

Torts: Cases & Context

CONIC 3.β (*BETA*) EDITION

Volume Two Negligence

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The Pylon Edition is configured for a negligence-first approach. PYLON, as a backronym, stands for “Priming Young Lawyers On Negligence.”

About this Conic 3.β (Beta) Edition

This is ***Torts: Cases and Context, Conic 3.β (Beta) Edition, Volume Two***. It is the second volume of the author-revised third edition, in the intentional-torts-first configuration, created in 2026. (“Conic” designates the author’s own edition in intentional-torts-first configuration, and 3.β (Beta) indicates the third generation of revisions for the book as a whole.)

This edition takes material from Volume One, published in 2024 of the Pylon 2.1 Edition (which is in the negligence-first configuration).

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As compared to the first edition, Pylon 2.0 made many substantive changes, including adding substantial material, deleting substantial material, and re-writing substantial material. Pylon 2.1 made updates (including regarding references to state statutory law and various references to the current status of things) and made some substantive changes.

This Conic 3.β (Beta) Edition incorporates substantial changes and substantial new material. See details below.

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What's New in 3.β (Beta)

This 3.β (Beta) edition features substantial changes, additions, and re-writing. I took chapters from the 2.1 edition and then, in places, treated the material as an early rough draft.

Finely granulated section numbering facilitates assignments of only particular portions of chapters without using page numbers. Typography

has been re-thought and re-implemented. New in-document coding facilitates use of navigation tools.

Selected new content worth a particular mention:

{ _____ to be inserted _____ }

Removed content worth a mention:

{ _____ to be inserted _____ }

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13. Introduction to Negligence

“Good judgment comes from experience, and a lot of that comes from bad judgment.”

– Will Rogers

A. Lead-in

The center-stage cause of action in torts is negligence. In terms of its economic impact and social importance, negligence predominates in the law of torts.

In its briefest form, the doctrine of negligence holds that if you are to blame, through your carelessness, for an injury to the person or property of another, you will be liable for the damage.

Attorneys who practice “personal injury law” are, for the most part, working with the negligence cause of action. Bus-stop ads and billboards offering legal representation for “ACCIDENTS” are mostly aimed at negligence claims. On the other side of the coin, defending against negligence suits is a major preoccupation of insurance companies.

B. Negligence's Open-Ended Nature

After being neck-deep in the intentional torts, negligence doctrine can cause the law student to experience whiplash. Imagine if, instead of battery, assault, false imprisonment, trespass to chattels, trespass to land, conversion, and intentional infliction of emotional distress, there was just one tort, called intentiogenance.

In this way, the negligence cause of action reflects a completely different design philosophy. Instead of seven intentional torts each with three or four elements, negligence is one claim that requires only duty, breach of duty,

causation, and injury. Last season's fleet of intentional torts was a collection of specific vehicles for specific sorts of things a defendant might do. Negligence, however, is an adaptable, versatile, one-size-fits-all (for legal reasons, *one-size-fits-most?* –ed.) tort claim.

Torts treatise maven Dan B. Dobbs has written:

The structure of the negligence case allows the plaintiff to claim that any given conduct was negligent. The argument is that the defendant should not have indulged in the conduct at all or he should have carried it out more safely. It is not necessary for the plaintiff to show some predetermined act. At least in form, this differs from the rules for the intentional trespassory torts ... The trespassory torts described particular conduct that counted as a tort – a harm or offensive touch, a confinement, an entry upon land. Negligence law in contrast is open-ended. The plaintiff can assert that *any* conduct counts as negligence.

Dobbs, THE LAW OF TORTS (2000) at p. 257-258 (emphasis original).

The intentional torts had a bunch of specific little rules. A set of tidy bento boxes into which you could portion out your facts. Negligence, by contrast, has big, fuzzy concepts. It is, essentially, a large, soft-sided piece of luggage. Maybe even a duffel bag that, like a great pair of jeans, goes with everything.

As a set of legal doctrine, negligence is cut from a different cloth. Cast from a different mold. Mixed from a different metaphor.

Get ready for a whole new ballgame.

C. The Central Idea: Shifting the Burden of Loss

Negligence is all about who should bear the burden of the loss that results from an injury-producing incident. It takes as a given that something bad has happened. Often it is something tragic. Negligence tries to make the best out of a bad situation by allowing the burden of the loss to be shifted from one party to another where appropriate.

Fundamentally, the negligence cause of action is about compensation. It is not about punishment. It is possible to get punitive damages as an added remedy in a negligence lawsuit, but doing so requires proving more

than negligence. In particular a punitive damages award requires showing that the defendant's conduct was reckless, wanton, or willful. But at its most basic level, the cause of action for negligence is about trying to allow a less blameworthy party to shift the burden of misfortune on to a more blameworthy party.

There are many stories of runaway jury verdicts in negligence cases that give plaintiffs a huge windfall of cash. Some of these stories are apocryphal. Most omit important context that would make the verdict seem less shocking. Jackpot verdicts happen, but they are outliers, and even those are almost always cut down to size on a post-trial motion or appeal.

Real-life jury verdicts that run to the millions of dollars often include large punitive damage components, meaning more than negligence was at work. If a multi-million-dollar verdict is handed down merely on the basis of negligence alone, and thus comprises only what are called "compensatory damages," then it is usually because the plaintiff will suffer lifelong chronic pain, has permanent injuries that will make normal life impossible, or will be unable to pursue what had been a very lucrative career. Or it might be a combination of these factors. For example, a multi-million-dollar verdict consisting of only compensatory damages could well be possible – and might even be expected – for a young Wall Street financial whiz whose brilliant career was cut short by a massive brain injury that has left her in constant, severe pain and unable to eat, drink, or use the toilet without assistance. In other words, a person with a huge compensatory damages verdict is probably someone you wouldn't want to switch places with.

D. The Elements and Defenses for Negligence

The law of negligence is both complicated and simple. Negligence is simple in terms of its central idea. That idea is that a party injured in an accident should be able to recover the loss from whoever is at fault for causing the accident. The core notion is one of *responsibility*.

A good way to think about the law of negligence is that it is a formalized system for assigning blame. The elements of the prima facie case for negligence, and the defenses that are allowed, form a highly structured way for the courts to "think" about issues of responsibility and blame, and thereby hold parties accountable as appropriate. This is where negligence

law gets complicated. Exactly what does it mean to say that someone is “to blame” for an injury?

Try to imagine that you are shipwrecked on a remote island with a large group of castaways. None are lawyers or judges. There are no books, and there is no internet. You are appointed as a judge in this cleaved-off society. A dispute comes before you, and you are asked to determine whether someone is to blame for an accident. “Blame” is a broad and vague word. How could you subdivide the question for analysis? In other words, what things would have to be true for you to confidently say that a given person is “to blame” for the injuries of another?

In essential substance, it is these questions that, by way of lawsuits appearing on court dockets, have been put to the common law over the past centuries. And the answer the common law has come up with is the modern cause of action for negligence.

The prima facie elements and affirmative defenses of negligence reflect a way of dividing up the blame question into many subsidiary issues.

Here are the elements of a prima facie case for negligence:

- (1) The defendant owed a **duty of care** to the plaintiff. (That is, the defendant had a reason to be careful.)
- (2) The defendant’s conduct constituted a **breach** of that duty of care. (In other words, the defendant was *not* careful.)
- (3) The defendant’s conduct was an **actual cause** of the plaintiff’s injury. (Without the defendant’s conduct, there would not have been an injury.)
- (4) The defendant’s conduct was a **proximate cause** of the plaintiff’s injury. (This concept is complicated, but it means something like the plaintiff’s injury isn’t so indirectly connected to the defendant’s actions that it isn’t fair to hold the defendant responsible. A prevailing test is whether the plaintiff has shown that the injury sued upon was foreseeable at the time of the breach.)
- (5) There was an **injury** to the plaintiff’s person or property. (An injury “to the person” here generally means the person’s body, and “property” generally means something tangible.)

This way of dividing up the question of blame in the case of accidents is not a logical necessity. Other people could have come up with other systems. In fact, it's not hard to argue that other systems could be better. Regardless, this is the system we have.

In talking about a different body of American law, legal scholar Sarah Burstein said, "It's a weedy garden, but it's our garden." The exact same sentiment could be expressed about American negligence law.

This is a good point at which to pause and note that some other people writing about torts – such as lawyers, commentators, or judges – might tell you that the negligence cause of action only has four elements. Others might say the number is six. Accountings of the elements vary. But if you look closely at the content of what other sources say, you will find that it is, in essence, the same as the five elements laid out above.

Plausibly, a court could say that the negligence cause of action consists of just *two* elements: (1) a breach of a duty of care owed to the plaintiff, (2) an injury that was caused thereby. While this formulation looks different – since it is two elements instead of five – look closely and you will see that it is actually the same thing, just with various parts lumped together.

You may be tempted to ask about the "official" list of elements of the cause of action for negligence. Well, there is no official list. As a common-law subject, negligence is the product of many, many different courts, all reading each other's work, but with no one really in charge. Add to that the fact that the doctrine evolves over time. The bottom line is that in learning negligence, as with the rest of tort law, you will have to pay attention to concepts more than labels.

Now, going back to the list of the five elements above, you might think, right off the bat, that the concept of "duty of care" seems strange and unnecessary. Once we get into it, however, you will see that this element helps to filter out a lot of cases where it would seem unfair for the plaintiff to be able to recover.

In particular, the duty-of-care concept helps filter out many cases where the plaintiff's injury seems too indirectly connected with the defendant's conduct. That the duty-of-care element would do this is strange, since the proximate-cause element also helps filter out cases where there is an indirect connection between the plaintiff's injury and the defendant's conduct.

The fact is, the elements of negligence contain considerable room for overlap. As far as that goes, it's notable that the conceptual overlap between the duty of care element and the proximate causation element is at the heart of what is likely the most famous torts case of all time: *Palsgraf v. Long Island Railroad*, 248 N.Y. 339 (N.Y. 1928).

An alternative to the prima facie elements would be for every case to be decided on its own, with a judge listening to both sides and simply determining what is fair. And that is a very plausible way things could be done. But it's an anathema to the common law. The project of the common law is to build a body of doctrine that helps to ensure that like cases will be decided alike, no matter who the judge is and who the parties are.

By setting out a formal system, rather than depending entirely on intuition and a rough sense of justice, the courts aim to avoid arbitrary decisions, achieving a "rule of law" rather than a "rule of persons."

That's the idea, anyway. Throughout your study of the law, you can constantly ask yourself whether negligence law, through its structure of elements, is achieving that goal. At times you may find that the determination with regard to any individual element in any given case seems to be decided arbitrarily – not according to any system, but just according to the judge's "rough sense of justice." In fact, one way of defining the proximate causation element, as you will be able to see from the *Palsgraf* case, is that it is a placeholder for "a rough sense of justice." *Palsgraf*, 248 N.Y. at 352 (Andrews, J., dissenting).

At the end of the day, the use of individual elements within the prima facie case for negligence reflects the common law's incomplete project of striving to avoid arbitrariness. A good way to think about it is that conceptualizing a negligence claim as requiring proof of a discrete set of elements provides us with a helpful structure to organize our thinking about negligence.

Alongside the prima facie elements of the negligence case are the principal defenses to negligence. These are, of course, vital to marking out the full metes and bounds of liability under the law of negligence. The three defenses that are most central to delimiting the field are the following:

Comparative negligence. With the defense of comparative negligence, if the plaintiff's injury is at least partly attributable

to the plaintiff's own negligence, then the defendant will not be liable to the plaintiff for the full amount of the plaintiff's damages. If the plaintiff's relative fault is very large in comparison to the defendant, then, depending on the jurisdiction, the plaintiff may be barred from any recovery whatsoever. (Instead of "comparative negligence," courts and statutes often refer to this defense as **comparative fault**, a usefully broadened name, since the defense is available in contexts other than negligence, namely the cause of action of strict liability.)

Contributory negligence. The defense of contributory negligence is a more defendant-friendly version of comparative negligence. It's the older version, the "classic" style of defense that points a finger of carelessness back at the plaintiff. Today, contributory negligence is used in a minority of jurisdictions in lieu of comparative negligence. Under contributory negligence, if the plaintiff's own negligence contributed even slightly to the injuries sued upon, the plaintiff is completely barred from any recovery.

Assumption of the risk. Despite the existence of a prima facie case for negligence, the plaintiff will not be able to recover if the plaintiff willingly assumed the potential burden that something bad might happen. Such an assumption of the risk can be implied by the circumstances. Or assumption of the risk can be expressed in words, whether written or oral.

While most torts courses cover those three negligence defenses, it should be said that there are other defenses out there in the wild, even if many torts courses do not go into them deeply, if at all. For instance, there are generic defenses available – defenses that are available in all torts cases. These include the statute of limitations, which causes you to lose your claim if you wait too long to file. And a deep dive will reveal some unique defenses, sometimes very important in negligence cases, that are only applicable to certain kinds of defendants. An example is sovereign immunity for some governmental entities.

E. A Quick Note About Respondeat Superior

You probably are somewhat familiar with a doctrine called *respondeat superior* – even if you’ve never heard those particular words. Respondeat superior is Latin for “let the master respond.” It’s the doctrine that causes an employer to be liable for the torts of an employee committed in the course of and within the scope of their employment. It’s hard to imagine the world of torts without it. If it weren’t for respondeat superior, companies would rarely be liable. And if there were no companies and only employees to sue, few tort suits would make economic sense to bring in the first place, since you can’t collect a judgment from someone who lacks the means to pay it.

Respondeat superior is at work behind the scenes of the vast majority of tort lawsuits. The doctrine is discussed in somewhat more detail elsewhere, amid a discussion of various forms of vicarious liability, of which respondeat superior is just one. But the use of the doctrine is so pervasive, it’s worth going slightly out of order in your study of tort law to learn respondeat superior’s name and to put a face with it. (Done and done.)

F. Check-Your-Understanding Questions About Negligence Elements and Defenses

- A.** The plaintiff is able to establish a preponderance of the elements, including duty of care, actual causation, and injury. Based on this showing, will the plaintiff be able to prevail?
- B.** The defendant’s negligence played a large part in the plaintiff’s injury, but the plaintiff’s own negligence played a role, too. Because of the law applicable in this jurisdiction, the plaintiff will be entitled to only a partial recovery. Why?
- C.** The defendant undertook the utmost care in trying to prevent the plaintiff’s injury, but the plaintiff was injured anyway. What element can the defendant readily point to in order to show that no prima facie case can be made out for negligence?
- D.** Must a plaintiff prove reckless, wanton, or willful conduct on the part of the defendant to establish a prima facie case for negligence?

—||—||—||—

14. An Example of a Negligence Case

“Keep the patient informed.”

— Oxford Handbook of Clinical Medicine (2017)

“‘Closing the loop’ on test results – ensuring test results are communicated with patients and acted on by care teams in a timely manner – helps prevent missed or delayed diagnosis and protects patient safety.”

— American Medical Association (2025)

A. Lead-in

In the following case, you will be able to see how negligence law works within a structure made of causes of action, elements, and affirmative defenses. The case does a great job, as well, of showing the different roles of the judge and the jury. It also shows the common-law method at work – past decisions being applied as precedent to help decide a new case presenting different facts. Perhaps most usefully, the case shows negligence law in a very typical role: adjudicating a dispute after something bad has happened, and where, it is alleged, an opportunity was missed to avert real suffering.

In reading this case, you may see what appears to be a simple story of a medical mess-up disappear into a whirling blender of tort doctrine, legal

procedure, and lawyering gaffes. In so far as that goes, the case may be a particularly revealing reflection of the real world of torts.

B. Case: *Georgetown v. Wheeler* (D.C. 2013)

B.1. Advance notes

This case has purposefully been left raw, without the normal polishing and smoothing treatment that's generally appropriate for the casebook context. And there's no editing for the purpose of focusing on a particular doctrinal point.

The rough edges and assortment of topics will hopefully give you a keen view of negligence in the wild.

In this case, a young woman named Crystal Wheeler sought medical advice for a wide array of troubling and seemingly unrelated symptoms, including headaches, gastrointestinal problems, and extreme nausea. It turns out she had a very discrete malady, and, better yet, it was highly treatable with a straightforward surgical procedure. What's more, it was revealed on an MRI. But sadly, no one followed up with Wheeler about what the MRI had revealed. As a result it seems that Wheeler endured preventable suffering for many more years.

When Wheeler's problem was eventually discovered and communicated to her by a different physician, Wheeler sued the doctors and hospital who seemed to have missed the chance to help her earlier.

B.2. Opinion

Georgetown v. Wheeler

District of Columbia Court of Appeals

September 19, 2013

75 A.3d 280. PRESIDENT and DIRECTORS OF GEORGETOWN COLLEGE, et al., Appellants, v. Crystal WHEELER, Appellee. Nos. 12-CV-671, 12-CV-672. Before WASHINGTON, Chief Judge, BLACKBURNE-RISGBY, Associate Judge, and BELSON, Senior Judge.

Senior Judge JAMES BELSON:

This is an appeal by a hospital and a physician from a large judgment against them in a medical malpractice case. Appellee Crystal Wheeler suffered various medical complications as the result of a Rathke's cleft cyst behind her left eye, which went undetected for nearly ten years despite its appearance on a 1996 MRI report. Wheeler brought a medical-malpractice suit against the appellants, Marilyn McPherson-Corder, M.D., and the President and Directors of Georgetown College ("Georgetown"), claiming that their negligence caused the cyst to go undiscovered. Following a lengthy trial in Superior Court, a jury awarded Wheeler more than \$2.5 million in damages. Dr. McPherson-Corder and Georgetown now appeal, making four arguments: (1) the jury's verdict was irreconcilably inconsistent, in that it found that the appellants' negligent failure to detect the cyst was a proximate cause of Wheeler's injuries, but also found that Wheeler's own failure to follow up on the 1996 MRI report, while negligent, was not a proximate cause; (2) the trial court erred by admitting Wheeler's proffered expert testimony, as her experts' conclusion that her cyst caused certain gastrointestinal problems has not been generally accepted in the medical scientific community; (3) Wheeler's counsel made improper and prejudicial statements during her closing argument; and (4) the jury's verdict was against the weight of the evidence.

