When a common law claim is asserted, the Doctrine is inapplicable, as the Court's analysis must be the same as it would be with a private defendant. *See* RCW 4.92.090. Accordingly, common law doctrines have been applied to actions undertaken only by government without reference to the Public Duty Doctrine. *See, e.g., Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992) (liability of parole officers); *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) (action against State for negligence in releasing psychiatric patient); *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979) (negligent roadway design); *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975) (negligent licensing of drivers). Whether a claim is asserted against a private or public entity, the inquiry is the same: does the conduct fit within the scope of a duty recognized under the common law?<sup>3</sup>

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<sup>2</sup> "A principle of law reached by a majority of the court, even in a fractured opinion, is not considered a plurality but rather binding precedent." *King Cty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 626, 398 P.3d 1093, 1097 (2017) (quoting *In re Det. of Reyes*, 184 Wn.2d 340, 346, 358 P.3d 394 (2015)).

<sup>3</sup> Indeed, because the Court cannot supersede a statute, it arguably lacks authority to override the waiver statute and decline to apply common law duties that apply to private entities. Only when there is a statutory conflict, as between the waiver statute and another statutory provision that evidences Legislative intent to impose no enforceable duty, should the Court refuse to hold the government liable for its tortious conduct, as such refusal would otherwise be in contravention of the Legislative mandate in the waiver.

**B. Negligence Claims Arising Out Of The Unreasonable Use Of Deadly Force May Be Grounded In Existing Doctrines Recognized Under Washington Law, And Where The Claims Are Asserted Against The Officer's Employer, Those Claims Can Be Based Both On Vicarious and Direct Liability Theories.**

Claims asserting negligent law enforcement have been brought under a variety of legal doctrines recognized in Washington, including outrage, *see Chambers-Castanes v. King County*, 100 Wn.2d 275, 288, 669 P.2d 451 (1983); negligent infliction of emotional distress, *see Garnett v. City of Bellevue*, 59 Wn. App. 281, 796 P.2d 782 (1990), and breach of a duty based on one's own acts of misfeasance, *see Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013). Where the defendant is an employer, both direct and vicarious liability theories may be asserted.

1. Washington law recognizes a duty of reasonable care to prevent harm arising from one's own acts of misfeasance, where the acts involve an unreasonable risk of harm stemming from the foreseeable conduct of third parties.

While there is generally no duty to prevent harm to others, a duty exists to prevent foreseeable harm stemming from one's own affirmative acts of misfeasance. Based on this general principle, the Court in *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.2d 212 (2013), adopted *Restatement (Second) of Torts* § 302B (1965), which provides:

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

The Court looked to *Restatement (Second) of Torts* § 302 (1965) to highlight the legal significance of the misfeasance/nonfeasance distinction:

[A]nyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relationship between the actor and the other which gives rise to the duty.

*Robb*, 176 Wn.2d at 436 (quoting § 302 cmt. a (brackets added)).

Section 302 provides that affirmative acts are negligent when they involve an unreasonable risk of harm through either the continuous operation of a series of events (§ 302(a)), or the foreseeable acts of a third party (§ 302(b)). Section 302 comment b clarifies that § 302(b) is related to §§ 302A and 302B, which reflect specific forms of the general duty articulated in § 302(b). Section 302A involves an unreasonable risk of harm stemming from the negligent acts of another; section 302B involves risk from the intentional acts of another. These related sections — §§ 302, 302A and 302B — have all been applied by Washington courts. *See Robb*, 176 Wn.2d at 436 (relying on § 302 to clarify the distinction between misfeasance

and nonfeasance, and adopting § 302B as a basis for a duty to protect others from foreseeable third party harm stemming from acts of misfeasance); *Steinbock v. Ferry Cty. Pub. Util. Dist. No. 1*, 165 Wn. App. 479, 490, 269 P.3d 275 (2011) (citing §§ 302 & 302A as support for the general proposition that an act or omission that presents an unreasonable risk of harm through the foreseeable conduct of a third party may constitute negligence); *Washburn*, 178 Wn.2d at 754 (claim based on police officer's alleged negligence in serving anti-harassment order that increased the risk of third party harm actionable under § 302B).<sup>4</sup>

Whether a duty exists in any given instance appears to turn on whether the conduct of the actor constitutes an affirmative act of misfeasance that increases or creates an unreasonable risk of harm through the foreseeable conduct of either a third party or the other. *See Washburn*, 178 Wn.2d at 757-58; *Robb*, 176 Wn.2d at 434; *see also Restatement* §§ 302(b), 302A and 302B. Thus, in *Robb*, where the plaintiff was shot by a suspect who used bullet shells that someone left on the ground and were not removed by the officer, the officer's conduct constituted nonfeasance and triggered no duty, because the risk pre-existed his involvement and his failure to remove the shells did not increase the risk. *See Robb*, 176 Wn.2d

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<sup>4</sup> *Restatement (Second) of Torts* §§ 302, 302A & 302B are reproduced in the Appendix.

at 437-38. In contrast, when in *Washburn* the officer served a protection order on the victim's boyfriend in the victim's presence, despite knowledge of the risk that would be created, his acts constituted misfeasance and created a duty because he "created a new and very real risk to [the victim's] safety." *Washburn*, 178 Wn.2d at 760 (brackets added).