We reject the appellants' first argument because they waived their objection to any alleged inconsistency by failing to raise the issue before the jury's dismissal. We find their second argument lacking, as it misstates our standard for the admission of expert testimony. We likewise find their third argument unpersuasive, as we see no impropriety in Wheeler's counsel's remarks. We do, however, find merit in one aspect of appellant's argument on the weight of the evidence, i.e., insofar as it relates to the jury's award of greater future medical costs than the evidence established. Because the jury awarded \$19,450 more than the record supports, we remand with instructions that the trial court amend its order to reduce the award in that amount. In all other respects, we affirm.

I.

Wheeler has long suffered from a litany of health problems, including serious gastrointestinal difficulties. At several times in her youth, she was hospitalized due to extreme nausea and vomiting.

These problems persisted throughout her adolescence, and have lasted well into her adult life.

In 1996, Wheeler began attending college in southern Virginia. When she returned home to Washington, D.C., the following summer, she complained of severe headaches to her then-pediatrician, Dr. Marilyn McPherson-Corder. Accordingly, Dr. McPherson-Corder referred her to a Georgetown University Hospital pediatric neurologist, Dr. Yuval Shafrir.

Dr. Shafrir saw Wheeler twice that summer, once on July 8, and again on August 5. During the first visit, Wheeler was also experiencing leg and ear pain. Because of these other maladies, Dr. Shafrir was unable to fully diagnose her headaches. He prescribed medication for her ear pain, which he concluded was the result of an ear infection, and asked her to come back in a few weeks when her symptoms cleared. When she returned, Dr. Shafrir diagnosed her headaches as migraines. Accordingly, he instructed her on migraine management, prescribed medication, and asked her to keep a headache diary. He also noticed “a new complete blurring of [Wheeler’s] right optic disk,” which prompted him to give her a prescription and tell her to arrange an EKG and an MRI through her primary-care physician.

The parties dispute exactly what Dr. Shafrir told Wheeler about these tests. At trial, Wheeler testified that Dr. Shafrir told her that both procedures were merely “precautionary,” and that he would contact her if there were “any concerns with the MRI.” Dr. Shafrir, however, testified that while he does not have any independent memory of Wheeler’s visits, he “always” told patients to contact him within three days of having an MRI if they did not hear from him. He also testified that whenever he ordered an MRI he would instruct the patient to come back for a follow-up visit. He said that this system, which placed the onus on the patient to follow up on test results, had “never” failed him. He testified that it would be “impossible” for him to track down every result independently, in light of the system he used for having patients get an MRI.

After Wheeler’s second visit, Dr. Shafrir wrote to Dr. McPherson-Corder, informing her that he asked Wheeler to undergo an MRI and EKG. Although he indicated that he had already received the EKG results, which came back “normal,” he did not mention any MRI results. He also wrote that he would “like to see [Wheeler] again in my office during her next college vacation.”

Wheeler obtained a referral for the MRI from Dr. McPherson-Corder's office. She then had the MRI performed at Georgetown Hospital on August 16. This MRI revealed a 3–5 mm suprasellar cyst behind her left eye – likely a Rathke's pouch cyst. At the time, the cyst was not pressuring her pituitary gland, hypothalamus, or her optic chiasm. Neither Dr. McPherson-Corder nor Dr. Shafrir ever saw the results of this MRI during the time relevant to this proceeding.

Wheeler's gastrointestinal issues troubled her throughout college. She continued to struggle with nausea, vomiting, and low appetite. After her graduation in 2000, her symptoms only worsened. She began losing weight, required at least four gastric-emptying procedures, and on several occasions had to be hospitalized. Eventually, her condition deteriorated to the point that her doctors were forced to insert a feeding tube. In 2003, she was diagnosed with gastroparesis: a condition that makes it more difficult for the stomach to empty properly.

Wheeler's physical decline correlated with her deteriorating mental health. In 2002, she reported increasing depression and stress, which she attributed to her physical maladies. In 2003, her depression worsened, and she began to suffer from panic attacks. She was diagnosed with depressive disorder in 2004 and major depression in 2005. She was also diagnosed with a mood disorder.

Her medical problems came to a head when, in December 2005, she checked into George Washington University Hospital ("GWU") complaining of vertigo and double vision. At that time, GWU doctors ordered an MRI. Like the 1996 MRI, this new test showed a cyst-like mass behind Wheeler's left eye. The cyst had visibly grown, now measuring approximately 11 x 8.5 x 10 mm, and was causing "mass effects" on Wheeler's optic chiasm. Also at this time, GWU doctors diagnosed Wheeler with thyroid and adrenal deficiencies, as well as abnormally low levels of human growth hormone.

After her discharge from GWU Hospital, Wheeler saw Dr. Walter Jean, a neurosurgeon at Georgetown University Hospital. Dr. Jean asked Wheeler to undergo another MRI. While examining the results of this MRI in March 2006, Dr. Jean discovered the 1996 MRI. Comparing the two MRIs, he noted that Wheeler's cyst had "progress[ed]" during the intervening decade, becoming "bigger." Dr. Jean then performed surgery to remove the cyst, without complication.

Wheeler brought suit against Georgetown and Dr. McPherson-Corder on November 24, 2008. Over the course of a thirteen-day trial, both sides called several competing medical experts. Through her experts, Wheeler sought to establish that the cyst caused or contributed to her hormone deficiencies, gastroparesis, and mental-health issues. Her experts testified that, had the cyst been detected and removed earlier, she would have avoided these problems. The appellants' experts vigorously disputed any such causal connection. The appellants also disputed Wheeler's claim that Drs. McPherson-Corder and Shafrir breached their respective duties of care, argued that the doctors' actions did not cause Wheeler's injuries, and contested the extent of her damages. In addition, they maintained that, because Wheeler failed to follow up on the MRI results herself, she was contributorily negligent.

The jury ultimately returned a verdict in Wheeler's favor. It found that the doctors breached their respective standards of care and that their breaches proximately caused Wheeler's injuries. It also found that Wheeler was "contributorily negligent" for not "following Dr. Shafrir's instructions to follow up with him after obtaining the MRI." However, it concluded that her negligence was not a proximate cause of her injuries. It awarded her \$505,450.37 in past medical expenses, \$800,000 in future medical expenses, and \$1,200,000 in noneconomic damages, for a total of \$2,505,450.37.

The verdict form's first three questions, and the jury's answers to them, read:

VERDICT FORM

1(a). Did Yuval Shafrir, M.D., as agent and employee of Georgetown University Hospital, breach the standard of care in his care and treatment of Crystal Wheeler? Yes ☒; No ☐.

1(b). Did Marilyn McPherson-Corder, M.D. breach the standard of care in her care and treatment of Crystal Wheeler? Yes ☒; No ☐.

If you answered "NO" to BOTH Questions # 1(a) and # 1(b), STOP ANSWERING QUESTIONS HERE. THE FOREPERSON SHOULD SIGN AND DATE THIS FORM, AND NOTIFY THE JUDGE.

If you answered "YES" to Question # 1(a), please answer Question # 2(a).

If you answered “YES” to Question # 1(b), please answer Question # 2(b).

2(a). Was the breach of the standard of care by Yuval Shafrir, M.D., as agent and employee of defendant Georgetown University Hospital, a proximate cause of injuries and damages to Crystal Wheeler? Yes x; No___.

2(b). Was the breach of the standard of care by Marilyn McPherson-Corder, M.D. a proximate cause of injuries and damages to Crystal Wheeler? Yes x; No___.

If you answered “NO” to Questions # 2(a) and # 2(b), STOP ANSWERING QUESTIONS HERE. THE FOREPERSON SHOULD SIGN AND DATE THIS FORM, AND NOTIFY THE JUDGE.

If you answered “YES” to Question # 2(a) or # 2(b), please proceed to Question # 3.

3(a). Was Crystal Wheeler contributorily negligent in not following Dr. Shafrir’s instructions to follow up with him after obtaining the MRI? Yes x; No___.

* * * *

3(b). Was Crystal Wheeler’s negligence a proximate cause of her injuries and damages? Yes___; No x.

Following trial, Georgetown and Dr. McPherson-Corder moved jointly for judgment notwithstanding the verdict, or in the alternative for a new trial. In support of this motion, they presented four arguments. First, they claimed that the jury could not rationally have concluded that the negligence of each of the physicians was a proximate cause of Wheeler’s injuries, but that her own negligent failure to follow up with Dr. Shafrir was not. Therefore, they argued, the jury’s verdict was irreconcilably inconsistent. Second, they asserted that there was no general acceptance in the medical scientific community of a causal connection between Rathke’s cleft cysts and gastroparesis. Accordingly, Wheeler’s expert testimony on that point had been inadmissible under *Dyas v. United States*, 376 A.2d 827 (D.C.1977), and *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (1923). Third, they claimed that the jury’s verdict was against the weight of the evidence. Fourth and finally, they argued that Wheeler’s attorney improperly appealed to the jury’s passions during her closing argument.

The trial court denied their motion on April 27, 2012. This appeal followed.

II.

On appeal, Georgetown and Dr. McPherson-Corder reiterate the arguments they presented in their post-trial motion. We address these arguments in turn, beginning with their claim that the verdict was irreconcilably inconsistent.~

Georgetown and Dr. McPherson-Corder's first argument on appeal is essentially the same one they made to the trial court: that the jury could not rationally have concluded that their negligent conduct was a proximate cause of Wheeler's injuries, but that the contributory negligence it found Wheeler had committed was not a proximate cause. The trial court rejected this argument, finding that the verdict was not irreconcilable. We now affirm, but on alternate grounds. We do not reach the question of whether the verdict was irreconcilably inconsistent. Rather, we conclude that the appellants waived their objection by failing to raise the issue before the jury's discharge.

In general, a civil jury will return one of three types of verdicts. In many cases, this will be a standard general verdict. A general verdict is "[a] verdict by which the jury finds in favor of one party or the other, as opposed to resolving specific fact questions." *Wilbur v. Corr. Servs. Corp.*, 393 F.3d 1192, 1201 (11th Cir.2004) (quoting *Mason v. Ford Motor Co.*, 307 F.3d 1271, 1274 (11th Cir.2002)); accord BLACK'S LAW DICTIONARY 1696 (9th ed. 2009). The jury will also set damages, where appropriate. See *Mason, supra*, 307 F.3d at 1273. When the jury returns such a verdict, the basis for its decision is usually not stated explicitly; the jury simply announces a decision for one side or the other. See *Robinson v. Washington Internal Med. Assocs., P.C.*, 647 A.2d 1140, 1144 (D.C.1994) ("Because the jury returned a general verdict in favor of the defendants, we do not know whether the jury found that the defendants were not negligent (or that proximate causation was not proven) or that the plaintiff was contributorily negligent."); see also *Sinai v. Polinger Co.*, 498 A.2d 520, 523 n. 1 (D.C.1985).

In addition, Superior Court Civil Rule 49 authorizes trial courts to use two alternate verdict types. First, subsection (a) permits the trial court to submit to the jury "a special verdict in the form of a special written finding upon each issue of fact." When returning such a "special verdict," the jury answers only the specific factual questions posed by the court. *Trull v. Volkswagen of Am., Inc.*, 320 F.3d 1, 4 (1st Cir.2002) (describing special verdicts under the corresponding Fed.R.Civ.P. 49(a) as setting forth "written finding[s] upon each issue

of fact”); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1519 (6th Cir.1990) (“A special verdict is one in which the jury finds *all* the facts and then refers the case to the court for a decision on those facts.” (citation omitted)). Indeed, “[w]ith a special verdict, the jury’s sole function is to determine the facts; the jury needs no instruction on the law because the court applies the law to the facts as found by the jury.” *Mason, supra*, 307 F.3d at 1274.

Second, subsection (b) authorizes the court to “submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon [one] or more issues of fact the decision of which is necessary to a verdict.” Verdicts submitted under this section are “hybrid[s]” between standard general verdicts and special verdicts. *Mason, supra*, 307 F.3d at 1274; *see also Portage II, supra*, 899 F.2d at 1520 (“The general verdict with interrogatories may be viewed as a middle ground between the special verdict and the general verdict....”). They “permit[] a jury to make written findings of fact and to enter a general verdict,” *Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48, 53 (2d Cir.1992), and are useful when it is necessary to determine “specifically what the jury found.” *Sinai, supra*, 498 A.2d at 533 (Nebeker, J., concurring).

The distinction between these verdict types is crucial in this case, because a party waives its objection to any alleged inconsistency in a general verdict, with or without interrogatories, if it fails to object before the jury’s discharge. *See District of Columbia Hous. Auth., v. Pinkney*, 970 A.2d 854, 868 (D.C.2009) (“DCHA did not raise an objection based on inconsistent verdicts before the jury was excused, [after returning general verdict with special interrogatory,] and it therefore has waived this argument.”); *Estate of Underwood v. Nat’l Credit Union Admin.*, 665 A.2d 621, 645 (D.C.1995) (explaining that Rule 49, “particularly section (b), countenances a waiver of objections to inconsistencies in the verdict that are not pointed out before the jury is discharged”). That rule, however, may not apply to special verdicts. *See Mason, supra*, 307 F.3d at 1274 (“[I]f the jury rendered inconsistent general verdicts, failure to object timely waives that inconsistency as a basis for seeking retrial; inconsistent special verdicts, on the other hand, may support a motion for a new trial even if no objection was made before the jury was discharged.”).

In this case, the verdict form itself did not specify the type of verdict to be rendered. That form, labeled simply “Verdict,” first directed the jurors to determine whether Dr. Shafrir or Dr. McPherson-Corder breached the applicable standards of care in his or

her care of and treatment of Wheeler. If the jurors answered either question with a “yes,” the form instructed them to determine whether the breach by either or both doctors was a proximate cause of injuries and damages to Wheeler. If the jurors answered “yes” again, the form instructed them to then determine whether Wheeler was “contributorily negligent in not following Dr. Shafrir’s instructions to follow up with him after obtaining the MRI.” Then, if the jurors found that she was, the form required them to determine whether Wheeler’s “negligence [was] a proximate cause of her injuries and damages.”

The appellants do not argue that the verdict form was facially inconsistent because it allowed the jury to reach different conclusions as to Wheeler’s “contributory negligence,” a concept which ordinarily encompasses negligence and proximate cause. Indeed, it is not clear they could do so, given that appellants’ counsel took primary responsibility for drafting the verdict form. *See Preacher v. United States*, 934 A.2d 363, 368 (D.C.2007) (“Generally, the invited error doctrine precludes a party from asserting as error on appeal a course that he or she has induced the trial court to take.”).

Appellants could have avoided any potential confusion on this point by simply phrasing the verdict form to ask only whether Wheeler had been negligent by failing to follow Dr. Shafrir’s instructions (as opposed to *contributorily* negligent), and whether her negligence was a proximate cause of her injuries. Such phrasing would have tracked the language of the applicable Standardized Instructions. *See* Standardized Civil Jury Instructions for the District of Columbia, No. 5–15 (2013 rev. ed.) (“The defendant alleges that the plaintiff was negligent. The defendant is not liable for the plaintiff’s injuries if the plaintiff’s own negligence is a proximate cause of [his] [her] injuries.”).

The form also called on the jurors to consider the appellants’ assumption-of-the-risk defense. Finally, if the jurors ultimately found in Wheeler’s favor, the form required them to award damages.

The verdict form used in this case did not call for a general verdict of the most basic type. In the past, however, we have at times referred to similar verdicts as general. *See Nimetz v. Cappadona*, 596 A.2d 603, 606 (D.C.1991) (describing as “general” a verdict form that “require[ed] the jury to make separate findings only on negligence, proximate cause, and the award of damages for each plaintiff”). *Accord Portage II, supra*, 899 F.2d at 1518, 1522 (construing as “general” a verdict form that asked the jury whether the defendant was negligent and whether the plaintiff was contributorily negligent); *Pinkney*,

supra, 970 A.2d at 868–69 (holding that appellant waived its objection to inconsistency in remarkably similar verdict by failing to raise it before jury’s discharge). Nevertheless, this verdict does not comfortably fit the accepted definition of a “general” verdict, because it required the jurors to expressly resolve at least one discrete factual issue: whether Wheeler “follow[ed] Dr. Shafrir’s instructions to follow up with him after obtaining the MRI.” *See, e.g., Wilbur, supra*, 393 F.3d at 1201. Thus, although this verdict form was similar to others we have called “general,” it was not a general verdict in its most basic form.

But it is likewise unclear that the form called for a Rule 49(b) general verdict with interrogatories. True, one portion of the form suggests such a verdict, because, as noted above, the jury answered at least one question regarding a discrete factual issue (i.e., whether Wheeler failed to follow Dr. Shafrir’s instructions), while still deciding the ultimate issue of liability. *See Portage II, supra*, 899 F.2d at 1521 (holding that verdict form that asked jury several factual questions, but also required it to determine ultimate liability, called for a general verdict with interrogatories). But the trial court here did not indicate that it was exercising its authority under Rule 49(b). Rather, it used a form simply labeled “Verdict.” And that form did not pose any purely factual questions. Instead, each question required the jury to resolve both factual questions and legal issues. *But cf. Lavoie, supra*, 975 F.2d at 54 (finding verdict form was a general verdict with interrogatories despite the “unusual nature” of the form used).

The issues before us, however, do not require us to choose between labeling this verdict a general verdict or a Rule 49(b) general verdict with interrogatories, because we can clearly determine that it was not a special verdict – the only type of verdict to which a party might be permitted to raise an inconsistency objection after the jury’s discharge. Special verdicts do not require the jury to determine ultimate liability, or indeed reach any legal conclusions whatsoever. *Mason, supra*, 307 F.3d at 1274 (“[A] Rule 49(a) special verdict is a verdict by which the jury finds the facts particularly, and then submits to the court the questions of law arising on them.” (internal quotation marks omitted)). Indeed, when a trial court uses a special-verdict form, it generally will not instruct the jury on the law at all, because the jury will not be called upon to apply the law. *See Bills v. Aseltine*, 52 F.3d 596, 605 (6th Cir.1995) (holding that verdict was general where the jury instructions “discussed legal matters in detail”); *Portage II, supra*, 899 F.2d at 1521. In other words, when rendering a special

verdict, the jury *only* finds specific facts. BLACK'S LAW DICTIONARY 1697 (9th ed. 2009) (defining "special verdict" as "[a] verdict in which the jury makes findings *only* on factual issues submitted to them by the judge" (emphasis added)).

But here, the jury did much more. Not only did the jury determine ultimate liability, it explicitly resolved several mixed legal and factual issues along the way, including negligence, proximate cause, and assumption of the risk. *Cf. Jarvis v. Ford Motor Co.*, 283 F.3d 33, 56 (2d Cir.2002) (holding that Federal Rule 49(a), governing special verdicts, does not apply when "the jury is required to make determinations not only of issues of fact but of ultimate liability"). Recognizing that the jury would be applying law to facts, the trial court thoroughly instructed it on the applicable legal principles. *Cf. Portage II, supra*, 899 F.2d at 1521 ("If the written questions submitted to the jury were truly special verdicts, no instruction on the law, and certainly not one as detailed would have been given to the jury."). With these facts in mind, we can comfortably conclude that, whatever type of verdict this was, it was not a special verdict.

Accordingly, because the verdict was not special, it was either a standard general verdict or a Rule 49(b) general verdict with interrogatories. To preserve an objection to an alleged inconsistency in either of these types, a party must raise the argument before the jury is discharged. Here, appellants failed to do so. Accordingly, they waived their objection to any inconsistency in the verdict. *See, e.g., Underwood, supra*, 665 A.2d at 645; *Pinkney, supra*, 970 A.2d at 868.

III.

The appellants next argue that the trial court erred by permitting Wheeler's expert witnesses to testify that there was a causal link between her Rathke's cleft cyst and her gastroparesis. They assert that Wheeler failed to demonstrate that such a causal relationship is generally accepted in the medical scientific community.

In general, "[t]he trial court has broad discretion to admit or exclude expert testimony." *Russell v. United States*, 17 A.3d 581, 585 (D.C.2011). But this discretion is not unlimited. Before permitting expert testimony, the trial court must determine that the proffered testimony meets three threshold requirements:

- (1) the subject matter must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman; (2) the witness must have sufficient skill, knowledge, or experience in that

field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth; and (3) expert testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.

Id. at 586 (quoting *Dyas v. United States*, 376 A.2d 827, 832 (D.C.1977)) (original emphasis omitted) (internal quotation marks omitted). Here, appellants acknowledge that Wheeler's experts satisfied the first two requirements. They argue only that the experts' testimony failed to meet the third requirement: that the "state of the pertinent art or scientific knowledge" permits the expert to state "a reasonable opinion." Specifically, they claim that "Wheeler's experts were required to demonstrate that the medical community recognizes and supports their conclusion that there is a causal link between a Rathke's cleft cyst and gastroparesis or hormonal insufficiency and gastroparesis."

This argument misstates our admissibility standard. The third *Dyas* requirement focuses not on "the acceptance of a particular ... conclusion derived from [the] methodology," but rather on "the acceptance of the methodology itself." *Minor v. United States*, 57 A.3d 406, 420–21 (D.C.2012) (quoting *United States v. Jenkins*, 887 A.2d 1013, 1022 (D.C.2005)). In other words, "satisfaction of the third *Dyas* criterion begins – and ends – with a determination of whether there is general acceptance of a particular scientific methodology, not an acceptance, beyond that, of particular study results based on that methodology." *Burgess v. United States*, 953 A.2d 1055, 1063 n. 12 (D.C.2008) (quoting *Ibn-Tamas v. United States*, 407 A.2d 626, 638 (D.C.1979)).

Here, the appellants challenge Wheeler's experts' "conclusion[s]," not their methodology. This challenge fails, because it "focuse[s] on the wrong question." *Minor, supra*, 57 A.3d at 420. At trial, Wheeler's experts testified that they based their conclusions on case studies and medical literature, which listed endocrine conditions like hypothyroidism as a cause of gastroparesis. The appellants contested these conclusions during trial, and do so again on appeal. But they have offered no argument that reliance on relevant medical literature, which according to at least one expert dates back to the 1970s, as well as case studies appearing in that literature, is not a "generally accepted" method for forming an opinion regarding medical causation. Accordingly, we find the appellants' challenge unpersuasive.

IV.

Next, the appellants argue that the trial court should have ordered a new trial based on certain comments Wheeler's counsel made during closing arguments. Specifically, they point to counsel's statements regarding the applicable standard of care, which they characterize as an improper send-a-message argument:

You know, the jury system in our country exists to protect the community. And in this medical malpractice case, you will decide what standards doctors must meet in the community when they provide care and treatment to patients. You will decide what standards doctors must meet to protect patient health and safety.... Remember, the standards ... in the medical community exist for a reason. They have been developed by doctors for doctors. They exist to promote patient safety. They exist to protect patient health. They're to provide a medical care system that above all prevents harm that's avoidable. And what these standards are in this community is what you will be deciding when you go back to the jury room.

This court will reverse on the basis of improper comments by counsel only when it is likely that the comments left "the jurors with wrong or erroneous impressions, which were likely to mislead, improperly influence, or prejudice them to the disadvantage of the [defendant]." *Psychiatric Inst. of Wash. v. Allen*, 509 A.2d 619, 629 (D.C.1986) (quoting *Simpson v. Stein*, 52 App.D.C. 137, 139, 284 F. 731, 733 (1922)). Because it has the advantage of observing the arguments as they occurred, the trial court is in a better position than this court to determine whether counsel's statements were prejudicial. *Scott v. Crestar Fin. Corp.*, 928 A.2d 680, 690 (D.C.2007). Accordingly, we afford the trial court's conclusions on that count broad deference, and will sustain its ruling so long as it is "rational." *Id.*

Here, the trial court concluded that counsel's statements "related to the determination the jury was being asked to make regarding the standard of care," and found "no impropriety in the closing argument." Based on our own reading of counsel's comments, we conclude that the trial court's conclusion was "rational." *Id.* Counsel merely explained the jury's role in determining the applicable standard of care. She did not urge the jury to penalize the appellants based on irrelevant considerations or to return a verdict that would "send a message." Accordingly, we will defer to the trial court's judgment.

V.

Finally, the appellants argue that the verdict was against the weight of the evidence. Although their argument is multi-faceted,* we focus in particular on their claim that the evidence did not support the jury's award of \$800,000 in future medical costs. Specifically, the appellants argue that the jury awarded \$19,450 more than Wheeler's damages expert testified was necessary, and that this additional award was based on pure speculation. We agree.

* The appellants also make a broader weight-of-the-evidence argument, contending that the jury could not rationally have credited Wheeler's experts over their own. We do not think it necessary to restate the particulars of that argument here. We note only that it would not be proper for this court to usurp the jury's factfinding role by reweighing the evidence in a manner more to the appellants' liking. "When the case turns on disputed factual issues and credibility determinations, the case is for the jury to decide." *Durphy v. Kaiser Found. Health Plan of Mid-Atlantic States, Inc.*, 698 A.2d 459, 465 (D.C.1997); *see also Burke v. Scaggs*, 867 A.2d 213, 217 (D.C.2005) (holding that judgment as a matter of law is permissible "only if it is clear that the plaintiff has not established a *prima facie* case" (quoting *Haynesworth v. D.H. Stevens Co.*, 645 A.2d 1095, 1097 (D.C.1994))).

In general, we do not require plaintiffs to prove their damages "precisely" or "with mathematical certainty." *District of Columbia v. Howell*, 607 A.2d 501, 506 (D.C.1992) (quoting *Garcia v. Llerena*, 599 A.2d 1138, 1142 (D.C.1991)). Nevertheless, plaintiffs must provide "some reasonable basis upon which to estimate damages." *Id.* The jury may not award damages based solely on speculation. *Zoerb v. Barton Protective Servs.*, 851 A.2d 465, 470 (D.C.2004). Specifically in the context of future-medical-expenses awards, we have held that where there is "no basis upon which the jury could have reasonably calculated or inferred the cost of [the plaintiff's] future medical expenses," the trial court may not "allow the jury to speculate in this area of damages." *Romer v. District of Columbia*, 449 A.2d 1097, 1100 (D.C.1982).

Here, Wheeler's damages expert, economist Dr. Richard Lurito, testified that a lump-sum payment of \$780,550 would fully compensate Wheeler for her future medical costs. He reached this figure by looking at historical trends, projected treatment costs, and

estimated inflation in the general economy. He testified that he used a 3.75% after-tax discount rate, which he described as “reasonable and conservative.” He adopted this rate based on current market conditions, accounting for current returns on short-and long-term government bonds, and adjusting for relatively low present interest rates. Then, during closing arguments, Wheeler’s counsel urged the jury to award Wheeler \$780,550 – the full amount Dr. Lurito recommended. But the jury was ultimately more generous, rounding Dr. Lurito’s figure up and awarding Wheeler \$800,000 for future medical expenses – a sum \$19,450 in excess of the amount Dr. Lurito indicated was necessary.

Wheeler points us to no record evidence upon which the jury could have reasonably awarded this additional \$19,450, nor can we discern any. Wheeler argues that the jury could have inferred that a larger sum would be necessary based on Dr. Lurito’s description of his estimate as “conservative.” But there was no basis in the evidence for the jury to make such an inference. Although Dr. Lurito described in detail the factors he considered in his calculations, he did not testify what a more pessimistic forecast would have entailed, nor did he indicate how much additional money would be necessary under less-favorable circumstances. Accordingly, the jury could only speculate that Wheeler might require an extra \$19,450 to cover her medical costs. *Cf. Zoerb, supra*, 851 A.2d at 471 (“[E]ven if we were to conclude – which we do not – that generalizations such as ‘the sooner the better,’ without evidence as to how much sooner was how much better, were sufficient to preclude the direction of a verdict as to liability, the jury would face an impossible task in attempting to make a rational award of damages.”).

The jury is not permitted to award damages based on such speculation. *See Romer, supra*, 449 A.2d at 1100. Because the award of an additional \$19,450 was not supported by the evidence, the trial court should have granted a remittitur in that amount. *See Duff v. Werner Enters., Inc.*, 489 F.3d 727, 730–31 (5th Cir.2007) (ordering trial court to grant remittitur where future-medical-costs award exceeded “the ‘maximum amount calculable from the evidence’” (quoting *Carlton v. H.C. Price Co.*, 640 F.2d 573, 578 (5th Cir.1981))). Accordingly, we remand with instructions for the trial court to amend its order, reducing the future-medical-expenses award by \$19,450 to accord with the evidence.

So ordered.

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B.3. Check-Your-Understanding Questions About *Georgetown v. Wheeler*

- A. What is the difference between the verdict and the judgment?
- B. What is the procedural posture of the case?
- C. The trial court's rulings on what motions are being reviewed?
- D. What is an example of a common-law doctrine that is applied?
- E. What is an example of a rule of procedure that is applied?
- F. What is an example of a standard of review that is applied?

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Prima Facie Negligence

15. When and to Whom is a Duty of Care Owed

“A danger foreseen is half-avoided.”

– Cheyenne Proverb

A. Lead-in

The first element that must be established by a plaintiff in proving a negligence case is that the defendant owed the plaintiff a duty of care. If the defendant did not owe the plaintiff a duty of care, then even if the defendant was careless and caused injury to the plaintiff, there will be no recovery in negligence.

Suppose someone asks you for one of your kidneys, explaining that otherwise they will die. In terms of negligence doctrine, you do not owe this person a duty to hand over a kidney. And even if the person dies as a result of not getting one of your kidneys, there is no *prima facie* case against you for negligence. You can probably intuit that there is not a good cause of action here, but it is instructive to consider the explicit reason. Check off the elements: There is an injury. There is causation. Those are not lacking. And assuming, for argument’s sake, there were a duty, then there is arguably a breach, since not handing over a kidney will foreseeably result in injury. What is definitively lacking, however, is the existence of a duty in this situation.

Now, suppose you are carelessly operating a rocket-powered tricycle and, thanks to your lack of care, you careen out of control, hitting and injuring a pedestrian who was walking on a sidewalk. You owed the

pedestrian a duty of care, and you breached that duty. And that breach caused an injury. Thus, the pedestrian will be able to establish a prima facie case for negligence. All the elements are in place.

In this chapter, the key question is when and to whom is a duty of care owed. In other words: Is there a duty? The question of what is required by a duty of care – in other words, just how careful do you have to be – is a question for the next chapter, in which we will talk about *breach of duty*. Here, the question is just whether a duty exists at all – that is, whether the law will impose on the potential defendant some incipient obligation that brings the defendant within the realm of potential negligence liability.

Whether or not there is a duty of care is considered a *question of law*, meaning it is a matter for the judge to decide. Thus, the doctrine of duty of care can be used to prevent a jury from hearing a case that might otherwise result in a substantial award of damages.

One potentially frustrating thing for students about the existence-of-duty element of a negligence case is that it usually is a gimme. That is, in the real world, the existence of a duty is so obvious that it doesn't present any meaningful concern in a litigation. So the student, starting their study of negligence, all fired up to apply duty doctrine in hypotheticals may be left bewildered, wondering where the issue is lurking.

As one court put it: "Occasions for judicial determination of a duty of care are infrequent, because in 'run of the mill' accident cases the existence of a duty may be – and usually is – safely assumed." *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814 (Cal. App. 1976).

B. Duty: Its Essential Concept and Role

B.1. Defining Duty

The duty of care can be defined as an obligation for people to exercise reasonable care to avoid foreseeable harm to others. It is a frustratingly fuzzy definition. So, if you end up feeling like you have a hard time understanding the concept of duty, do not worry. It probably just means that you are reading closely and thinking deeply. The duty-of-care standard is vague out of necessity.

B.2. Duty as a Policy-Based Gatekeeper

B.2.a. In General

The definition of the duty of care is probably less important than the way it is employed by courts. Justice Stanley Mosk described the role of the duty of care with considerable candor when he wrote, “It is the court’s ‘expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.’” *Weirum v. RKO General*, 15 Cal. 3d 40, 46 (Cal. 1975).

In other words, the element of the existence of a duty plays a gatekeeping role, setting an outer boundary on what kinds of causes of action will be entertained in the courts and be given to a jury for resolution.

B.2.b. Thing in Point: Colorado Pattern Civil Jury Instructions

One way to see legal rules, announced by appellate courts, in everyday action, is to look at pattern jury instructions. Instructing the jury is a key job of the trial judge, and it’s a rite of judicial process depicted in countless television shows and movies. Pattern jury instructions are made-ahead-of-time instructions gathered into a book offering judges an off-the-shelf means of telling the jury how to do its job. They go by different names in different states (e.g., *California Civil Jury Instructions*, *Arkansas Model Jury Instructions*, *Florida Standard Jury Instructions*). Typically, they are prepared by a committee of judges, practicing lawyers, and law professors.

It’s up to the trial judge how to instruct a jury. But trial judges hate to get reversed on appeal, and using pattern jury instructions helps trial judges avoid reversible error.

Looking at, for example, the Colorado Pattern Civil Jury Instructions, can help you see the role of duty in a negligence case. In the chapter concerning negligence, the “Introductory Note” at the beginning – so, not actual jury instruction language itself – provides an introduction to the negligence cause of action explaining to the reader: “To recover on a negligence claim, the plaintiff must establish the existence of a legal duty on the part of the defendant, a breach of that duty, causation, and damages.”

Then here is actual jury instruction language for the judge to use:

For the plaintiff, (name), to recover from the defendant, (name), on (his) (her) claim of negligence, you must find that all of the following have been proved by a preponderance of the evidence:

1. The plaintiff had (injuries) (damages) (losses);
2. The defendant was negligent; and
3. The defendant's negligence was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these (number) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (number) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [insert any affirmative defense that would be a complete defense to plaintiff's claim]). ...

Colorado Pattern Civil Jury Instructions 9:1. Within these instructions you can see the elements of breach, actual causation, proximate causation, and injury.

Injury, of course, is in instruction No. 1. That's pretty obvious.

The breach element is represented by instruction No. 2. That's filled out by section 9:6, which is an add-in definition for the jury on what "negligent" means:

Negligence means a failure to do an act which a reasonably careful person would do, or the doing of an act which a reasonably careful person would not do, under the same or similar circumstances to protect (oneself or) others from (bodily injury) (death) (property damage) (insert any other appropriate description ...) ...

Colorado Pattern Civil Jury Instructions 9:6.

And then causation is in instruction No. 3, and the add-in explanation to the jury of "cause" embraces both the actual causation and proximate causation elements:

The word “cause” as used in these instructions means an act or failure to act which in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have happened.

Colorado Pattern Civil Jury Instructions 9:18.

But what about the existence of a duty? It is, in fact, nowhere to be found in the actual text of the pattern jury instructions. And that is for a reason: Whether a duty exists is a question of law, something for the court to determine. The “Introductory Note” to the negligence chapter explains:

“Generally, a legal duty to use due care arises in response to a foreseeable and unreasonable risk of harm to others. In determining whether a person has a duty to act or refrain from acting to avoid injury to others, the nature of the inquiry is essentially whether recognizing a duty would comport with fairness under contemporary standards. To decide this, the court must consider several factors, including the feasibility and likelihood of injury and the possible extent of that injury, the magnitude of the burden placed on the defendant to guard against injury, and the consequences of placing that burden on the defendant. Ultimately, whether a duty exists depends on considerations of policy. ... The existence and scope of a legal duty are generally questions of law for the court to determine.”

Colorado Pattern Civil Jury Instructions, “Introductory Note”(citations omitted).

This view of negligence – provided by these jury instructions – gives you a sense of the whole lay of the land. It shows how the parts work together. And, in particular, it illustrates exactly how the duty element serves a gatekeeping role that makes negligence – in all of its open-ended adaptability to potentially anything and everything causing an injury – obey outer boundaries that courts set based on an open-ended set of concerns about preventing liability from running wild.

B.3. Duty as Something to Breach

Another reason for duty as an element is structural: It helps provides the cause of action of negligence with a foundation upon which to construct legal meaning.