The Court in *Washburn* identified several factors supporting its conclusion that the officer's conduct there constituted misfeasance. First, the officer knew or should have known that the perpetrator may react violently to the service of the order. *See Washburn*, 178 Wn.2d at 760. Second, he knew the victim was present, increasing the likelihood that she would be at risk. *Id.* Finally, the officer failed to bring a translator, who may have facilitated the de-escalation of a dangerous situation. *Id.*

Volk's actions here are similar to the officer's conduct in *Washburn*. Although Beltran-Serrano posed no threat, and despite indications he was mentally ill and growing confused and flustered, Volk confronted him and eventually tased him. Notably, just as the officer in *Washburn* failed to bring a translator to facilitate communication, Volk questioned Beltran-Serrano instead of waiting just five minutes for a Spanish speaking officer.

Admittedly, it is unclear whether Beltran-Serrano reacted intentionally or negligently to Volk's advances. Additionally, while in *Robb* and

*Washburn*, the harm resulted from acts of a third party, here Beltran-Serrano's reaction may instead constitute "conduct of the other" within the meaning of § 302B. Neither of these potential factual distinctions change the analysis, however, as the factors warranting recognition of a duty under this Court's jurisprudence are 1) whether the act constitutes misfeasance or nonfeasance, and 2) whether the harmful conduct was a reasonably foreseeable result of the actor's affirmative act of misfeasance. As the Court in *Robb* explained, when a person, through an affirmative act, "creates or exposes another to the recognizable high degree of risk of harm," a duty to prevent foreseeable harm is created. 176 Wn.2d at 429-30. Because the underlying principles animating the recognition of a duty focus on the affirmative nature of the act and the foreseeability of an unreasonable risk of harm, whether the harm results from a third party or the other, and whether it is intentional or negligent, should be immaterial to the duty analysis.<sup>5</sup>

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<sup>5</sup> California law has adopted a "totality of the circumstances" approach that examines the reasonableness of deadly force based on the circumstances surrounding the encounter, including pre-shooting conduct. See *Hayes v. County of San Diego*, 305 P.3d 252, 257, 57 Cal.4th 622 (2013). The Hayes approach may be conceptually distinguishable from the Restatement approach: The California rule recognizes a duty to refrain from the unreasonable use of deadly force, and examines whether liability for breach of this duty may be based in part on pre-shooting conduct; this Restatement approach recognizes a duty to prevent foreseeable harm stemming from one's acts of misfeasance that involve an unreasonable risk of harm, and sees the ultimate shooting as a result of the initial act of misfeasance. Practically, however, where there is evidence of pre-shooting negligence, as here, the analysis undertaken by these approaches would appear to be very similar.

2. In Washington, employers have a duty to train employees in the proper use of instrumentalities related to work and should be liable in tort for injuries proximately caused by a failure to reasonably train, regardless of whether the employee was acting in the scope of employment.

Beltran-Serrano also argues the City owes an independent duty to train and supervise its employees, and that its failure to use reasonable care in discharging this duty proximately caused Beltran-Serrano's injuries. The City responds that a claim for negligent training and supervision may only be sustained if the employee is acting outside the scope of employment. Washington courts have at times dismissed direct negligence claims against employers, generally because such claims are redundant. Beltran-Serrano's direct and vicarious liability claims here are not redundant, and he should be permitted to advance both theories of recovery.

Vicarious liability provides that a wrongful act of the employee is imputed to the employer, who holds legal responsibility for the employee's breach. In contrast, claims of direct liability against an employer, which may include negligent supervision and training, involve allegations that the employer's own negligence proximately caused injury to the plaintiff. *See Anderson v. Soap Lake Sch. Dist.*, \_\_\_ Wn.2d \_\_\_, 423 P.3d 197, 214

n.21 (2018). There must be an underlying injurious act performed by the employee, but that act is distinct from the employer's own negligence.

Where a defendant employer concedes its employee was acting in the scope of employment, claims of direct and vicarious liability may be redundant. *See Gilliam v. Dep't of Soc. & Health Servs.*, 89 Wn. App. 569, 584-85, 950 P.2d 20 (1998). In *Gilliam*, the court of appeals explained:

Here, the State acknowledged [the employee] was acting within the scope of her employment, and that the State would be vicariously liable for her conduct. Under these circumstances a cause of action for negligent supervision is redundant. If [plaintiff] proves [the employee's] liability, the State will also be liable. If [plaintiff] fails to prove [the employee's] liability, the State cannot be liable even if its supervision was negligent. We find no error in the trial court's dismissing the cause of action given the record before it.

89 Wn. App. at 585 (brackets added); *see also LaPlant v. Snohomish County*, 162 Wn. App. 476, 479-80, 217 P.2d 254 (2011) (dismissing direct negligence claims, in part, because “[b]oth [direct and vicarious liability claims] rest upon a determination that the deputies were negligent and that this negligence was the proximate cause of LaPlant’s injuries” (brackets added)); *Brownfield v. City of Yakima*, 178 Wn. App. 850, 878, 316 P.3d 520 (2014) (noting when an employer does not disclaim liability for the employee, “the claim collapses into a direct tort claim against the employer, which requires dismissal of the negligent supervision claim”).

Government entities have a duty to reasonably train their employees. *See Strachan v. Kitsap County*, 27 Wn. App. 271, 276, 616 P.2d 1251, review denied, 94 Wn.2d 1025 (1980) (“[m]unicipalities have a duty to ensure their police officers receive adequate training in the handling of firearms” (brackets added)); *Babcock v. State*, 160 Wn.2d 596, 639, 643, 809 P.2d 143 (1991) (Andersen, J. concurring). Unlike negligent supervision, a negligent training claim is not redundant when the employer acknowledges the employee was acting within the scope of her employment and the employer would be vicariously liable for her conduct. In *Gilliam*, the basis for finding the claims redundant was that if the plaintiff proves the employee liable, the employer is also liable under respondeat superior; if the plaintiff fails to prove the employee is liable, the employer cannot be liable even if its supervision was negligent. 89 Wn. App. at 585. In contrast, where there is a claim for tortious conduct against an employee and a negligent training claim against the employer, the factfinder could find the employee is not liable *because* the employee was not adequately trained; in that instance, the negligent training claim would not be redundant.