Consider that the elements of a negligence case are duty, breach of duty, actual causation, proximate causation, and injury. The heart of the negligence cause of action – the thing that makes negligence *negligence* – is the breach-of-duty element.

The injury is usually quite clear, as uninjured plaintiffs would tend to have little reason to want to bring a claim. And causation is a matter of connecting that injury to the alleged breach. Sometimes causation is hard to prove or creates difficult legal issues, but causation doctrine is not unique to negligence. It pops up all across the torts landscape and in other fields of law as well. So the doctrine of negligence is centered on this idea of breach. But breach of what? The duty is the what.

Consider that negligence and contract law are both about obligations. This is not merely conceptual, by the way. In Louisiana, which follows the civil law tradition rather than the common law, the “law of obligations” is an umbrella category covering both contracts and torts (known as “delicts” in the Bayou State).

Very roughly, negligence law imposes obligations to be careful and contract law imposes obligations to keep promises. Both negligence and contract causes of action are built on the notion of “breach.”

In contract law, the cause of action at the center of everything is breach of contract. We can’t very well talk about breach unless we know what is being breached. In contract law, that what is the contract. Contract law has to consider at least these three distinct questions: Does a contract exist in this situation? If so, what does it require the defendant to do? And finally, has the defendant done what is required?

Similarly, in negligence law, we can’t very well talk about breach unless there’s a *something* that is being breached. In the imagination of negligence law, the “duty” is what is getting breached. Thus, negligence law has to consider at least these three distinct questions: Does a duty of care exist in this situation? If so, what does it require the defendant to do? And finally, has the defendant done what is required?

It is for these reasons that we are separating out the question of *whether a duty of care exists* from the question of what level of care is required.

B.4. Duty as Doctrinal Wiggle Room

One way to think about the elements of a negligence case is that they are the law's way of providing an analytical structure that will pare down the universe of possible negligence matters into a subset of cases where awarding compensation is in tune with our basic intuitions of fairness. But when you try to construct simply stated rules that will both correspond with a sense of justice and work in any context, you run into the inevitable need for wiggle room. In tort law, the elements of duty of care and proximate causation do the most to provide that wiggle room, with duty of care being primarily the domain of the judge, and proximate causation being generally the province of the jury.

B.5. Foreseeability (Among a Mass of Policy Considerations)

The most essential concept in defining the duty of care in negligence is *foreseeability*. A defendant is said to owe a duty of care to all foreseeable plaintiffs for all foreseeable harm.

But you can't take that statement too seriously. Suppose your brother-in-law is fixing to remodel his kitchen. He asks you to fly across the country, on your own dime, to help with the demolition work. Maybe this sounds like fun and you'll do it. But maybe you prefer not to. Let's stipulate that your brother-in-law is a hasty doofus with a history of being overexcitable with big and powerful tools – exactly such as a reciprocating saw and a sledgehammer, which you've already seen shown off in selfies he texted you. It might be very foreseeable that he will get badly hurt if you don't cross two time zones to go and help him. But there's no negligence duty here. Perhaps pangs of conscience or parent-in-law guilt will get you on a plane. But there's no need to fear negligence liability for failure to fly out there.

In *Weirum v. RKO*, 15 Cal. 3d 40, 46 (Cal. 1975), Justice Mosk wrote that “foreseeability of the risk is a primary consideration in establishing the element of duty.” But he described the role of the duty of care with considerable candor when he wrote: “It is the court's ‘expression of the sum

total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”

C. The Entertainment Context as Example

C.1. Case: *Weirum v. RKO* (Cal. 1975)

C.1.a. Advance Notes

In this case there is carelessness, injury, actual and proximate causation. The only open question is whether a duty of care is owed. This opinion, written by legendary California jurist Stanley Mosk, is valuable for being open and blunt about the duty element in negligence – how it may be dealt with, the role it plays in the universe of tort liability, and its essentially indeterminate nature.

Some synthesizing:

Dramatis Personae:

- Ronald A. Weirum: plaintiff/appellant; driver run off the freeway and killed in car wreck
- Weirum’s wife and children: plaintiffs/appellants; suing for wrongful death
- Robert Sentner: defendant; 17-year-old driver and radio listener; settled
- Marsha L. Baime: defendant; 19-year-old driver and radio listener; liable, didn’t appeal RKO General: defendant/appellant; owner of KHJ
- KHJ: radio station with an enormous teenage audience
- The Real Don Steele: KHJ disc jockey driving around giving out money as part of radio contest

Fact synopsis: In the summer of 1970, KHJ’s “Super Summer Spectacular” contest offered cash to the first listener to get to a secret location where a deejay waited. Sentner and/or Baime, racing to be the first to Steele’s next giveaway stop, ran Weirum off the freeway, causing his death.

Posture on appeal: Weirum won a jury verdict and judgment against KHJ. KHJ appeals from the judgment denial of JNOV. The primary

question is whether KHJ owed a duty to Weirum arising out of its broadcast giveaway contest.

Result: Plaintiff/appellant Weirum wins; judgment upheld. The record amply supports foreseeability and, thus, the imposition of a duty.

C.1.b. Opinion

Weirum v. RKO General, Inc.

Supreme Court of California

August 21, 1975

15 Cal.3d 40. RONALD A. WEIRUM et al., Plaintiffs and Appellants, v. RKO GENERAL, INC., Defendant and Appellant; MARSHA L. BAIME, Defendant and Respondent. L.A. No. 30452. In Bank. Opinion by Mosk, J., expressing the unanimous view of the court. Wright, C. J., McComb, J., Tobriner, J., Sullivan, J., Clark, J., and Richardson, J., concurred.

Justice STANLEY MOSK:

A rock radio station with an extensive teenage audience conducted a contest which rewarded the first contestant to locate a peripatetic disc jockey. Two minors driving in separate automobiles attempted to follow the disc jockey's automobile to its next stop. In the course of their pursuit, one of the minors negligently forced a car off the highway, killing its sole occupant. In a suit filed by the surviving wife and children of the decedent, the jury rendered a verdict against the radio station. We now must determine whether the station owed decedent a duty of due care.

The facts are not disputed. Radio station KHJ is a successful Los Angeles broadcaster with a large teenage following. At the time of the accident, KHJ commanded a 48 percent plurality of the teenage audience in the Los Angeles area. In contrast, its nearest rival during the same period was able to capture only 13 percent of the teenage listeners. In order to attract an even larger portion of the available audience and thus increase advertising revenue, KHJ inaugurated in July of 1970 a promotion entitled "The Super Summer Spectacular." The "spectacular," with a budget of approximately \$40,000 for the month, was specifically designed to make the radio station "more exciting." Among the programs included in the "spectacular" was a contest broadcast on July 16, 1970, the date of the accident.

On that day, Donald Steele Revert, known professionally as "The Real Don Steele," a KHJ disc jockey and television personality, traveled

in a conspicuous red automobile to a number of locations in the Los Angeles metropolitan area. Periodically, he apprised KHJ of his whereabouts and his intended destination, and the station broadcast the information to its listeners. The first person to physically locate Steele and fulfill a specified condition received a cash prize. “The conditions varied from the giving of a correct response to a question to the possession of particular items of clothing.” In addition, the winning contestant participated in a brief interview on the air with “The Real Don Steele.” The following excerpts from the July 16 broadcast illustrate the tenor of the contest announcements:

9:30 and The Real Don Steele is back on his feet again with some money and he is headed for the Valley. Thought I would give you a warning so that you can get your kids out of the street.

The Real Don Steele is out driving on – could be in your neighborhood at any time and he’s got bread to spread, so be on the lookout for him.

The Real Don Steele is moving into Canoga Park – so be on the lookout for him. I’ll tell you what will happen if you get to The Real Don Steele. He’s got twenty-five dollars to give away if you can get it ... and baby, all signed and sealed and delivered and wrapped up.

10:54 – The Real Don Steele is in the Valley near the intersection of Topanga and Roscoe Boulevard, right by the Loew’s Holiday Theater – you know where that is at, and he’s standing there with a little money he would like to give away to the first person to arrive and tell him what type car I helped Robert W. Morgan give away yesterday morning at KHJ. What was the make of the car. If you know that, split. Intersection of Topanga and Roscoe Boulevard – right nearby the Loew’s Holiday Theater – you will find The Real Don Steele. Tell him and pick up the bread.

In Van Nuys, 17-year-old Robert Sentner was listening to KHJ in his car while searching for “The Real Don Steele.” Upon hearing that “The Real Don Steele” was proceeding to Canoga Park, he immediately drove to that vicinity. Meanwhile, in Northridge, 19-year-old Marsha Baime heard and responded to the same information. Both of them arrived at the Holiday Theater in Canoga Park to find that someone had already claimed the prize. Without knowledge of the other, each decided to follow the Steele vehicle to its next stop and thus be the

first to arrive when the next contest question or condition was announced.

For the next few miles the Sentner and Baime cars jockeyed for position closest to the Steele vehicle, reaching speeds up to 80 miles an hour. “It is not contended that the Steele vehicle at any time exceeded the speed limit.” About a mile and a half from the Westlake offramp the two teenagers heard the following broadcast: “11:13 – The Real Don Steele with bread is heading for Thousand Oaks to give it away. Keep listening to KHJ The Real Don Steele out on the highway – with bread to give away – be on the lookout, he may stop in Thousand Oaks and may stop along the way Looks like it may be a good stop Steele – drop some bread to those folks.”

The Steele vehicle left the freeway at the Westlake offramp. Either Baime or Sentner, in attempting to follow, forced decedent’s car onto the center divider, where it overturned. Baime stopped to report the accident. Sentner, after pausing momentarily to relate the tragedy to a passing peace officer, continued to pursue Steele, successfully located him and collected a cash prize.

Decedent’s wife and children brought an action for wrongful death against Sentner, Baime, RKO General, Inc. as owner of KHJ, and the maker of decedent’s car. Sentner settled prior to the commencement of trial for the limits of his insurance policy. The jury returned a verdict against Baime and KHJ in the amount of \$300,000 and found in favor of the manufacturer of decedent’s car. KHJ appeals from the ensuing judgment and from an order denying its motion for judgment notwithstanding the verdict. Baime did not appeal.

The primary question for our determination is whether defendant owed a duty to decedent arising out of its broadcast of the giveaway contest. The determination of duty is primarily a question of law. It is the court’s “expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” (Prosser, *Law of Torts* (4th ed. 1971) pp. 325-326.) Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. (Prosser, *Palsgraf Revisited* (1953) 52 MICH. L. REV. 1, 15.) While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. However,

foreseeability of the risk is a primary consideration in establishing the element of duty. Defendant asserts that the record here does not support a conclusion that a risk of harm to decedent was foreseeable.

While duty is a question of law, foreseeability is a question of fact for the jury. The verdict in plaintiffs' favor here necessarily embraced a finding that decedent was exposed to a foreseeable risk of harm. It is elementary that our review of this finding is limited to the determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

We conclude that the record amply supports the finding of foreseeability. These tragic events unfolded in the middle of a Los Angeles summer, a time when young people were free from the constraints of school and responsive to relief from vacation tedium. Seeking to attract new listeners, KHJ devised an "exciting" promotion. Money and a small measure of momentary notoriety awaited the swiftest response. It was foreseeable that defendant's youthful listeners, finding the prize had eluded them at one location, would race to arrive first at the next site and in their haste would disregard the demands of highway safety.

Indeed, "The Real Don Steele" testified that he had in the past noticed vehicles following him from location to location. He was further aware that the same contestants sometimes appeared at consecutive stops. This knowledge is not rendered irrelevant, as defendant suggests, by the absence of any prior injury. Such an argument confuses foreseeability with hindsight, and amounts to a contention that the injuries of the first victim are not compensable. "The mere fact that a particular kind of an accident has not happened before does not ... show that such accident is one which might not reasonably have been anticipated." (*Ridley v. Grifall Trucking Co.* (1955) 136 Cal.App.2d 682, 686.) Thus, the fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts.

It is of no consequence that the harm to decedent was inflicted by third parties acting negligently. Defendant invokes the maxim that an actor is entitled to assume that others will not act negligently. This concept is valid, however, only to the extent the intervening conduct was not to be anticipated. If the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction whether innocent or negligent does not prevent the actor from being liable for the harm caused thereby. Here,

reckless conduct by youthful contestants, stimulated by defendant's broadcast, constituted the hazard to which decedent was exposed.

It is true, of course, that virtually every act involves some conceivable danger. Liability is imposed only if the risk of harm resulting from the act is deemed unreasonable – i.e., if the gravity and likelihood of the danger outweigh the utility of the conduct involved.

We need not belabor the grave danger inherent in the contest broadcast by defendant. The risk of a high speed automobile chase is the risk of death or serious injury. Obviously, neither the entertainment afforded by the contest nor its commercial rewards can justify the creation of such a grave risk. Defendant could have accomplished its objectives of entertaining its listeners and increasing advertising revenues by adopting a contest format which would have avoided danger to the motoring public.

Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.

We are not persuaded that the imposition of a duty here will lead to unwarranted extensions of liability. Defendant is fearful that entrepreneurs will henceforth be burdened with an avalanche of obligations: an athletic department will owe a duty to an ardent sports fan injured while hastening to purchase one of a limited number of tickets; a department store will be liable for injuries incurred in response to a "while-they-last" sale. This argument, however, suffers from a myopic view of the facts presented here. The giveaway contest was no commonplace invitation to an attraction available on a limited basis. It was a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit. In the assertedly analogous situations described by defendant, any haste involved in the purchase of the commodity is an incidental and unavoidable result of the scarcity of the commodity itself. In such situations there is no attempt, as here, to generate a competitive pursuit on public streets, accelerated by repeated importuning by radio to be the very first to arrive at a particular destination. Manifestly the "spectacular" bears little resemblance to daily commercial activities.~

The judgment and the orders appealed from are affirmed.~

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C.1.c. Questions to Ponder About *Weirum v. RKO*

- A. Does the duty-of-care concept work well to provide an outer boundary for what is recoverable in negligence? What might you replace it with?
- B. The court held that the accident was foreseeable. If it was foreseeable, why do you think the radio station personnel staged the contest? Were they greedy? Were they ignorant? Were they in denial? Or does “foreseeable” mean something different for the court than it does for an individual? If so, should it?
- C. How could KHJ have changed the contest to avoid liability?

C.1.d. Some Historical Notes About *Weirum v. RKO*

1. Mosk's legacy

The court held that the plaintiff “failed to plead the elements required to state a false imprisonment claim.”

Justice Mosk is the namesake of the Stanley M. Mosk Courthouse, the main courthouse of the Los Angeles County Superior Court for civil litigation. (The Clara Shortridge Foltz courthouse, site of many famous celebrity criminal trials, is a couple of blocks to the east.)

2. Boss radio

KHJ was a legendary AM radio station of the Top-40 format. Most notably, KHJ was the progenitor of the “Boss Radio” style that spread throughout the nation in the early 1970s. The Everclear song “AM Radio,” released in 2000, pays homage to KHJ and even includes a KHJ jingle at the beginning. KHJ was a launching pad for many famous radio personalities, including Rick Dees, Shadove Stevens, and Charlie Tuna.

Don Steele was one of the most important personalities behind the boss sound, and he is considered to have been one of the greatest personalities in the history of L.A. radio. To really understand Steele’s boss-jock style, you need to listen to tapes of his radio shows from the early 70s. To say that he

was extremely energetic is putting it mildly. His patter commonly included rapid-fire nonsensical rhymes and frequent outbursts of “Yeah, baby!” Steele died in 1997 at age 61 of lung cancer.

C.2. Duty of Care in Entertainment Industry Cases

C.2.a. Generally

Weirum v. RKO is frequently cited in negligence cases where the entertainment media is blamed for death or injury. In other cases, however, plaintiffs have not tended to fare as well as the Weirum family. Some succeed, but many are prevented from reaching the jury.

C.2.b. Case in Point: *DeFilippo v. NBC* (R.I. 1982)

In the case of *DeFilippo v. National Broadcasting Co., Inc.*, 446 A.2d 1036 (R.I. 1982), plaintiffs Shirley and Nicholas DeFilippo, Sr. pursued a wrongful death suit for the loss of their 13-year-old son, Nicholas DeFilippo, Jr. (Nicky). They sued NBC, the National Broadcasting Co., Inc., and the owner-operator of their local NBC affiliate, WJAR-TV.

“The Tonight Show,” a very popular late-night talk show hosted by Johnny Carson, was broadcast in the Eastern Time Zone at 11:30 p.m. The May 23, 1979 broadcast promised to feature a professional stuntman, Dar Robinson, who would, the program teased, “hang” Carson later in the broadcast. Robinson was brought on as a guest, and Carson conversed with him. Following clips of some of Robinson’s past stunts and a commercial break, Carson was shown standing on a gallows platform. Following some witty dialogue, a hood was placed on Carson’s head, and a noose was put on over the hood and around Carson’s neck. At the solemn direction of Robinson, “Hangman, do your job,” the trapdoor under Carson’s feet was triggered to fall open, and Carson dropped through. He played dead for a moment. Then, to delighted cheers, Carson revealed he was fine.

Beneath his outer clothing, Carson wore a body harness attached to a thin wire cable alongside or behind the thick hanging rope. Thus, Carson’s neck did not take the force of the deceleration, and he was not actually hanged by the rope. The wire is briefly visible in the scene, but neither the wire, nor the harness, nor the means by which the stunt was safely accomplished were pointed out to or disclosed to viewers.

Nicky, a “Tonight Show” fan, watched the broadcast. Several hours afterward, his parents found him hanging from a noose in front of the television, which was on and still tuned to WJAR-TV. In their complaint, Nicholas and Shirley DeFilippo alleged Nicky watched the stunt and then tried to imitate it.

The plaintiffs cited to *Weirum v. RKO* (Cal. 1975) in opposing defendants’ motion to dismiss and for summary judgment. The trial court granted judgment for the defendants, concerned that permitting suit “would create a chilling effect” on others. The Supreme Court of Rhode Island upheld the trial court’s judgment for the defendants, writing: “To permit plaintiffs to recover on the basis of one minor’s actions would invariably lead to self-censorship by broadcasters in order to remove any matter that may be emulated and lead to a law suit.”

Technically, the Rhode Island Supreme Court pinned its decision on the First Amendment rather than the non-existence of a duty of care. The policy-centered analysis, however, corresponded to the questions dealt with in *Weirum* (which also discussed the First Amendment in another portion of the opinion). In barring plaintiff’s claim, Rhode Island’s high court noted that, at least prior to the commercial break, Robinson stressed the stunt’s dangers and said “it’s not something that you want to go and try.”

C.2.c. Case in Point: *McCollum v. CBS* (Cal. App. 1988)

In *McCollum v. CBS, Inc.*, 202 Cal.App.3d 989 (Cal. App.1988), a 19-year-old killed himself with a gun after listening to the Ozzy Osbourne song, “Suicide Solution.” The song includes the lyrics “Suicide is the only way out” and “Get the gun and try it. Shoot, shoot, shoot ...” The California Court of Appeals rejected the plaintiffs’ attempt to use *Weirum v. RKO* to show a duty of care. While acknowledging *Weirum*’s broad language, the court found the case to be of limited applicability, concluding that while the accident in *Weirum* was foreseeable, the Osbourne fan’s suicide was not.

The court also noted the separation in time involved in recorded music versus live radio: “Osbourne’s music and lyrics had been recorded and produced years before. There was not a ‘real time’ urging of listeners to act in a particular manner. There was no dynamic interaction with, or live

importuning of, particular listeners.” Emphasizing the policy implications of their decision, the court added, “[I]t is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy.”

C.2.d. Problem: WZX Cash Patrol

Suppose you are an attorney for radio station WZX. The station is considering staging a “Cash Patrol” contest in which a disc jockey will drive around the city in an unmarked vehicle looking for cars with a WZX bumper sticker. When the disc jockey has found such a car, the disc jockey will go on the air via a remote hookup, describe the car they are following, and ask that car to pull over to receive a \$1,000 cash prize. How would you advise WZX on its liability risk? Should they do the contest or pull the plug? Does it matter that WZX’s sister station in another city tried the promotion and it resulted in a ratings spike that substantially increased station revenues?

D. Assorted Duty Contexts: More Examples

D.1. Case in Point: *Peter W. v. S.F. Unified School District* (Cal. App. 1976)

Educational malpractice is an area where courts have used the duty element to stop negligence claims from proceeding past the pleadings stage. An example is *Peter W. v. San Francisco Unified School District*, 60 Cal. App. 3d 814 (Cal. App. 1976).

Peter W., 18 years old and a recent high school graduate, sued his school district. After 12 years of schooling in district schools, Peter had no better than a fifth-grade reading ability, limited writing ability, and was thus left with an “inability to gain meaningful employment.”

The complaint alleged: “Defendant school district, its agents and employees, negligently and carelessly failed to provide plaintiff with adequate instruction, guidance, counseling and/or supervision in basic

academic skills such as reading and writing, although said school district had the authority, responsibility and ability ... “

The trial court sustained a demurrer to the student’s complaint – a procedure equivalent to the more familiar motion to dismiss, in the federal courts and various states, for failure to state a claim upon which relief can be granted – and entered judgment for the defendant school district accordingly. The appellate court upheld the judgement on the basis that the school district did not have a duty of care – in the technical legal sense, that is. The court wrote:

According to the familiar California formula, the allegations requisite to a cause of action for negligence are (1) facts showing a duty of care in the defendant, (2) negligence constituting a breach of the duty, and (3) injury to the plaintiff as a proximate result. The present parties do not debate the adequacy of plaintiff’s first count with respect to the elements of negligence, proximate cause, and injury; they focus exclusively upon the issue (which we find dispositive, as will appear) of whether it alleges facts sufficient to show that defendants owed him a “duty of care.”

The facts which it shows in this respect – or not – appear in its allegations that he had been a student undergoing academic instruction in the public school system operated and administered by defendants. He argues that these facts alone show the requisite “duty of care” upon three judicially recognized theories, for which he cites authorities, pertaining to the public schools.~

{P}laintiff’s allegations of his enrollment and attendance at defendants’ schools do not plead the requisite “duty of care,” relative to his academic instruction, upon any of the three theories he invokes. Of course, no reasonable observer would be heard to say that these facts did not impose upon defendants a “duty of care” within any common meaning of the term; given the commanding importance of public education in society, we state a truism in remarking that the public authorities who are dutybound to educate are also bound to do it with “care.” But the truism does not answer the present inquiry, in which “duty of care” is not a term of common parlance; it is instead a legalistic concept of “duty” which will sustain

liability for negligence in its breach, and it must be analyzed in that light.

The concept reflects the longstanding language of decisions in which the existence of a “duty of care,” in a defendant, has been repeatedly defined as a requisite element of his liability for negligence. The concept has not been treated as immutable; with respect to physical injury resulting from emotional “spectator” shock, for example, it now incorporates a test -- the foreseeability of the injury -- which it had previously excluded.

Despite such changes in the concept, several constants are apparent from its evolution. One is that the concept itself is still an essential factor in any assessment of liability for negligence. Another is that whether a defendant owes the requisite “duty of care,” in a given factual situation, presents a question of law which is to be determined by the courts alone. A third, and the one most important in the present case, is that judicial recognition of such duty in the defendant, with the consequence of his liability in negligence for its breach, is initially to be dictated or precluded by considerations of public policy.~

On occasions when the Supreme Court has opened or sanctioned new areas of tort liability, it has noted that the wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework. This is simply not true of wrongful conduct and injuries allegedly involved in educational malfeasance. Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might -- and commonly does -- have his own emphatic views on the subject.~

We find in this situation no conceivable “workability of a rule of care” against which defendants’ alleged conduct may be measured, no reasonable “degree of certainty that ... plaintiff suffered injury” within the meaning of the law of negligence, and no such perceptible “connection between the defendant’s conduct and the injury suffered,” as alleged, which would establish a causal link between them within the same meaning.

These recognized policy considerations alone negate an actionable “duty of care” in persons and agencies who administer the academic phases of the public educational process. Others, which are even more important in practical terms, command the same result. Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large.~ To hold them to an actionable “duty of care,” in the discharge of their academic functions, would expose them to the tort claims -- real or imagined -- of disaffected students and parents in countless numbers.~ The ultimate consequences, in terms of public time and money, would burden them – and society – beyond calculation.

Peter W. , 60 Cal. App. 3d at 820-825 (citations omitted).

D.2. Case: *Kubert v. Colonna* (N.J. App. 2013)

D.2.a. Advance Notes

The New Jersey case of *Kubert v. Colonna* explores the duty of care in the context of texting while driving. The facts took place in 2009, soon after smart phones with text messaging became ubiquitous. Thus, this case faced a relatively novel at the time – but all too commons since – accident scenario.

Some synopsising (unreviewed product of AI! ☺):

Dramatis Personae:

- David Kubert: plaintiff/appellant; motorcyclist struck head-on; lost his left leg
- Linda Kubert: plaintiff/appellant; his wife, riding as passenger; lost her left leg
- Kyle Best: defendant; eighteen-year-old pick-up truck driver who was texting and crossed the double center line; claims against him were settled and are no longer part of the suit

- Shannon Colonna: defendant/respondent; seventeen-year-old who was seeing Best socially and texted him throughout the day, including one text received seconds before the crash; won summary judgment below
- Susan R. Best, Executrix of the Estate of Nickolas J. Best: defendant; named in the caption, but her role is not explained in the excerpt

Fact synopsis: On the afternoon of September 21, 2009, Best’s pick-up truck crossed the double center line on Hurd Street in Mine Hill Township and struck the Kuberts’ motorcycle, costing each of them a left leg. Best and Colonna had texted each other sixty-two times that day; she texted him at 5:48:14 p.m., he texted back at 5:48:58, and the 911 call came seventeen seconds later. The contents of the messages were never obtained, and Colonna testified she had “no idea” what they said and generally did not pay attention to whether a recipient was driving.

Posture on appeal: After settling with Best, plaintiffs added Colonna, who moved for summary judgment; the trial judge held that a remote texter owes no legal duty to avoid texting a driver even if she knows he is driving, and dismissed the claims against her. Plaintiffs appeal from that summary judgment. The question is whether one who texts from a location remote from the driver can be liable to persons injured because the driver was distracted.

Result: Defendant/respondent Colonna wins; summary judgment affirmed, though not on the trial court’s reasoning. A remote texter does owe a duty to refrain from texting a driver when the sender knows or has special reason to know the recipient is driving and will read the text while driving — but plaintiffs produced no evidence that Colonna knew Best would view her text while at the wheel.

D.2.b. Opinion

Kubert v. Colonna

Superior Court of New Jersey, Appellate Division

August 27, 2013

__ A.3d __, 2013 WL 4512313 Linda KUBERT and David Kubert, Plaintiffs–Appellants, v. Kyle BEST, Susan R. Best, Executrix of the Estate of Nickolas J.

Best, Deceased, Defendants, and Shannon Colonna, Defendant-Respondent. Before Judges ASHRAFI, ESPINOSA and GUADAGNO. Espinosa, J.A.D., filed a concurring opinion, not reproduced here.

Judge VICTOR ASHRAFI:

Plaintiffs Linda and David Kubert were grievously injured by an eighteen-year-old driver who was texting while driving and crossed the center-line of the road. Their claims for compensation from the young driver have been settled and are no longer part of this lawsuit. Plaintiffs appeal the trial court's dismissal of their claims against the driver's seventeen-year-old friend who was texting the driver much of the day and sent a text message to him immediately before the accident.~

We must determine as a matter of civil common law whether one who is texting from a location remote from the driver of a motor vehicle can be liable to persons injured because the driver was distracted by the text. We hold that the sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had special reason to know that the recipient would view the text while driving and thus be distracted.

In this appeal, we must also decide whether plaintiffs have shown sufficient evidence to defeat summary judgment in favor of the remote texter. We conclude they have not. We affirm the trial court's order dismissing plaintiffs' complaint against the sender of the text messages, but we do not adopt the trial court's reasoning that a remote texter does not have a legal duty to avoid sending text messages to one who is driving.

I.

The Kuberts' claims against defendant Shannon Colonna, the teenage sender of the texts, were never heard by a jury. Since this appeal comes to us from summary judgment in favor of Colonna, we view all the evidence and reasonable inferences that can be drawn from the evidence favorably to plaintiffs, the Kuberts.

On the afternoon of September 21, 2009, David Kubert was riding his motorcycle, with his wife, Linda Kubert, riding as a passenger. As they came south around a curve on Hurd Street in Mine Hill Township, a pick-up truck being driven north by eighteen-year-old Kyle Best crossed the double center line of the roadway into their lane of travel. David Kubert attempted to evade the pick-up truck but could not. The front driver's side of the truck struck the Kuberts and their motorcycle. The collision severed, or nearly severed, David's left leg. It

shattered Linda's left leg, leaving her fractured thighbone protruding out of the skin as she lay injured in the road.

Best stopped his truck, saw the severity of the injuries, and called 911. The time of the 911 call was 17:49:15, that is, fifteen seconds after 5:49 p.m. Best, a volunteer fireman, aided the Kuberts to the best of his ability until the police and emergency medical responders arrived. Medical treatment could not save either victim's leg. Both lost their left legs as a result of the accident.

After the Kuberts filed this lawsuit, their attorney developed evidence to prove Best's activities on the day of the accident. In September 2009, Best and Colonna were seeing each other socially but not exclusively; they were not boyfriend and girlfriend. Nevertheless, they texted each other many times each day. Best's cell phone record showed that he and Colonna texted each other sixty-two times on the day of the accident, about an equal number of texts originating from each. They averaged almost fourteen texts per hour for the four-and-a-half-hour, non-consecutive time-span they were in telephone contact on the day of the accident.

The telephone record also showed that, in a period of less than twelve hours on that day, Best had sent or received 180 text messages. In her deposition, Colonna acknowledged that it was her habit also to text more than 100 times per day. She said: "I'm a young teenager. That's what we do." She also testified that she generally did not pay attention to whether the recipient of her texts was driving a car at the time or not. She thought it was "weird" that plaintiffs' attorney was trying to pin her down on whether she knew that Best was driving when she texted him.

During the day of the accident, a Monday, Best and Colonna exchanged many text messages in the morning, had lunch together at his house, and watched television until he had to go to his part-time job at a YMCA in Randolph Township. "Our record does not indicate why Colonna was not in school that day. Best was a student at a community college and also worked part-time." The time record from the YMCA showed that Best punched in on a time clock at 3:35 p.m. At 3:49 p.m., Colonna texted him, but he did not respond at that time. He punched out of work at 5:41. A minute later, at 5:42, Best sent a text to Colonna. He then exchanged three text messages with his father, testifying at his deposition that he did so while in the parking lot of the YMCA and that the purpose was to notify his parents he was coming home to eat dinner with them.

The accident occurred about four or five minutes after Best began driving home from the YMCA. At his deposition, Best testified that he did not text while driving—meaning that it was not his habit to text when he was driving. He testified falsely at first that he did not text when he began his drive home from the YMCA on the day of the accident. But he was soon confronted with the telephone records, which he had seen earlier, and then he admitted that he and Colonna exchanged text messages within minutes of his beginning to drive.

The sequence of texts between Best and Colonna in the minutes before and after the accident is shown on the following chart.~

Sent	Sender	Received	Recipient
5:42:03	Best	5:42:12	Colonna
5:47:49	Best	5:47:56	Colonna
5:48:14	Colonna	5:48:23	Best
5:48:58	Best	5:49:07	Colonna
(5:49:15	911 Call)		
5:49:20	Colonna	5:55:30	Best
5:54:08	Colonna	5:55:33	Best

This sequence indicates the precise time of the accident – within seconds of 5:48:58. Seventeen seconds elapsed from Best’s sending a text to Colonna and the time of the 911 call after the accident. Those seconds had to include Best’s stopping his vehicle, observing the injuries to the Kuberts, and dialing 911. It appears, therefore, that Best collided with the Kuberts’ motorcycle immediately after sending a text at 5:48:58. It can be inferred that he sent that text in response to Colonna’s text to him that he received twenty-five seconds earlier. Finally, it appears that Best initiated the texting with Colonna as he was about to and after he began to drive home.

Missing from the evidence is the content of the text messages. Plaintiffs were not able to obtain the messages Best and Colonna actually exchanged, and Best and Colonna did not provide that information in their depositions. The excerpts of Best’s deposition that have been provided to us for this appeal do not include questions and answers about the content of his text messages with Colonna late that afternoon. When Colonna’s deposition was taken sixteen months after the accident, she testified she did not remember her texts that day. Despite the fact that Best did not respond to her last two texts at 5:55 p.m., and despite her learning on the same evening that he had been involved in a serious accident minutes before he failed to

respond to her, Colonna testified that she had “no idea” what the contents of her text messages with Best were that afternoon.

After plaintiffs learned of Colonna’s involvement and added her to their lawsuit, she moved for summary judgment. Her attorney argued to the trial court that Colonna had no liability for the accident because she was not present at the scene, had no legal duty to avoid sending a text to Best when he was driving, and further, that she did not know he was driving. The trial judge reviewed the evidence and the arguments of the attorneys, conducted independent research on the law, and ultimately concluded that Colonna did not have a legal duty to avoid sending a text message to Best, even if she knew he was driving. The judge dismissed plaintiffs’ claims against Colonna.

II.

On appeal before us, plaintiffs argue that Colonna is potentially liable to them if a jury finds that her texting was a proximate cause of the accident. They argue that she can be found liable because she aided and abetted Best’s unlawful texting while he was driving, and also because she had an independent duty to avoid texting to a person who was driving a motor vehicle. They claim that a jury can infer from the evidence that Colonna knew Best was driving home from his YMCA job when she texted him at 5:48:14, less than a minute before the accident.

We are not persuaded by plaintiffs’ arguments as stated, but we also reject defendant’s argument that a sender of text messages never has a duty to avoid texting to a person driving a vehicle. We conclude that a person sending text messages has a duty not to text someone who is driving if the texter knows, or has special reason to know, the recipient will view the text while driving. But we also conclude that plaintiffs have not presented sufficient evidence to prove that Colonna had such knowledge when she texted Best immediately before the accident.~

We first address generally the nature of a duty imposed by the common law.

In a lawsuit alleging that a defendant is liable to a plaintiff because of the defendant’s negligent conduct, the plaintiff must prove four things: (1) that the defendant owed a duty of care to the plaintiff, (2) that the defendant breached that duty, (3) that the breach was a proximate cause of the plaintiff’s injuries, and (4) that the plaintiff suffered actual compensable injuries as a result. The plaintiff bears

the burden of proving each of these four “core elements” of a negligence claim.

Because plaintiffs in this case sued Best and eventually settled their claims against him, it is important to note that the law recognizes that more than one defendant can be the proximate cause of and therefore liable for causing injury. Whether a duty exists to prevent harm is not controlled by whether another person also has a duty, even a greater duty, to prevent the same harm.~

“A duty is an obligation imposed by law requiring one party ‘to conform to a particular standard of conduct toward another.’” *Acuna v. Turkish*, 192 N.J. 399, 413 (2007) (quoting *Prosser & Keeton on Torts: Lawyer’s Edition* § 53, at 356 (5th ed.1984)); see also *Restatement (Second) of Torts* § 4 (1965) (“The word ‘duty’ ... denote[s] the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor’s conduct is a legal cause.”).

Whether a duty of care exists “is generally a matter for a court to decide,” not a jury. The “fundamental question [is] whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct.” *J.S. v. R.T.H.*, 155 N.J. 330, 338 (1998).

The New Jersey Supreme Court recently analyzed the common law process by which a court decides whether a legal duty of care exists to prevent injury to another. *Estate of Desir ex. rel. Estiverne v. Vertus*, --- N.J. ---- (2013). The Court reviewed precedents developed over the years in our courts and restated the “most cogent explanation of the principles that guide [the courts] in determining whether to recognize the existence of a duty of care”:

“[w]hether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy. That inquiry involves identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.... The analysis is both very fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct.”