It is true this Court has stated that an action against an employer for negligent training and supervision arises only when an employee is acting outside of the scope of his or her employment. *See Anderson v.*

*Soap Lake School Dist.*, 423 P.3d at 208 (citing *Restatement (Second) of Torts* §317 cmt. a). Quoting *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 929 P.2d 420 (1997), the Court in *Anderson* stated that “[a] duty of supervision extends to acts beyond the scope of employment when the ‘employer knew, or in the exercise of reasonable care should have known that the employee presented a risk of danger to others.’” *Anderson*, 423 P.3d at 209 (quoting *Niece*, 131 Wn.2d at 48-49 (brackets added)).<sup>6</sup>

Importantly, *Niece* only involved claims of negligent supervision, which may fit within the “control” framework described in Restatement § 317.<sup>7</sup> Claims of negligent training, however, have no necessary connection to knowledge of an employee’s dangerous propensities and no necessary connection to § 317 liability. Instead, more generalized knowledge as to

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<sup>6</sup> It is questionable whether *Niece* stands for the broad and categorical rule that direct liability claims require proof the employee was acting outside the scope of employment. Rather, the Court appeared to clarify that in contrast to vicarious liability claims, which are limited to acts undertaken in the scope of employment, direct liability theories are not so limited: “[T]he scope of employment is *not a limit* on an employer’s liability for a breach of its own duty of care. *Even where* an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty . . . to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.” *Niece*, 131 Wn.2d at 48 (italics and brackets added).

<sup>7</sup> *Niece* and *Anderson* rely on *Restatement (Second) of Torts* § 317 (1965), entitled “Duty of Master to Control Conduct of Servant.” Notably, while the Restatement (Second) references the rule that an employee must be acting outside the scope of employment to trigger a duty, the Third Restatement abandons this factor altogether, instead describing an employer’s duty as one “of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship.” *Restatement (Third) of Torts: Liability for Physical Harm* § 41 (2005). The Third Restatement test is whether “the employment facilitates the employee’s causing harm to third parties.” See § 41 cmt. e. *Restatement (Second)* § 317 and *Restatement (Third)* § 41 are reproduced in the Appendix.

dangers of instrumentalities of the work, and the potential for improper use of those instrumentalities, would appear to be the proper inquiry.

An employer's negligent training of an employee may proximately cause harm to another whether or not the employee is acting in the scope of employment. Beltran-Serrano argues here that Volk was not properly trained to deal with mentally ill persons, particularly those with whom the officer is unable to communicate. He further alleges she was not trained in de-escalation techniques that could prevent the need for force. That she was acting in the course of her employment would appear to bolster, not undermine, the argument that the City must use due care in training officers to reduce the need for deadly force.<sup>8</sup>

**C. Whether The Use Of Deadly Force May Give Rise To An Assault And Battery Claim Should Be Irrelevant To Whether A Plaintiff Can Assert A Negligence Claim Arising Out Of The Same General Set Of Facts, And To Best Deter Deadly Force By Police Officers, Washington Law Should Permit A Common Law Claim For Negligent Police Practices That Includes Consideration Of Conduct Preceding The Use Of Deadly Force.**

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<sup>8</sup> In *Robb*, 176 Wn.2d at 433, this Court discussed the application of *Restatement (Second) of Torts* § 302B (1965) to create a duty to third parties where the actor's own affirmative act creates a recognizable high risk of harm. Section 302B provides an alternative basis for finding a duty against the City for its failure to adequately train Volk in the proper method to interact with a mentally disturbed suspect. Section 302B provides that an act may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of a third person which is intended to cause harm. Here, Beltran-Serrano should be permitted to argue that the City either realized or should have realized that its failure to adequately train its officers in the proper method to confront and treat mentally disabled suspects created an unreasonable risk of harm to those suspects from the conduct of its officers.

The City maintains there is no sustainable negligence claim here and that Beltran-Serrano's claim should be limited to one for assault and battery. The Court should reject the City's argument and allow Beltran-Serrano's negligence claims to proceed.

First, it is well-settled that plaintiffs may assert alternative, even inconsistent, theories of recovery. *See* CR 8(e)(2) (providing a party may plead "as many separate claims or defenses as he has regardless of consistency"). This rule is generally limited only by the good faith requirement of CR 11. *See Amrine v. Murray*, 28 Wn. App. 650, 655, 626 P.2d 24, 28 (1981). Where litigants assert a cause of action, the determining factor should not be whether an alternative theory may also be advanced, but instead whether the plaintiff can meet the elements of the asserted claim.

Second, the gravamen of the negligence claims is not that Volk intentionally and unlawfully used deadly force. Rather, the core of these claims is that the City, both through its own actions and the actions of its officer, failed to implement and follow carefully crafted procedures that were reasonably calculated to reduce the *need* for deadly force.

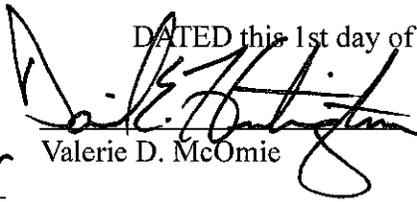
It is imperative that Washington's police officers are properly trained to identify dangerous situations, and have the necessary tools to

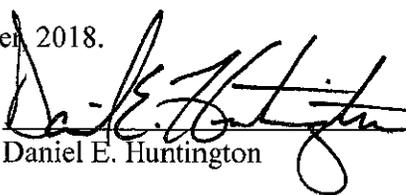
avoid or reduce the likelihood of deadly force. The retention of government accountability in this context allows the deterrent effect of tort law to influence these critical changes. As this Court noted in *Savage*, 127 Wn.2d at 446, “maintaining the potential of state liability, as established in RCW 4.92, can be expected to have the salutary effect of providing the State an incentive to ensure that reasonable care is used.” *Id.*, 127 Wn.2d at 446. Recognizing state accountability for officers’ pre-shooting negligence should incentivize the State to hire, train and supervise its officers in such a way as to reduce unnecessary and avoidable deadly force by Washington’s police officers.

## VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving this appeal.

DATED this 1st day of October, 2018.

for   
Valerie D. McOmie

  
Daniel E. Huntington

On Behalf of WSAJ Foundation

# Appendix

- A-1. RCW 4.92.020
- A-2. *Restatement (Second) of Torts* § 302 (1965)
- A-3. *Restatement (Second) of Torts* § 302A (1965)
- A-4. *Restatement (Second) of Torts* § 302B (1965)
- A-5. *Restatement (Second) of Torts* § 317 (1965)
- A-6. *Restatement (Third) of Torts* § 41 (2012)



KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

[West's Revised Code of Washington Annotated](#)  
[Title 4. Civil Procedure \(Refs & Annos\)](#)  
[Chapter 4.92. Actions and Claims Against State \(Refs & Annos\)](#)

West's RCWA 4.92.090

4.92.090. Tortious conduct of state--Liability for damages

[Currentness](#)

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

**Credits**

[1963 c 159 § 2; 1961 c 136 § 1.]

[Notes of Decisions \(125\)](#)

West's RCWA 4.92.090, WA ST 4.92.090

Current with all effective legislation from the 2018 Regular Session of the Washington Legislature.

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## Restatement (Second) of Torts § 302 (1965)

Restatement of the Law - Torts | June 2018 Update  
Restatement (Second) of Torts  
Division Two, Negligence  
Chapter 12. General Principles  
Topic 4. Types of Negligent Acts

### § 302 Risk of Direct or Indirect Harm

[Comment:](#)

[Reporter's Notes](#)

[Case Citations - by Jurisdiction](#)

**A negligent act or omission may be one which involves an unreasonable risk of harm to another through either**

- (a) the continuous operation of a force started or continued by the act or omission, or**
- (b) the foreseeable action of the other, a third person, an animal, or a force of nature.**

**See Reporter's Notes.**

**Comment:**

*a.* This Section is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk. In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty. As to the distinction between act and omission, or “misfeasance” and “non-feasance,” see § 314 and Comments. If the actor is under no duty to the other to act, his failure to do so may be negligent conduct within the rule stated in this Section, but it does not subject him to liability, because of the absence of duty.

*b.* A special application of Clause (b) of this Section, involving the risk of harm through the negligent or reckless conduct of others, is stated in § 302A. A second special application of Clause (b), involving the risk of the intentional or criminal conduct of others, is stated in § 302B.

*c.* The actor may be negligent in setting in motion a force the continuous operation of which, without the intervention of other forces or causes, results in harm to the other. He may likewise be negligent in failing to control a force already in operation from other causes, or to prevent harm to another resulting from it. Such continuous operation of a force set in motion by the actor, or of a force which he fails to control, is commonly called “direct causation” by the courts, and very often the question is considered as if it were one of the mechanism of the causal sequence. In many instances, at least, the same problem may be more effectively dealt with as a matter of the negligence of the actor in the light of the risk created.

**Illustrations:**

1. A sets a fire on his own land, with a strong wind blowing toward B's house. Without any other negligence on the part of A, the fire escapes from A's land and burns down B's house. A may be found to be negligent toward B in setting the fire.

2. A discovers on his land a fire originating from some unknown source. Although there is a strong wind blowing toward B's house, A makes no effort to control the fire. It spreads to B's land and destroys B's house. A may be found to be negligent toward B in failing to control the fire.

*d. Probability of intervening action.* If the actor's conduct has created or continued a situation which is harmless if left to itself but is capable of being made dangerous to others by some subsequent action of a human being or animal or the subsequent operation of a natural force, the actor's negligence depends upon whether he as a reasonable man should recognize such action or operation as probable. The actor as a reasonable man is required to know the habits and propensities of human beings and animals and the normal operation of natural forces in the locality in which he has intentionally created such a situation or in which he knows or should realize that his conduct is likely to create such a situation. (See § 290.) In so far as such knowledge would lead the actor as a reasonable man to recognize a particular action of a human being or animal or a particular operation of a natural force as customary or normal, the actor is required to anticipate and provide against it. The actor is negligent if he intentionally creates a situation, or if his conduct involves a risk of creating a situation, which he should realize as likely to be dangerous to others in the event of such customary or normal act or operation. (See § 303.)

*e. Meaning of "normal."* The actor as a reasonable man is required to anticipate and provide against the normal operation of natural forces. And here the word "normal" is used to describe not only those forces which are constantly and habitually operating but also those forces which operate periodically or with a certain degree of frequency.