The Court emphasized that the law must take into account “generally applicable rules to govern societal behaviors,” not just an “outcome that reaches only the particular circumstances and parties before the Court today[.]” The Court described all of these considerations as “a full duty analysis” to determine whether the law recognizes a duty of care in the particular circumstances of a negligence case.~

Plaintiffs argue~ that Colonna independently had a duty not to send texts to a person who she knew was driving a vehicle. They have not cited a case in New Jersey or any other jurisdiction that so holds, and we have not found one in our own research.

The trial court cited one case that involved distraction of the driver by text messages, *Durkee v. C.H. Robinson Worldwide, Inc.*, 765 F.Supp.2d 742 (W.D.N.C.2011). In *Durkee*, the plaintiffs were injured when a tractor-trailer rear-ended their car. In addition to the truck driver and other defendants, they sued the manufacturer of a text-messaging device that was installed in the tractor-trailer. They claimed the device was designed defectively because it could be viewed while the truck driver was driving and it distracted the driver immediately before the accident that injured them. The federal court dismissed the plaintiffs’ claims against the manufacturer of the device, holding that it was the driver’s duty to avoid distraction. Since other normal devices in a motor vehicle could distract the driver, such as a radio or GPS device, attributing a design defect to the product would have too far-reaching an effect. It would allow product liability lawsuits against manufacturers of ordinary devices found in many motor vehicles and hold them liable for a driver’s careless use of the product.

Similarly, at least two state courts have declined to hold manufacturers of cell phones liable for failing to design their products to prevent harm caused when drivers are distracted by use of the phones.

We view *Durkee* and these state cases as appropriately leading to the conclusion that one should not be held liable for sending a wireless transmission simply because some recipient might use his cell phone unlawfully and become distracted while driving. Whether by text, email, Twitter, or other means, the mere sending of a wireless transmission that unidentified drivers may receive and view is not enough to impose liability.

Having considered the competing arguments of the parties, we also conclude that liability is not established by showing only that the sender directed the message to a specific identified recipient, even if the sender knew the recipient was then driving. We conclude that additional proofs are necessary to establish the sender's liability, namely, that the sender also knew or had special reason to know that the driver would read the message while driving and would thus be distracted from attending to the road and the operation of the vehicle. We reach these conclusions by examining the law in analogous circumstances and applying "a full duty analysis" as discussed in *Desir, supra*, slip op. at 24.

A section of the *Restatement* that the parties have not referenced provides:

An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of another, a third person, or an animal in such a manner as to create an unreasonable risk of harm to the other.

[*Restatement* § 303.]

To illustrate this concept, the *Restatement* provides the following hypothetical example:

A is driving through heavy traffic. B, a passenger in the back seat, suddenly and unnecessarily calls out to A, diverting his attention, thus causing him to run into the car of C. B is negligent toward C.

[*Restatement* § 303, comment d, illustration 3.]

We have recognized that a passenger who distracts a driver can be held liable for the passenger's own negligence in causing an accident. In other words, a passenger in a motor vehicle has a duty "not to interfere with the driver's operations."

One form of interference with a driver might be obstructing his view or otherwise diverting his attention from the tasks of driving. It would be reasonable to hold a passenger liable for causing an accident if the passenger obstructed the driver's view of the road, for example, by suddenly holding a piece of paper in front of the driver's face and urging the driver to look at what is written or depicted on the paper. The same can be said if a passenger were to hold a cell phone with a text message or a picture in front of the driver's eyes. Such distracting conduct would be direct, independent negligence of the passenger.

Here, of course, Colonna did not hold Best's cell phone in front of his eyes and physically distract his view of the road.

The more relevant question is whether a passenger can be liable not for actually obstructing the driver's view but only for urging the driver to take his eyes off the road and to look at a distracting object. We think the answer is yes, but only if the passenger's conduct is unreasonably risky because the passenger knows, or has special reason to know, that the driver will in fact be distracted and drive negligently as a result of the passenger's actions.

It is the primary responsibility of the driver to obey the law and to avoid distractions. Imposing a duty on a passenger to avoid any conduct that might theoretically distract the driver would open too broad a swath of potential liability in ordinary and innocent circumstances. As the Supreme Court stated in *Desir*, courts must be careful not to "create a broadly worded duty and ... run the risk of unintentionally imposing liability in situations far beyond the parameters we now face." "The scope of a duty is determined under 'the totality of the circumstances,' and must be 'reasonable' under those circumstances." *J.S.*, 155 *N.J.* at 339.

"Foreseeability of the risk of harm is the foundational element in the determination of whether a duty exists." *Id.* at 337. "Foreseeability, in turn, is based on the defendant's knowledge of the risk of injury."

It is foreseeable that a driver who is actually distracted by a text message might cause an accident and serious injuries or death, but it is not generally foreseeable that every recipient of a text message who is driving will neglect his obligation to obey the law and will be distracted by the text. Like a call to voicemail or an answering machine, the sending of a text message by itself does not demand that the recipient take any action. The sender should be able to assume that the recipient will read a text message only when it is safe and legal to do so, that is, when not operating a vehicle. However, if the sender knows that the recipient is both driving and will read the text immediately, then the sender has taken a foreseeable risk in sending a text at that time. The sender has knowingly engaged in distracting conduct, and it is not unfair also to hold the sender responsible for the distraction.

"When the risk of harm is that posed by third persons, a plaintiff may be required to prove that defendant was in a position to 'know or have reason to know, from past experience, that there [was] a

likelihood of conduct on the part of [a] third person[]' that was 'likely to endanger the safety' of another." *J.S.*, 155 *N.J.* at 338. In *J.S.*, the Court used the phrase "special reason to know" in reference to a personal relationship or prior experience that put a defendant "in a position" to "discover the risk of harm." Consequently, when the sender "has actual knowledge or special reason to know," from prior texting experience or otherwise, that the recipient will view the text while driving, the sender has breached a duty of care to the public by distracting the driver.~

When the sender knows that the text will reach the driver while operating a vehicle, the sender has a relationship to the public who use the roadways similar to that of a passenger physically present in the vehicle. As we have stated, a passenger must avoid distracting the driver. The remote sender of a text who knows the recipient is then driving must do the same.

When the sender texts a person who is then driving, knowing that the driver will immediately view the text, the sender has disregarded the attendant and foreseeable risk of harm to the public. The risk is substantial, as evidenced by the dire consequences in this and similar cases where texting drivers have caused severe injuries or death.

With respect to the sender's opportunity to exercise care, "[a] corresponding consideration is the practicality of preventing [the risk]." We must take into account "how establishing this duty will work in practice." In imposing an independent duty of the passengers in *Podias*, we noted the "relative ease" with which they could have used their cell phones to summon help for the injured motorcyclist. It is just as easy for the sender of a text message to avoid texting to a driver who the sender knows will immediately view the text and thus be distracted from driving safely. "When the defendant's actions are 'relatively easily corrected' and the harm sought to be presented [*sic*] is 'serious,' it is fair to impose a duty."

At the same time, "[c]onsiderations of fairness implicate the scope as well as the existence of a duty." Limiting the duty to persons who have such knowledge will not require that the sender of a text predict in every instance how a recipient will act. It will not interfere with use of text messaging to a driver that one expects will obey the law. The limited duty we impose will not hold texters liable for the unlawful conduct of others, but it will hold them liable for their own negligence when they have knowingly disregarded a foreseeable risk of serious injury to others.

Finally, the public interest requires fair measures to deter dangerous texting while driving. Just as the public has learned the dangers of drinking and driving through a sustained campaign and enhanced criminal penalties and civil liability, the hazards of texting when on the road, or to someone who is on the road, may become part of the public consciousness when the liability of those involved matches the seriousness of the harm.~

To summarize our conclusions, we do not hold that someone who texts to a person driving is liable for that person's negligent actions; the driver bears responsibility for obeying the law and maintaining safe control of the vehicle. We hold that, when a texter knows or has special reason to know that the intended recipient is driving and is likely to read the text message while driving, the texter has a duty to users of the public roads to refrain from sending the driver a text at that time.~

In this case, plaintiffs developed evidence pertaining to the habits of Best and Colonna in texting each other repeatedly. They also established that the day of the accident was not an unusual texting day for the two. But they failed to develop evidence tending to prove that Colonna not only knew that Best was driving when she texted him at 5:48:14 p.m. but that she knew he would violate the law and immediately view and respond to her text.

As our recitation of the facts shows, Colonna sent only one text while Best was driving. The contents of that text are unknown. No testimony established that she was aware Best would violate the law and read her text as he was driving, or that he would respond immediately. The evidence of multiple texting at other times when Best was not driving did not prove that Colonna breached the limited duty we have described.

Because the necessary evidence to prove breach of the remote texter's duty is absent on this record, summary judgment was properly granted dismissing plaintiffs' claims against Colonna.

Affirmed.

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D. The Duty of Care and Criminal Acts

D.1. In General

One troublesome question regarding the duty of care is whether a duty of care will be present in the circumstance in which a person is pressured to accede to the demands of a criminal in order to prevent harm to an innocent person. Few courts have considered this question, but a majority have concluded that there is no duty.

D.2. Case: *Boyd v. Racine Currency Exchange* (Ill. 1973)

D.2.a. Advance Notes

The following case considers whether there is a duty to accede to criminal demands. While you read, ask yourself whether you find the court's use of precedent persuasive.

Some synopsising (unreviewed product of AI):

Dramatis Personae:

- Piney Boyd: plaintiff/appellee; widow of John Boyd, suing for wrongful death
- John Boyd: decedent; business invitee present in the currency exchange to transact business, taken hostage and shot dead
- Racine Currency Exchange, Inc.: defendant/appellant; business proprietor, alleged to have a policy of protecting its money at all costs and to have withheld that policy from customers
- Blanche Murphy: defendant/appellant; teller who, from behind a bulletproof glass partition, refused the robber's demand and fell to the floor
- The armed robber: not a party; held a pistol to Boyd's head, demanded the money or that the door be opened on pain of killing Boyd, and shot him when Murphy did not comply

Fact synopsis: On April 27, 1970, John Boyd was in the Racine Currency Exchange to transact business when an armed robber put a pistol to his head and told teller Blanche Murphy to hand over the money or open the door or he would kill Boyd. Murphy, behind bulletproof glass, did not

comply and instead dropped to the floor. The robber shot Boyd in the head and killed him.

Posture on appeal: Piney Boyd brought a wrongful death action alleging that defendants breached a duty to their business invitee by refusing to accede to the robber's demands and by keeping their money-at-all-costs policy secret. The circuit court of Cook County dismissed the complaint for failure to state a cause of action, the appellate court reversed and remanded, and defendants appeal. The question is whether a business proprietor owes an invitee a duty to comply with a criminal's demands.

Result: Defendants/appellants Racine Currency Exchange and Murphy win; appellate court reversed, circuit court affirmed. There is no duty to accede to criminal demands, since such a duty would benefit only criminals, encourage the use of hostages, and offer no assurance of reducing the risk to the invitee. Justice Goldenhersh dissented, arguing that on the pleadings the reasonableness of Murphy's conduct was for the trier of fact.

D.2.b. Opinions

Boyd v. Racine Currency Exchange, Inc.

Supreme Court of Illinois
November 30, 1973

56 Ill.2d 95. Piney BOYD, Appellee, v. RACINE CURRENCY EXCHANGE, INC., et al., Appellants. No. 45557.

Justice HOWARD C. RYAN:

The plaintiff's husband, John Boyd, was present in the Racine Currency Exchange on April 27, 1970, for the purpose of transacting business. While he was there, an armed robber entered and placed a pistol to his head and told Blanche Murphy, the teller, to give him the money or open the door or he would kill Boyd. Blanche Murphy was at that time located behind a bulletproof glass window and partition. She did not comply with the demand but instead fell to the floor. The robber then shot Boyd in the head and killed him.

This is a wrongful death action against Racine Currency Exchange and Blanche Murphy to recover damages for the death of plaintiff's decedent. Plaintiff's complaint was dismissed on motion of the defendants by the circuit court of Cook County for failure to state a

cause of action. The appellate court reversed and remanded the cause to the circuit court.~

Plaintiff alleges several acts of negligence by the Racine Currency Exchange and Blanche Murphy. Count I alleges that the defendants owed Boyd, a business invitee, the duty to exercise reasonable care for his safety and that they breached this duty when they refused to accede to the robber's demands. Count I also alleges that defendants acted negligently in adopting a policy, knowledge of which was deliberately withheld from their customers, according to which their money was to be protected at all costs, including the safety and the lives of the customers.

In count II the plaintiff alleges that the Currency Exchange was negligent in failing to instruct its employees regarding the course of conduct which would be necessary under the circumstances of this case to prevent exposing customers to unreasonable risks of harm. Count II further alleges that the Currency Exchange was negligent in employing a person who was incompetent to fulfill the responsibilities of her position. Negligence is also alleged in the failure to furnish guidelines of how to act in case of armed robbery, and alternatively that it was negligent in failing to disclose to its customers its policy of preserving its monies at all costs.

It is fundamental that there can be no recovery in tort for negligence unless the defendant has breached a duty owed to the plaintiff. The plaintiff contends that a business proprietor has a duty to his invitees to honor criminal demands when failure to do so would subject the invitees to an unreasonable risk. It is claimed that this duty arises from the relationship between a landowner and a business invitee.

It is the general rule in Illinois and other jurisdictions that a person has no duty to anticipate the criminal acts of third parties. An exception to this rule exists, however, when criminal acts should reasonably have been foreseen. (*Neering v. Illinois Central R.R. Co.*, 383 Ill. 366.) *Neering*, and many of the other cases cited by the parties, involved the question of whether facts existed which should have alerted the defendant to a risk of harm to his invitees by criminals. These cases are of little help here since our case presents a question of whether the defendant who is faced with an imminent criminal demand incurs liability by resisting, not whether he is negligent in failing to take precautions against a possible future crime.

Also of little assistance in *Sinn v. Farmers Deposit Savings Bank*, 300 Pa. 85, 150 A. 163. In that case recovery for the plaintiff, who was injured when a bank robber detonated dynamite within the bank, was upheld. The plaintiff alleged that had the bank warned him that a bank robbery was in progress, as they had the opportunity to do, he could have escaped unharmed. The plaintiff's intestate in our case, however, was obviously on notice that a robbery was in progress, and plaintiff does not predicate her claim on the absence of warning.~

We are aware of only two cases which have discussed issues similar to the one with which we are faced here – whether a person injured during the resistance to a crime is entitled to recover from the person who offered the resistance. In *Genovay v. Fox*, 50 N.J. Super. 538, a plaintiff who was shot and wounded during the robbery of a bowling alley bar claimed that the proprietor was liable because instead of complying with the criminal demand he stalled the robber and induced resistance by those patrons present. The plaintiff was shot when several patrons attempted to disarm the bandit. The court there balanced the interest of the proprietor in resisting the robbery against the interest of the patrons in not being exposed to bodily harm and held that the complaint stated a cause of action. The court stated: 'The value of human life and of the interest of the individual in freedom from serious bodily injury weigh sufficiently heavily in the judicial scales to preclude a determination as a matter of law that they may be disregarded simply because the defendant's activity serves to frustrate the successful accomplishment of a felonious act and to save his property from loss.' The court held that under the circumstances it was for the jury to determine whether defendant's conduct was reasonable.

In *Noll v. Marian*, 347 Pa. 213, the court held that no cause of action existed. The plaintiff was present in a bank when an armed robber entered and announced "It's a holdup. Nobody should move." The bank teller, instead of obeying this order, dropped down out of sight. The gunman then opened fire and wounded the plaintiff. The court held that even though the plaintiff might not have been injured if the teller had stood still, the teller did not act negligently in attempting to save himself and his employer's property.

In *Lance v. Senior*, 36 Ill.2d 516, this court noted that foreseeability alone does not result in the imposition of a duty. 'The likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing the burden upon the defendant, must also be taken into account.'

In the present case an analysis of those factors leads to the conclusion that no duty to accede to criminal demands should be imposed. The presence of guards and protective devices do not prevent armed robberies. The presence of armed guards would not have prevented the criminal in this case from either seizing the deceased and using him as a hostage or putting the gun to his head. Apparently nothing would have prevented the injury to the decedent except a complete acquiescence in the robber's demand, and whether acquiescence would have spared the decedent is, at best, speculative. We must also note that the demand of the criminal in this case was to give him the money or open the door. A compliance with this alternate demand would have, in turn, exposed the defendant Murphy to danger of bodily harm.

If a duty is imposed on the Currency Exchange to comply with such a demand the same would only inure to the benefit of the criminal without affording the desired degree of assurance that compliance with the demand will reduce the risk to the invitee. In fact, the consequence of such a holding may well be to encourage the use of hostages for such purposes, thereby generally increasing the risk to invitees upon business premises. If a duty to comply exists, the occupier of the premises would have little choice in determining whether to comply with the criminal demand and surrender the money or to refuse the demand and be held liable in a civil action for damages brought by or on behalf of the hostage. The existence of this dilemma and knowledge of it by those who are disposed to commit such crimes will only grant to them additional leverage to enforce their criminal demands. The only persons who will clearly benefit from the imposition of such a duty are the criminals. In this particular case the result may appear to be harsh and unjust, but, for the protection of future business invitees, we cannot afford to extend to the criminal another weapon in his arsenal.

For these reasons we hold that the defendants did not owe to the invitee Boyd a duty to comply with the demand of the criminal.

Accordingly, the judgment of the appellate court will be reversed, and the judgment of the circuit court of Cook County will be affirmed.

Appellate court reversed; circuit court affirmed.

Justice JOSEPH H. GOLDENHERSH, dissenting:

I dissent. The majority opinion fails to take into account the principles of law clearly enunciated in *Restatement (Second) of Torts* and on the basis of pure conjecture concludes that nothing that

defendant's employee could have done would have saved the deceased from death or injury. The majority's polemic on the subject of the hazards which would be created by an application of established legal principles to this case finds little support in logic and none whatsoever in the legal authorities.