**Illustration:**

3. A erects a swinging sign over the highway. He is required to keep it in such condition that it will not be blown down, not only by the ordinary breezes which are of everyday occurrence, but also by the gales which experience shows are likely to occur from time to time.

*f. Normal conditions of nature.* As stated in § 290, Comments *g* and *h*, the actor is required to recognize the fact that a certain number of animals and human beings may act in a way which is not customary for ordinary individuals, and that there are occasional operations of natural forces which are radically different from the normal. It would, however, be impracticable to set a standard of behavior so high as to require every man under all circumstances to take into account the chance of these exceptional actions and operations. Therefore, except where the actor has reason to expect the contrary, he is entitled to assume that human beings and animals will act and the natural forces will operate in their usual manner, unless their exceptional action or operation would create a serious chance of grave harm to some valuable interest and there is little utility in the actor's conduct. Thus a motorist driving along a highway is entitled to assume, unless he has special reason to expect the contrary, that other motorists will keep to the right side of the road, since motor traffic would be unduly hindered unless motorists were free to act on that assumption. On the other hand, a motorist approaching a railroad crossing is not entitled to assume that the railway company will comply with its duty to blow the whistle and ring the bell, but is required to take very great precautions to look out for trains which have not given such notice of their approach.

*g. Abnormal conditions of nature.* The actor is not required to anticipate or provide against conditions of nature or the operation of natural forces which are of so unusual a character that the burden of providing for them would be out of all proportion to the chance of their existence or operation and the risk of harm to others involved in their possible existence or operation. It is therefore not necessary that a particular operation of the natural force be unprecedented. The likelihood of its recurrence may be so slight that in the aggregate the burden of constantly providing against it would be out of all proportion great as compared with the magnitude of the risk involved in the possibility of its recurrence.

**Illustration:**

4. In 1938 a hurricane caused serious damage in a city in New England. There is no record of any hurricane of similar force within the preceding 130 years. A, thereafter constructing a building in the city in question, is not negligent in failing to adopt an expensive method of construction which would make it safe against damage from a similar hurricane.

5. The same facts as in Illustration 4, with the additional fact that by 1957 hurricanes of similar violence have recurred four times in New England. A, constructing a building in 1957, may be found to be negligent in failing to adopt a method of construction which would make it safe against such hurricanes.

*h.* If the actor knows or should perceive circumstances which would lead a reasonable man to expect a particular operation of a natural force, he is required to provide against it, although, but for such circumstances, it would be so extraordinary that he would be entitled to ignore the possibility of its occurrence.

**Illustration:**

6. A moors his boat in a river fed by mountain streams. The moorings are sufficient to prevent the boat from being cast adrift by any stage of water likely to occur at that season of the year. A sudden cloudburst in the mountain causes an extraordinary flood which sweeps his boat away, causing it to collide with the boat of B. A may be found to be negligent if he has or should have such knowledge of the occurrence of the cloudburst as to give him reason to expect the unusual and otherwise unforeseeable flood.

*i. Action of domestic animals.* The actor as a reasonable man is both entitled to assume and required to expect that domestic animals will act in accordance with the nature of such animals as a class, unless he knows or should know of some circumstances which should warn him that the particular animal is likely to act in a different manner.

*j. Action of human beings.* As stated in § 290, the actor is required to know the common qualities and habits of other human beings, in so far as they are a matter of common knowledge in the community. The actor may have special knowledge of the qualities or habits of a particular individual, over and above the minimum which he is required to know. His act or omission may be negligent because it involves an unreasonable risk of harm to another through the intervention of conduct on the part of the other, or of third persons, which a reasonable man in the actor's position would anticipate and guard against. As to the actor's negligence where such foreseeable conduct is itself negligent, see § 302A. As to his negligence where the foreseeable conduct is intentional or criminal, see § 302B.

**Reporter's Notes**

This Section has been changed from the first Restatement by rewording it to include negligent omissions as well as acts. The original Comments *j* to *n* inclusive, with the accompanying Illustrations, have been shifted to Sections 302A and 302B, which involve special applications of the rule stated in this Section.

**Case Citations - by Jurisdiction**

- 
- C.A.2
  - C.A.3
  - C.A.4
  - C.A.5
  - C.A.6

## Restatement (Second) of Torts § 302A (1965)

Restatement of the Law - Torts | June 2018 Update  
Restatement (Second) of Torts  
Division Two. Negligence  
Chapter 12. General Principles  
Topic 4. Types of Negligent Acts

### § 302A Risk of Negligence or Recklessness of Others

[Comment:](#)

[Reporter's Notes](#)

[Case Citations - by Jurisdiction](#)

**An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person.**

**See Reporter's Notes.**

**Comment:**

*a.* This Section is a special application of the rule stated in § 302 (b). Comment *a* to that Section is equally applicable here.

*b.* Where the other negligence or recklessness is that of the person who suffers harm, his recovery usually is barred by his own contributory negligence (see Chapter 17), or his assumption of the risk (see Chapter 17A). This does not mean, however, that the original actor is not negligent, but merely that the injured plaintiff is precluded from recovery by his own conduct. In a few states statutes provide for the apportionment of damages between a negligent defendant and a negligent plaintiff; and under such statutes this Section may apply to permit a partial recovery. Even in the absence of any statute, there may be situations involving the rule of the last clear chance (see §§ 479 and 480) in which the negligent plaintiff may recover all of his damages.

*c.* As stated in § 290, the actor is required to know the common qualities and habits of human beings, in so far as they are a matter of common knowledge in the community. The actor may have special knowledge of the qualities and habits of a particular individual, over and above the minimum he is required to know, or he may have special warning that the individual is or is about to be negligent or reckless in the particular case. Even without such special knowledge, the actor is required to know that there is a certain amount of negligence in the world, and that some human beings will fail on occasion to behave as a reasonable man would behave. Where the possibility of such negligence involves an unreasonable risk of harm, either to the person who is to be negligent or to another, the actor, as a reasonable man, is required to take it into account and to govern his conduct accordingly.

**Illustrations:**

1. A leaves a hole in the street, which would be quite obvious to an attentive automobile driver, but might easily not be discovered by an inattentive driver. B, a driver who is not keeping a proper lookout, drives into the hole and is injured. A may be found to be negligent toward B.

2. The same facts as in Illustration 1, except that the person injured is C, a guest in B's automobile. A may be found to be negligent toward C.

*d.* As stated in § 291, negligence is determined by weighing the magnitude of the risk involved against the utility of the actor's conduct. If the probability of the negligent conduct of another is relatively slight, or if the harm to be expected from it is relatively slight, and the utility of the actor's conduct is relatively great in proportion, the actor may be entitled to ignore the risk, and proceed on the assumption that others will act in a reasonable manner. On the other hand, if the actor knows or should realize that there is a serious chance of grave harm to valuable interests of others, and the utility of his own conduct is less than the risk, he is required to take precautions against the negligence of others which a reasonable man would take under like circumstances.

*e.* No fixed rules can be stated as to when the actor is required to guard against the negligence of others. The risk of such negligence may be increased by the fact that, to the actor's knowledge, there are irresponsible persons in the vicinity who are more likely than others to be negligent, as where he leaves an unlocked car parked on a hillside next to a playground full of children. It may be decreased by the fact that a competent and responsible person is in charge of the situation and aware of it, as where a car is left under similar circumstances with an adult present to keep an eye on it. In determining the magnitude of the risk, and the utility of the actor's conduct, the rules stated in §§ 292- 295 apply.

**Illustrations:**

3. A, constructing a building, blocks the sidewalk, and forces pedestrians to walk in the street, where there is heavy traffic and no protection. A could easily avoid the risk by constructing, at slight expense, a passage with a guardrail, but fails to do so. B, a pedestrian forced into the street, is struck and injured by an automobile driver who is not keeping a proper lookout. A may be found to be negligent toward B.

4. The same facts as in Illustration 3, except that there is very little traffic in the street, and the construction of any passageway would be impossible without unduly interfering with the use of the street. A is not negligent toward B.

5. A, the engineer of a railroad train, sees in the distance an automobile driven by B, approaching a crossing. A proceeds on the assumption that B will look and listen, and will stop for the crossing, and so does not stop or slow down his train. This is not negligence toward B, or toward C, a guest in B's automobile. There is, however, a possibility that B will be negligent which a reasonable man in A's position would take into account; and A's failure to blow his whistle, or to continue to look out for the automobile, is negligence toward B and toward C.

6. A lends his car to B to drive on a pleasure trip. A knows that B is an incompetent and habitually careless driver whose license to drive has been revoked for negligent driving. B negligently drives the car and injures C. A is negligent toward C.

7. The same facts as in Illustration 6, except that A lends the car to B to take a seriously injured child to the hospital, and there is no other available driver. A is not negligent toward C.

**Reporter's Notes**

This Section has been added to the first Restatement, as a special application of the rule stated in § 302 (b).

Illustrations 1 and 2 are supported by *Ethridge v. Nicholson*, 80 Ga. App. 693, 57 S.E.2d 231 (1950); *City of Louisville v. Hart's Adm'r*, 143 Ky. 171, 136 S.W. 212, 35 L.R.A.N.S. 207 (1911); *Stemmler v. City of Pittsburgh*, 287 Pa. 365, 135 A. 100, 49 A.L.R. 1227 (1926); *Price v. Burton*, 155 Va. 229, 154 S.E. 499 (1930); *Tobin v. City of Seattle*, 127 Wash. 664, 221 P. 583 (1923); *Butts v. Ward*, 227 Wis. 387, 279 N.W. 6, 116 A.L.R. 1441 (1938).

## Restatement (Second) of Torts § 302B (1965)

Restatement of the Law - Torts | June 2018 Update  
Restatement (Second) of Torts  
Division Two. Negligence  
Chapter 12. General Principles  
Topic 4. Types of Negligent Acts

### § 302B Risk of Intentional or Criminal Conduct

[Comment:](#)

[Reporter's Notes](#)

[Case Citations - by Jurisdiction](#)

**An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.**

**See Reporter's Notes.**

**Comment:**

*a.* This Section is a special application of the rule stated in Clause (b) of § 302. Comment *a* to that Section is equally applicable here.

*b.* As to the meaning of “intended,” see § 8A. The intentional conduct with which this Section is concerned may be intended to cause harm to the person or property of the actor himself, the other, or even a third person.

*c.* Where the intentional misconduct is that of the person who suffers the harm, his recovery ordinarily is barred by his own assumption of the risk (see Chapter 17A) or his contributory negligence (see Chapter 17). This does not mean, however, that the original actor is not negligent, but merely that the injured plaintiff is precluded from recovery by his own misconduct. There may still be situations in which, because of his immaturity or ignorance, the plaintiff is not subject to either defense; and in such cases the actor's negligence may subject him to liability.

**Illustration:**

1. A leaves dynamite caps in an open box next to a playground in which small children are playing. B, a child too young to understand the risk involved, finds the caps, hammers one of them with a rock, and is injured by the explosion. A may be found to be negligent toward B.