This case comes to us only on the pleadings and I agree with the appellate court that "Whether what defendants did or did not do proximately caused the injury that befell plaintiff's decedent, whether Blanche Murphy had the time so she could, under the circumstances alleged, exercise the kind of judgment expected of a person of ordinary prudence, were questions of fact which, from all the evidence, must be decided by a trier of the facts, judge or jury." I would affirm the judgment of the appellate court.

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D.2.c. Questions to Ponder About *Boyd*

A. Professor James Grimmelmann described *Boyd* this way: "Not the most tragic case of all time, but perhaps the most concisely tragic." Do you agree that there is something briskly heartbreaking about these facts? What role does emotion play in your view of the case? How about in the view of the majority and the dissent?

B. The majority believes that imposing a duty in this situation might "encourage the use of hostages." The court reasons as follows: "If a duty to comply exists, the occupier of the premises would have little choice in determining whether to comply with the criminal demand and surrender the money or to refuse the demand and be held liable in a civil action for damages brought by or on behalf of the hostage. The existence of this dilemma and knowledge of it by those who are disposed to commit such crimes will only grant to them additional leverage to enforce their criminal demands." Do you think this is true? Is it realistic that robbers will learn finer points of tort doctrine and then apply that knowledge strategically?

C. The dissent does not argue that the Racine Currency Exchange should be liable. Note the procedural posture of the case. The question is whether the complaint should be dismissed for failure to state a cause of action. The dissent argues that the complaint should survive and that the

issue of the bank employee's responsibility in such a situation should be put to a jury. If the dissent prevailed and this case had been heard by a jury, what would be your prediction about the verdict?

The Use of *Boyd* to Decide Duty in *Orrico v. Beverly Bank*

Several years later, the *Boyd* case was cited by a different bank in another wrongful death case. In *Orrico v. Beverly Bank*, 109 Ill.App.3d 102 (1982), a mentally disabled man was allowed to withdraw \$2,100 from his bank account in one-hundred dollar bills, despite the fact that the man's mother repeatedly expressed to the bank her concern for her son's safety should he be given such a large amount of cash. The bank at the time was also in receipt of a court order regarding the man's incompetency, a circumstance under which the bank would ordinarily freeze the man's account. After the man was given the cash and left the bank, he went to a park where he flashed the stack of money to people at a softball game. That night, the man was found dead, shot in the back of the head, all the money gone from his body. A jury in the case awarded \$9,500 to be paid by the bank to the mother. The bank appealed the verdict, citing *Boyd* to argue it owed no duty to the decedent. The Illinois Court of Appeals held for the plaintiff, saying that the bank did indeed owe a duty to the decedent because of its relationship to him. *Boyd*, the court said, reflected "a strong societal interest in not inducing criminal activity by acceding to criminal demands, even at the cost of harm to an individual." But the court held there was no such interest at stake in the later case. Thus, the court held that the bank owed the decedent "a duty not to utilize his funds in a manner which would increase the risk of danger to him."

E. Affirmative Duties

E.1. In General

It is well accepted that the general duty of care requires would-be defendants to refrain from actions that unreasonably subject foreseeable plaintiffs to a risk of harm. There is, however, no general duty to affirmatively engage in actions to prevent harm to plaintiffs.

Stated more plainly, you only have to try to not hurt people. You do not have to try to help them.

The distinction is sometimes said to be between “nonfeasance” on the one hand and “malfeasance” (a/k/a “misfeasance”) on the other. In this terminology, nonfeasance is doing nothing, while malfeasance or misfeasance is doing something harmful. Ordinarily, no legal duty is implicated in cases of nonfeasance – where the would-be defendant just stands by and watches harmful events unfold. This is true even, for instance, if there is an easy opportunity to step in and prevent massive loss of life or suffering. On the other the hand, any activity a person undertakes must be undertaken in a reasonably careful manner. Thus, malfeasance implicates the duty of care.

There are some important exceptions, which are discussed below. These include circumstances where there is a pre-existing special relationship between the plaintiff and defendant, and where the defendant’s own conduct put the plaintiff in peril.

E.2. The General Rule: No Affirmative Duty to Help

The overarching rule is that the law does not require persons to be good Samaritans and step up to help people in distress. This rule is often hard for students to accept. The next two cases demonstrate that even cruel indifference to another’s suffering does not make for a cause of action.

E.3. Case: *Theobald v. Dolcimascola* (N.J. App. 1997)

E.3.a. Advance Notes

This next case is a more contemporary example of the general rule of that there is no affirmative duty to act.

Some synopsising (unreviewed product of AI):

Dramatis Personae:

- Colleen Theobald: plaintiff/appellant; Sean’s mother, suing individually, as administrator ad prosequendum for his heirs, and as administrator of his estate
- Harold Theobald: plaintiff/appellant; Sean’s father; was downstairs watching television when the shooting occurred
- Sean Theobald: decedent; teenager who produced a revolver and ammunition, said he would try Russian Roulette, and shot himself

- Michael Dolcimascola: defendant/respondent; one of the five teenagers in the bedroom who watched; won summary judgment below
- Robert Bruck: defendant/respondent; teenager present, whose birthday the gathering celebrated; won summary judgment below
- Amy Flanagan: defendant/respondent; teenager present; won summary judgment below
- Charles Henn, Jr., Charles and Joan Henn, Katherine Gresser, and Jackson Sporting Goods: defendants below; removed from the case by settlement or unappealed summary judgment

Fact synopsis: On January 20, 1991, Sean Theobald was in his second-floor bedroom with five friends gathered for Robert Bruck’s birthday, while Sean’s father watched television downstairs. Sean produced an unloaded revolver and ammunition, the conversation turned to a friend who had died playing Russian Roulette, and Sean said he would try the “game.” On the predominant version of the testimony, he loaded a bullet, pointed the gun at his head and pulled the trigger repeatedly over several attempts until it fired and killed him, while the other five merely sat and watched.

Posture on appeal: The trial judge held that if none of the teenagers actively participated, they had no duty to stop the decedent, and entered summary judgment. Plaintiffs appeal from the summary judgments dismissing the complaint against the three remaining defendants — Dolcimascola, Bruck, and Flanagan. The question is whether mere observers of the shooting can be held civilly liable.

Result: Defendants/respondents win on the duty question: mere observers owed the decedent no common-law duty, there being no general duty to rescue absent a special relationship, and any such duty in this situation would have to be declared by the Supreme Court. The court adds, however, that liability may still be imposed on any defendant against whom there is admissible evidence of participation in deceiving the decedent into believing the weapon was unloaded.

E.3.b. Opinion

Theobald v. Dolcimascola

Superior Court of New Jersey, Appellate Division

April 2, 1997

299 N.J. Super 299. Colleen Theobald, as administrator ad prosequendum for the heirs at law of Sean Theobald, deceased as administrator of the Estate of Sean Theobald, and Colleen Theobald, Harold Theobald, individually, plaintiffs-appellants, v. Michael Dolcimascola, Amy Flanagan and Robert Bruck, defendants-respondents. Charles Henn, Jr., Charles Henn, Joan Henn, Katherine Gresser and Jackson Sporting Goods, defendants-third-party plaintiffs, v. Chris Smidt, third-party defendant. A-2863-95T3. Judges DREIER, D'ANNUNZIO and NEWMAN.

Presiding Judge WILLIAM A. DREIER:

Plaintiffs, Colleen Theobald as Administrator Ad Prosequendum for the heirs of Sean Theobald and as administrator of his estate, and Colleen Theobald and Harold Theobald (the parents of the late Sean Theobald), individually, appeal from summary judgments dismissing their complaint against the three remaining defendants, Michael Dolcimascola, Robert Bruck, and Amy Flanagan. Settlements or unappealed summary judgments have removed the remaining defendants from this case.

On January 20, 1991, plaintiffs' decedent, Sean Theobald, was in the second floor bedroom of his house with five of his friends. His father was downstairs watching television. The friends had gathered at 6:00 p.m. for a birthday party for one of the friends, Robert Bruck. The other teenagers present were Charles Henn, Michael Dolcimascola, Amy Flanagan and Katherine Gresser. At some time during the evening, the decedent produced an unloaded revolver and ammunition, both of which were examined by all of the teenagers. The discussion turned toward another friend of theirs who had died playing Russian Roulette, and the decedent indicated that he also would try the "game." According to the predominant version of the varying testimony, Sean put a bullet into the gun, pointed it at his head and pulled the trigger several times. He then put the gun down, checked the cylinder, and tried again three or four more times. The gun then went off, killing him. Other versions had the gun going off on the first occasion he tried, or the gun firing by accident without his putting the barrel to his head.~ There was, however, ample testimony that there were several attempts made while the five other teenagers merely sat around and watched. The trial judge determined that if

none of the teenagers actively participated, they had no duty to stop the decedent, and therefore summary judgment was entered.~

The first question before us is whether any of the defendants, if they were mere observers to this tragic event, can be held civilly liable to plaintiffs. We are at a loss for a viable theory. Had this been a joint endeavor in which all were participating in the “game” of Russian Roulette, there is some authority that each of the participants in the enterprise might be held responsible, although the only cases we have been able to retrieve involve the criminal responsibility of participants. *See e.g., Commonwealth v. Atencio*, 345 Mass. 627 (1963) (where the participants were found guilty of manslaughter). There is no reason to suppose that if the participants could be found criminally responsible, they could not also be held civilly liable. A line, however, has been drawn by the courts between being an active participant and merely being one who had instructed a decedent how to “play” Russian Roulette. In the latter case, a defendant was determined to be free of any potential criminal liability. *Lewis v. State*, 474 So. 2d 766, 771 (Ala.Crim.App. 1985). Another court, *in dictum*, stated that inducing an individual to engage in Russian Roulette creates a sufficiently foreseeable harm to engender potential civil liability. *Great Central Ins. Co. v. Tobias* 37 Ohio St.3d 127 (Ohio.Ct.App. 1987).

The most comprehensive New Jersey statement of the existence of a duty to another was expressed in *Wytupeck v. City of Camden*, 25 N.J. 450 (1957). Although the case involved the question of liability for the use of a dangerous instrumentality on defendant’s land, the case explored when a duty to act arises in inter-personal relationships:

“Duty” is not an abstract conception; and the standard of conduct is not an absolute. Duty arises out of a relation between the particular parties that in right[,] reason and essential justice enjoins the protection of the one by the other against what the law by common consent deems an unreasonable risk of harm, such as is reasonably foreseeable. In the field of negligence, duty signifies conformance “to the legal standard of reasonable conduct in the light of the apparent risk;” the essential question is whether “the plaintiff’s interests are entitled to legal protection against the defendant’s conduct.” *Prosser on Torts*, (2d ed., section 36). Duty is largely grounded in the natural responsibilities of social living and human relations, such as have the recognition of reasonable men; and fulfillment is had by a correlative standard of conduct.

If defendants had either been participants or had induced decedent to play Russian Roulette, or even if there had been some other factor by which we could find a common enterprise, then defendants may have had a duty to act to protect Sean from the consequences of his foolhardy actions. Such a duty would nevertheless invoke the usual principles of comparative negligence.~ The problem with such potential liability, however, is the significant factor of a decedent's own negligence which, when measured against any participant's breach of a duty of care, would probably preclude recovery in most cases.

What we are left with in the case before us, positing that there was no proof of encouragement or participation, is a claim which is grounded in a common law duty to rescue. As has been explained in texts and reiterated in case law, there is no such duty, except if the law imposes it based upon some special relationship between the parties. See W. Page Keeton, et al., *Prosser and Keaton on Torts*, § 56, at 375 (5th ed. 1984) ("[T]he law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life."); J.D. Lee and Barry A. Lindahl, *Modern Tort Law*, § 3.07, at 36 (1994 and Supp.1996) ("With regard to rescues, it has been stated that the general rule is that there is no liability for one who stands idly by and fails to rescue a stranger. ... "); *Restatement (Second) of Torts*, § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."). The Restatement's Illustration 1 is instructive. It posits the actor, A, viewing a blind man, B, stepping into the street in the path of an approaching automobile, where a word or touch by A would prevent the anticipated harm. The Restatement concludes that "A is under no duty to prevent B from stepping into the street, and is not liable to B."

Recent New Jersey decisions have focused upon the exceptions to this general rule and involve situations where a duty to act exists as a result of the relationship between the parties, namely, police-arrestee (*Del Tufo v. Township of Old Bridge*, 147 N.J. 90 (1996); *Hake v. Manchester Township*, 98 N.J. 302 (1985)) and physician-patient (*Olah v. Slobodian*, 119 N.J. 119 (1990)). These cases also address the liability of a ship's captain for failing to attempt to rescue a drowning seaman.

All of these cases are distinguishable from the situation before us, assuming the five observers were mere bystanders upon whom the law places no duty to have protected the decedent. While we may deplore their inaction, we, as did the trial judge, find no legal authority to impose liability. We note the ease with which defendants could have reached out and taken away the revolver when Sean put it down between his two series of attempted firings, or the simple act of one of the five walking to the door and summoning Sean's father, or even remonstrating with Sean concerning his actions. But such acts would have been no more or less than the simple preventatives given in the Restatement Illustration of a word or touch necessary to save a blind pedestrian. Where there is no duty, there is no liability.

We recognize that the Supreme Court in *Wytupeck v. City of Camden*, *supra*, has defined duty as a flexible concept:

"Duty" is not a rigid formalism according to the standards of a simpler society, immune to the equally compelling needs of the present order; duty must of necessity adjust to the changing social relations and exigencies and man's relation to his fellows; and accordingly the standard of conduct is care commensurate with the reasonably foreseeable danger, such as would be reasonable in the light of the recognizable risk, for negligence is essentially "a matter of risk * * * that is to say of recognizable danger of injury."

But, if a legally actionable duty is to be found in a situation such as the one before us, it must be declared by the Supreme Court.~ In sum, we determine that there was no common law duty owed by defendants to the decedent if defendants were mere observers of his shooting. If, however, there is admissible evidence against one or more of the defendants that they participated in deceiving the decedent into assuming the weapon was not loaded when in fact one of them had placed a bullet in the cylinder, then liability may be imposed against such defendant or defendants for such conduct.~

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Questions to Ponder About *Theobald*

- A.** This case accords with the blackletter rule, but seems to do so apologetically. Are you inclined to think that a concept of duty that

“adjust[s] to the changing social relations and exigencies and man’s relation to his fellows” requires recognizing an affirmative duty in a case such as this?

B. Does the doctrine barring a general affirmative duty to act reflect antiquated attitudes? If common-law tort doctrine were being written today on a blank slate, do you think the courts would recognize a general affirmative duty?

C. If courts were to recognize a general affirmative duty to act, what would be the limiting principle? Consider that most people have spent money on luxury items that they could have spent to feed starving children overseas. Should a failure to send to charity all money a person doesn’t strictly need expose one to liability? If trauma surgeons refrained from taking vacations and days off, arguably they could save more lives. Should their leisure hours expose them to tort liability? If your answer to those questions is no, how do you draw the line between those sorts of cases on the one hand and *Theobald* on the other?

E.4. The Exception of Defendant-Created Peril

A generally recognized exception to the no-affirmative-duty rule is the situation in which the defendant’s own negligence conduct created the plaintiff’s peril. If the defendant has left a banana peel in the road, and the plaintiff slips on it and falls, the defendant has a duty of care to help the plaintiff out of the roadway before a truck comes along and strikes the plaintiff. If the plaintiff is hurt badly enough, the defendant also has an affirmative duty to call emergency services, etc.

Note that this exception applies when it is the defendant’s negligence that has produced the perilous situation. If the defendant’s innocent conduct somehow creates the peril, traditional doctrine holds that no affirmative duty is incurred.

E.5. Case: *South v. Amtrak* (N.D. 1980)

E.5.a. Advance Notes

This case shows how one jurisdiction decided to broaden the defendant-created peril rule to include not just those situations occasioned

by the defendant's negligence, but also those situations that were created by the defendant's innocent conduct.

Some synthesizing (unreviewed product of AI):

Dramatis Personae:

- Billy Lee South: plaintiff/appellee; pickup driver seriously injured when a train struck his truck at a crossing
- Delores South: plaintiff/appellee; South's wife, suing for loss of consortium
- National Railroad Passenger Corporation (Amtrak): defendant/appellant; operator of the passenger train
- Burlington Northern Railroad, Inc., and Leslie Roy Strom: defendants/appellants; among the defendants the court refers to collectively as "the Railroad"
- S. M. Burdick: defendant/appellant; Public Special Administrator of the Estate of Howard W. Decker
- Howard W. Decker: train engineer at the time of the collision; died before trial, but his deposition had been taken

Fact synopsis: At about 6:20 a.m. on January 17, 1976, South drove his pickup south across the Barrett Avenue crossing in Larimore, North Dakota, on his first trip to a new missile-site work assignment. A westbound Amtrak train traveling about 68 miles per hour struck the left front of his truck, seriously injuring him. Engineer Decker saw "a hump on the right-of-way" but never walked over, and left his coat hanging in the cab rather than covering South with it.

Posture on appeal: The jury found the Railroad 100 percent negligent and South not negligent, awarding \$935,000 to South and \$125,000 to Delores, and the district court denied the Railroad's motion for JNOV or a new trial. The Railroad appeals, arguing that the engineer's parka testimony was inadmissible and that plaintiff's counsel's opening statement was prejudicial. Deciding admissibility required the court to resolve, as a matter of first impression, whether there is an affirmative duty to render assistance to an injured person.

Result: Plaintiffs/appellees South win; affirmed. Adopting § 322 of the Restatement (Second) of Torts, the court holds that one who knows or has reason to know that his conduct, whether tortious or innocent, has harmed

another has an affirmative duty to render assistance to prevent further harm, so the testimony was properly admitted; the statutory duty on “the driver of any vehicle” does not reach trains, and counsel’s opening was not prejudicial error.

E.5.b. Opinion

South v. Amtrak

Supreme Court of North Dakota

March 20, 1980

290 N.W.2d 819. Civil No. 9664. Billy Lee South and Delores South, husband and wife, Plaintiffs and Appellees v. National Railroad Passenger Corporation (AMTRAK), Burlington Northern Railroad, Inc., Leslie Roy Strom and S. M. Burdick as Public Special Administrator of the Estate of Howard W. Decker, Deceased, Defendants and Appellants. Paulson, Pederson, VandeWalle, Sand, JJ., Erickstad, C.J.