*d.* Normally the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law. Even where there is a recognizable possibility of the intentional interference, the possibility may be so slight, or there may be so slight a risk of foreseeable harm to another as a result of the interference, that a reasonable man in the position of the actor would disregard it.

**Illustration:**

2. A leaves his automobile unlocked, with the key in the ignition switch, while he steps into a drugstore to buy a pack of cigarettes. The time is noon, the neighborhood peaceable and respectable, and no suspicious persons are about. B, a thief, steals the car while A is in the drugstore, and in his haste to get away drives it in a negligent manner and injures C. A is not negligent toward C.

With this illustration, compare Illustration 14 below.

*e.* There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. The following are examples of such situations. The list is not an exclusive one, and there may be other situations in which the actor is required to take precautions.

A. Where, by contract or otherwise, the actor has undertaken a duty to protect the other against such misconduct. Normally such a duty arises out of a contract between the parties, in which such protection is an express or an implied term of the agreement.

**Illustration:**

3. The A Company makes a business of conducting tourists through the slums of the city. It employs guards to accompany all parties to protect them during such tours. B goes upon such a tour. While in a particularly dangerous part of the slums the guards abandon the party. B is attacked and robbed. The A Company may be found to be negligent toward B.

B. Where the actor stands in such a relation to the other that he is under a duty to protect him against such misconduct. Among such relations are those of carrier and passenger, innkeeper and guest, employer and employee, possessor of land and invitee, and bailee and bailor.

**Illustrations:**

4. The A company operates a hotel, in which B is a guest. C, another guest, approaches B in the hotel lobby, threatening to knock him down. There are a number of hotel employees on the spot, but, although B appeals to them for protection, they do nothing, and C knocks B down. The A Company may be found to be negligent toward B.

5. A rents an automobile from B. A keeps the automobile in his garage, but fails to lock either the car or the garage. The car is stolen. A may be found to be negligent toward B.

C. Where the actor's affirmative act is intended or likely to defeat a protection which the other has placed around his person or property for the purpose of guarding them from intentional interference. This includes situation where the actor is privileged to remove such a protection, but fails to take reasonable steps to replace it or to provide a substitute.

**Illustrations:**

6. A leases floor space in B's shop. On a holiday, A goes to the shop, and on leaving it forgets to take the key from the door. A thief enters the shop through the door and steals B's goods. A may be found to be negligent toward B.

7. A negligently operated train of the A Railroad runs down the carefully driven truck of B at a crossing, and so injures the driver as to leave him unconscious. While he is unconscious the contents of the truck are stolen by bystanders. The A Company may be found to be negligent toward B with respect to the loss of the stolen goods.

8. The A Company has a legislative authority to excavate a subway, and in so doing to remove a part of the wall of the basement of B's store. The workmen employed by the company remove a part of the wall, leaving an opening sufficient to admit a man. They leave the opening unguarded. During the night a thief enters the store through the opening, and steals B's goods. The A Company may be found to be negligent toward B.

D. Where the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.

**Illustrations:**

9. A is the landlord of an apartment house. He employs B as a janitor, knowing that B is a man of violent and uncontrollable temper, and on past occasions has attacked those who argue with him. C, a tenant of one of the apartments, complains to B of inadequate heat. B becomes furiously angry and attacks C, seriously injuring him. A may be found to be negligent toward C.

10. A, a young girl, is a passenger on B Railroad. She falls asleep and is carried beyond her station. The conductor puts her off of the train in an unprotected spot, immediately adjacent to a "jungle" in which hoboies are camped. It is notorious that many of these hoboies are criminals, or men of rough and violent character. A is raped by one of the hoboies. B Railroad may be found to be negligent toward A.

E. Where the actor entrusts an instrumentality capable of doing serious harm if misused, to one whom he knows, or has strong reason to believe, to intend or to be likely to misuse it to inflict intentional harm.

**Illustration:**

11. A gives an air rifle to B, a boy six years old. B intentionally shoots C, putting out C's eye. A may be found to be negligent toward C.

F. Where the actor has taken charge or assumed control of a person whom he knows to be peculiarly likely to inflict intentional harm upon others.

**Illustration:**

12. A, who operates a private sanitarium for the insane, receives for treatment and custody B, a homicidal maniac. Through the carelessness of one of the guards employed by A, B escapes, and attacks and seriously injures C. A may be found to be negligent toward C.

G. Where property of which the actor has possession or control affords a peculiar temptation or opportunity for intentional interference likely to cause harm.

**Illustrations:**

13. The same facts as in Illustration 1, except that the explosion injures C, a companion of B. A may be found to be negligent toward C.

14. In a neighborhood where young people habitually commit depredations on the night of Halloween, A leaves at the top of a hill a large reel of wire cable which requires a considerable effort to set it in motion. A group of boys, on that night, succeed in moving it, and in rolling it down the hill, where it injures B. A may be found to be negligent toward B, although A might not have been negligent if the reel had been left on any other night.

H. Where the actor acts with knowledge of peculiar conditions which create a high degree of risk of intentional misconduct.

**Illustration:**

15. The employees of the A Railroad are on strike. They or their sympathizers have torn up tracks, misplaced switches, and otherwise attempted to wreck trains. A fails to guard its switches, and runs a train, which is derailed by an unguarded switch intentionally thrown by strikers for the purpose of wrecking the train. B, a passenger on the train, and C, a traveler upon an adjacent highway, are injured by the wreck. A Company may be found to be negligent toward B and C.

*f.* It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence (see §§ 291- 293), it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it.

**Illustration:**

16. A, a convict, is confined in a state prison for forging a check. His conduct while in prison exhibits no tendency toward violence, and prison tests show that he is mentally normal. In company with other prisoners, A is permitted to do outside work on the prison farm, in accordance with the prison system. While at work he is not properly guarded, and escapes. In endeavoring to get away, A stops B, an automobile driver, threatens him with a knife, and takes B's car. B suffers severe emotional distress, and an apoplectic stroke from the excitement. The State is not negligent toward B.

**Reporter's Notes**

This Section has been added to the first Restatement. The Comments and Illustrations are in large part transferred from the original § 302.

Illustration 1 is based on *Vills v. City of Cloquet*, 119 Minn. 277, 138 N.W. 33 (1912); *Fehrs v. McKeesport*, 318 Pa. 279, 178 A. 380 (1935); *City of Tulsa v. McIntosh*, 90 Okla. 50, 215 P. 624 (1923); *Luhman v. Hoover*, 100 F.2d 127, 4 N.C.C.A.N.S. 615 (6 Cir.1938). Otherwise where the caps are left where it is not reasonably to be expected that children will interfere with them. *Vining v. Amos D. Bridges Sons Co.*, 142 A. 773 (Me.1929); *Perry v. Rochester Lime Co.*, 219 N.Y. 60, 113 N.E. 529, L.R.A.1917B, 1058 (1916). Past experience of meddling is to be taken into account. *Katz v. Helbing*, 215 Cal. 449, 10 P.2d 1001 (1932).

## Restatement (Second) of Torts § 317 (1965)

Restatement of the Law - Torts | June 2018 Update  
Restatement (Second) of Torts  
Division Two, Negligence  
Chapter 12. General Principles  
Topic 7. Duties of Affirmative Action  
Title A. Duty to Control Conduct of Third Persons

### § 317 Duty of Master to Control Conduct of Servant

[Comment:](#)

[Reporter's Notes](#)

[Case Citations - by Jurisdiction](#)

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

**(a) the servant**

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

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

**(b) the master**

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

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

**See Reporter's Notes.**

**Comment:**

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

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

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

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

### Reporter's Notes

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

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

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

### Case Citations - by Jurisdiction

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- [C.A.3](#)
  - [C.A.3,](#)
  - [C.A.4](#)
  - [C.A.5](#)
  - [C.A.6](#)
  - [C.A.7,](#)
  - [C.A.7](#)
  - [C.A.8](#)

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

Restatement of the Law - Torts | June 2018 Update  
Restatement (Third) of Torts: Liability for Physical and Emotional Harm  
Chapter 7. Affirmative Duties

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

[Comment:](#)

[Reporters' Note](#)

[Case Citations - by Jurisdiction](#)

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

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

- (1) a parent with dependent children,**
- (2) a custodian with those in its custody,**
- (3) an employer with employees when the employment facilitates the employee's causing harm to third parties, and**
- (4) a mental-health professional with patients.**

**Comment:**

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

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

*c. Duty of reasonable care.* The duty imposed by this Section is to exercise reasonable care under the circumstances. It is not to ensure that the other person is controlled. If the other person poses a risk of harm to third parties, the actor must take reasonable steps, in light of the foreseeable probability and magnitude of any harm, to prevent it from occurring. In addition, the relationships identified in this Section are ones in which the actor has some degree of control over the other person. The extent of that control also bears on whether the actor exercised reasonable care.

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

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

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

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

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

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

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

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

**Illustration:**

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

*f. Duty of custodians.* Custodians of those who pose risks to others have long owed a duty of reasonable care to prevent the person in custody from harming others. The classic custodian under this Section is a jailer of a dangerous criminal. Other well-established custodial relationships include hospitals for the mentally ill and for those with contagious diseases. Custodial relationships imposing a duty of care are limited to those relationships that exist, in significant part, for the protection of others from risks posed by the person in custody. The duty of care is limited to the period of actual custody. A custodial relationship that exists solely for rehabilitative purposes is insufficient to create a duty to protect others.

Thus, an inpatient clinic treating an individual with a compulsive-gambling addiction does not have a special relationship with the patient that imposes a duty of reasonable care to third parties.

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

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

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

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

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

The rule stated in this Section sets no limit on those to whom the duty is owed. Many courts and legislatures have limited the duty to warning third parties who are reasonably identifiable. Reasonable care itself does not require warning

individuals who cannot be identified, so such a limitation is properly a question of reasonable care, not a question of the existence of a duty. However, when reasonable care requires confining a patient who poses a real risk of harm to the community, the duty of the mental-health professional ordinarily extends to those members of the community who are put at risk by the patient.

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

**Illustrations:**

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

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

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

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

Even when a duty exists pursuant to Subsection (b)(4) and an actor breaches it, factual causation must exist for the actor to be subject to liability. Thus, when the actor's breach consists of failing to warn third parties who suffer harm, the actor is not subject to liability unless the warning would have prevented the harm. When those third parties are already aware of all the material information that would have been provided by the mental-health professional, any warning would not have made a difference and, hence, the actor is not subject to liability. Courts often express the reason for this outcome in duty terms: there is no duty to warn when the information is already known. It would be more accurate, however, to characterize the reason as the absence of factual causation.

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

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

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

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

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

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

## CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2018, I electronically filed the foregoing document with the Clerk of the Washington Supreme Court using the Washington State Appellate Courts Portal and also served a true and accurate copy via email to the following:

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