Justice WILLIAM L. PAULSON:

This is an appeal by the defendants, National Railroad Passenger Corporation (Amtrak) [and others] (herein collectively referred to as the “Railroad”), from the judgment of the Grand Forks District Court, entered March 21, 1978, and amended May 12, 1978, in which the court, upon jury verdicts, awarded the plaintiff Billy Lee South (herein referred to as “South”) \$948,552, including costs, and awarded the plaintiff Delores South \$126,000, including costs. The Railroad also appeals from the order of the district court, entered May 16, 1979, in which the court denied its motion for judgment notwithstanding the verdict or in the alternative for a new trial. We affirm.

An action was commenced by South for damages sustained as a result of a collision between a pickup truck, owned and driven by South, and the Railroad’s train at the Barrett Avenue crossing in Larimore, North Dakota, on January 17, 1976, at approximately 6:20 a.m. South sustained serious injuries in the collision. He sued the Railroad for damages on a theory of negligence, and his wife, Delores, also sued the Railroad for damages allegedly incurred by the loss of her husband’s consortium.~

Prior to the collision South was employed as a missile site superintendent. South lived in Larimore, and on the morning of the collision he, for the first time, was driving to work at a new missile site location to which he had been assigned. To drive to the old work site South crossed the railroad tracks in Larimore at the Towner

Avenue crossing, but in order to drive to the new work site South took a route which crossed the tracks at the Barrett Avenue crossing.

As South approached the Barrett Avenue crossing traveling south at approximately 20 miles per hour, a westbound Amtrak passenger train was also approaching the Barrett Avenue crossing traveling at approximately 68 miles per hour. Both the train and South's pickup reached the crossing at approximately the same instant and the front of the train engine collided with the left front portion of South's vehicle.~

The Railroad asserts that it was not negligent in the operation of its train and that the maintenance of the crossbuck sign was not a material issue because South was aware of the location of the railroad tracks running through Larimore. Several witnesses testified, on behalf of the Railroad, that the train whistle did blow a warning on the morning of the collision. The Railroad also attempted to prove that South was negligent in failing to ascertain the presence of the train and in failing to safely stop his vehicle prior to reaching the railroad tracks.

At the conclusion of the trial the jury returned a verdict in favor of South and his wife, Delores, against the Railroad. The jury, upon finding that the Railroad was 100 percent negligent and that South was not negligent, awarded general and special damages of \$935,000 to South and \$125,000 to Delores South.~

Prior to opening argument the Railroad made a motion *in limine* to exclude all evidence referring to the train engineer's failure to cover South with his parka or to otherwise assist South at the scene of the accident, on the ground that such evidence was prejudicial. The engineer who was operating the train at the time of the accident died prior to the commencement of the trial in this case. Prior to his death, the Souths' counsel had taken the engineer's deposition, and it was part of this deposition testimony that the Railroad sought to exclude in its motion *in limine*. The motion was denied, and during opening argument the Souths' counsel made the following statement:

The evidence will show that as he was lying there, and I'm taking the deposition of Mr. Decker, the engineer, I says to Mr. Decker, 'Did you have anything to cover him up with?' 'No, I told the police,' he says. 'Was it cold out? What did you do?' 'I went to the cab.' I said, 'Did you have anything to cover him up with?' He said, 'My new jacket.' I says, 'Why didn't you go and cover him up?' He says, 'That was a brand-new jacket. It cost \$55. I wasn't going to get it

bloody. The hood cost me \$7 alone and I was going to be in Devils Lake the next day and I didn't want to get cold. I wasn't going to get a jacket bloody for anybody.' I said, 'If you'd have known he was alive, would you have covered him up?' He said, 'No, I wouldn't ruin that jacket.'

Subsequent to opening arguments, the trial court ruled in chambers that he would not allow certain parts of the engineer's deposition testimony regarding the parka incident to be read to the jury because its prejudicial effect outweighed its probative value. The trial court allowed the following portion of the engineer's deposition on this matter to be read to the jury:

Q. [Plaintiff's counsel]: And did you know where Billy South was laying during this time?

A. [Decker]: Yes. I saw a hump on the right-of-way there. But I didn't go over.

Q. Did you have anything in the cab to cover him up with, blanket or anything like that?

A. No, no.

* * * *

A. ... I tried to do my best to get the Highway Patrolman and police to get some covering for him.

Q. Sure. They are the ones who are supposed to do things like that. What kind of – what day of the week was this?

A. I think it was on a Saturday morning.

* * * *

Q. Okay. And if you had –

A. In the first place, when he was layin' there I honest to God thought he was dead. Wouldn't do any good to cover him up.

* * * *

A. No, I just went out there with my coveralls.

Q. I see.

A. All the time my coat was hanging in the cab.

Q. And before the police came how close did you walk over to Billy South to see whether or not –

* * * *

A. I couldn't do anything anyway. They tell you not to move an injured person, the ambulance crew.

Q. You have heard about shock, haven't you?

A. Yes. I never go over.

Q. Did you ever take any courses in first aid?

A. No.

Q. Never?

A. (Indicating no.)

During closing argument, the Souths' counsel commented on the foregoing testimony.

In its instructions to the jury the trial court stated that if the jury found by a fair preponderance of the evidence that the Railroad failed to provide any necessary care for South after the accident he could recover for damages proximately resulting from such failure.

The Railroad asserts that counsel's opening statement was highly prejudicial and constitutes grounds for a new trial. The Railroad also asserts that it was improper for the Souths' counsel to comment on the parka incident during closing argument after the court had ruled to exclude such matters. The Railroad's latter assertion is based on an inaccurate premise of the trial court's ruling. The foregoing quoted portions of the deposition which were read to the jury demonstrate that the trial court did not exclude all testimony regarding the parka incident. Only certain statements made by the engineer which the court concluded were highly prejudicial and of little or no probative value were deleted from the deposition testimony. Provided the trial court did not err in admitting this evidence of the engineer's failure to assist South, then plaintiff counsel's comments during closing argument were not improper.

In order to determine whether it was error for the trial court to admit evidence of the engineer's failure to render assistance after the accident this Court must resolve, as a matter of first impression, whether there is an affirmative duty to render assistance to an injured person, and, if so, under what circumstances. Unless the engineer in this case had such an affirmative duty to assist South, all testimony regarding his failure to cover South with his parka or to otherwise assist was improperly admitted evidence – irrelevant and immaterial to any issue in the case.

During trial the Souths contended that the engineer had an affirmative duty to assist South by virtue of § 39-08-06, N.D.C.C., which imposes upon "the driver of any vehicle involved in an accident" a duty to render reasonable assistance to any person injured

in such accident. We disagree that the engineer incurred a duty to assist under § 39-08-06, N.D.C.C. Trains are excluded from the definition of “vehicle” under Title 39, N.D.C.C, as follows:

39-01-01.Definitions. In this title, unless the context or subject matter otherwise requires: ...

72. ‘Vehicle’ shall include every device in, upon, or by which any person or property may be transported or drawn upon a public highway, except devices moved by human power or used exclusively upon stationary rails or tracks.

We conclude that the requirements of § 39-08-06, N.D.C.C., do not pertain to trains, and no duty was imposed upon the engineer of the train in the instant case by virtue of that section.

On the subject of whether there is a common law duty to assist one in peril Prosser comments as follows in his treatise, Prosser, Law of Torts, Section 56 (4th Ed. 1971):

Because of this reluctance to countenance ‘nonfeasance’ as a basis of liability, the law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger, even though the outcome is to cost him his life. ...

Thus far the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one, has limited any tendency to depart from the rule to cases where some special relation between the parties has afforded a justification for the creation of a duty, without any question of setting up a rule of universal application.”

It also is recognized that if the defendant’s own negligence has been responsible for the plaintiff’s situation, a relation has arisen which imposes a duty to make a reasonable effort to give assistance, and avoid any further harm. Where the original danger is created by innocent conduct, involving no fault on the part of the defendant, it was formerly the rule that no such duty arose; but this appears to have given way, in recent decisions, to a recognition of the duty to take action, both where the prior innocent conduct has created an unreasonable risk of harm to the plaintiff, and where it has already injured him.

The Restatement (Second) of Torts § 322 (1965) takes the following position:

§ 322. Duty to Aid Another Harmed by Actor's Conduct

If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

Thus, the Restatement view is that one who harms another has an affirmative duty to exercise reasonable care to prevent further harm.

Although there is a paucity of case decisions involving this matter a few jurisdictions have discussed the issue. The Supreme Court of North Carolina held in *Parrish v. Atlantic Coast Line R.R. Co.*, 221 N.C. 292 (1942), that one who negligently harms another must take all steps necessary to mitigate the harm. See, also, *Whitesides v. Southern Railway Co.*, 128 N.C. 229 (1901). The Appellate Court of Indiana in *Tubbs v. Argus*, 140 Ind. App. 695 (1967), after quoting approvingly from § 322 of the Restatement (Second) of Torts, held that "... an affirmative duty arises to render reasonable aid and assistance to one who is helpless and in a situation of peril, when the injury resulted from the use of an instrumentality under the control of the defendant."

We believe that the position expressed by § 322, Restatement (Second) of Torts (1965), reflects the type of basic decency and human thoughtfulness which is generally characteristic of our people, and we therefore, adopt the standard imposed by that section. Accordingly, we hold that a person who knows or has reason to know that his conduct, whether tortious or innocent, has caused harm to another has an affirmative duty to render assistance to prevent further harm. One who breaches such duty is subject to liability for damages incurred as a result of the additional harm proximately caused by such breach. We further hold that, in the instant case, the trial court did not err in the admission of the engineer's testimony regarding the assistance, or lack thereof, to South at the scene of the accident, nor did the court abuse its discretion in refusing to admit those portions of the testimony which the court determined were highly prejudicial and irrelevant.

During opening argument to the jury, the Souths' counsel referred to statements made by the engineer as to why he did not cover South with his jacket. As noted previously, some of those statements were

never admitted into evidence because of the court's ruling that they were highly prejudicial. As part of its instruction to the jury the trial court gave a standard instruction that the arguments or other remarks of the attorneys were not to be considered as evidence in the case and that any comments by counsel concerning the evidence which were not warranted by the evidence actually admitted were to be wholly disregarded. We recognize the reality of a situation such as this wherein inflammatory comments made by counsel during opening argument, once impressed upon the minds of the jurors, can perhaps never be totally erased or their effect completely negated by an instruction that such comments are not evidence and should be wholly disregarded. Nevertheless, in view of the instruction as given and in view of the proper limited admission into evidence of the engineer's testimony regarding his failure to assist South after the accident we hold that the disputed comments of the Souths' counsel in opening argument did not constitute prejudicial error entitling the Railroad to a new trial.

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E.5.c. Questions to Ponder About *South v. Amtrak*

- A.** Recall from *Weirum v. RKO* Justice Mosk's explanation of the legal doctrine of duty as being informed by "our continually refined concepts of morals and justice." The North Dakota Supreme Court appears to be working in this vein when it announces that it is following § 322 of the *Restatement (Second) of Torts*, saying the affirmative duty to render aid "reflects the type of basic decency and human thoughtfulness which is generally characteristic of our people." Does this mean that North Dakota sees itself as a nicer state than jurisdictions that have kept the old common-law rule that there is no affirmative duty to render aid?
- B.** To get at the same sort of question from a different angle, does the American Law Institute's adoption of § 322 in 1965 indicate that modern American society is nicer, more thoughtful, and more caring than the society that adopted the old rule – or at least sees itself as such?

E.5.d. Weather and “Atmospherics”

Lawyers use the word “atmospherics” to refer to facts that, while not directly legally relevant, set a case’s overall mood. Legal irrelevance notwithstanding, atmospherics can be important in valuing a case and assessing a plaintiff’s likelihood of success. *South v. Amtrak* happens to have literal atmospherics. Northeastern North Dakota, where Larimore is, has the coldest winters in the lower 49 states. And the middle of January is the coldest time of the year. The case doesn’t say how cold it was on the morning of January 17, 1976, but according to archival weather data, it was approximately –9°F with a wind-chill temperature of –24°F. That’s not just uncomfortably cold – for someone not properly dressed, that’s lethally cold. Another aspect of this case’s atmospherics is the Cold War. The facts say that Billy South was on his way to a missile site. At the time, Grand Forks Air Force Base was home to the 321st Strategic Missile Wing, which controlled scores of nuclear-tipped Minuteman II intercontinental ballistic missiles loaded in underground silos spread out all over eastern North Dakota. The air base is about 20 minutes from where the accident occurred. So not only is it terrifically cold, we have a plaintiff who is serving his country. It would seem that neither America’s Cold War struggles nor North Dakota’s frigid winters were, strictly speaking, reasons to adopt a particular negligence doctrine suggested by the Restatement. But no lawyer for the plaintiff in such a case would fail to put them before the court.

E.5.e. Evidence Law and Procedural Posture

The *South v. Amtrak* case helps to show why procedural context is so important to understanding an opinion. The court needed to reach the substantive question of whether there is an affirmative duty to render aid in order to decide whether it was proper to admit testimony of the parka incident. Once that question of substantive tort law was answered, the admissibility of the testimony became a matter of the rules of evidence. Of course, what was really at stake in this case was the ability of the plaintiff’s lawyer to put before the jury the emotionally charged vignette of the Amtrak engineer’s refusal to use his jacket to keep the plaintiff warm. Technically, the importance of this testimony was slight. Lawyers on both sides, however, clearly understood the enormous potential of the testimony to make an impression on the jury.

E.5.f. Note About the Interpretation of Statutes

South v. Amtrak illustrates how courts interpret statutes and how statutes are potentially useful in negligence cases. North Dakota Century Code § 39-08-06, imposes a duty on “the driver of any vehicle involved in an accident” to render reasonable assistance. The plaintiff hoped to use this statute to impose such a duty on the Amtrak engineer. The ordinary meaning of the word “vehicle” would certainly include a train, and imposing a duty of assistance on train engineers seems to be well within the spirit of the statute. Yet the court declined to apply the statute, hewing to a somewhat idiosyncratic and technical definition found elsewhere in Title 39. The mystery of why trains are excluded from the definition is resolved when you find out that Title 39 of the North Dakota Century Code is the state’s comprehensive scheme for regulating the driving of cars and trucks on public roads. Without the definition’s exclusion of trains from “vehicle,” trains in North Dakota would be subject to all the provisions of Title 39, including requirements to use turn signals, display license plates, and even stop at railroad crossings when red lights were flashing. In this case, the plaintiff’s lawyers were hoping the court might stretch the meaning of “vehicle” in the context of § 39-08-06 to include trains. But to do so would have required ignoring the statute’s text. The court was, however, well within its mandate to uphold the spirit of the statute by announcing a new common-law doctrine.

E.6. “Good Samaritan” Laws

E.6.a. In General

Many people, when they first hear about the common law’s lack of a duty to rescue, ask, “What about Good Samaritan laws?”

All states have so-called “Good Samaritan” laws on the books – but they don’t work the way most people think. Instead of requiring people to come to one another’s rescue, these laws mostly function to provide a liability shield for the “clumsy rescuer,” who munificently decides to come to a person’s aid, but then ends up doing more harm than good. The idea of these statutes is to waylay the fears of someone who, at the scene of an accident, thinks, “Gosh, I know CPR, but if I try to help out, I might end up getting sued.”

Referring to the biblical parable that gives Good Samaritan laws their name, Dean William L. Prosser wrote, “[T]he Good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing.”

Good Samaritan laws vary state by state in coverage. Typically, the laws provide immunity from ordinary negligence, but not from gross negligence or recklessness. Who is protected by the laws varies as well. Some laws extend immunity to any well-meaning stranger. Some only apply to persons with training or persons who are licensed professionals, such as nurses, EMTs, and physicians.

On balance, scholars think Good Samaritan laws do little to actually encourage people to render help. Professor Dov Waisman, however, argues that Good Samaritan laws are justified in at least some situations on the basis of fairness. See Waisman, *Negligence, Responsibility, and the Clumsy Samaritan: Is There a Fairness Rationale for the Good Samaritan Immunity?*, 29 GA. ST. U. L. REV. 609 (2013).

E.6.b. Case in Point: *Swenson v. Waseca Mutual* (Minn. App. 2002)

An example is *Swenson v. Waseca Mutual Insurance Co.*, 653 N.W.2d 794 (Minn. App. 2002). In that case, a group of friends were snowmobiling when one of them, 13-year-old Kelly Swenson, suffered what appeared to be a dislocated knee. The friends tried to flag down a passing motorist for help. A woman named Lillian Tiegs was nice enough to stop. After trying unsuccessfully to call 911 on her cell phone, Tiegs offered to take Swenson to the hospital. When Tiegs tried to make a U-turn on the highway to go the direction Swenson needed, a speeding tractor-trailer rig struck Tiegs’s vehicle and killed Swenson. Swenson’s family sued Tiegs, alleging she was negligent in making the turn. Tiegs’s insurance company was able to use the state’s Good Samaritan law as a liability shield.

E.6.c. Laws Actually Requiring Rendering Aid

Although in the ordinary case, Good Samaritan laws do not require people to render aid, there are four states that have laws that impose some kind of a duty to stop and render aid. Maybe these statutes would be better called “Compelled Samaritan laws.” Minnesota, Rhode Island, and

Vermont make it an offense to fail to render reasonable assistance at the scene of an emergency to someone who is exposed to or has suffered grave physical harm if it is possible to safely do so. In Minnesota and Rhode Island, such failure to render aid is a low-level misdemeanor; in Vermont it carries a maximum \$100 fine. See Minn. Stat. § 604A.01, R.I. Gen. Laws § 11-56-1, & 12 Vt. Stat. § 519. Wisconsin has a narrower duty that attaches when someone is the victim of a crime. See Wis. Stat. § 940.34.

E.7. The Exception for Special Relationships

Despite the general no-affirmative-duty rule, there is an affirmative duty to render aid or take other affirmative actions in situations involving certain pre-existing relationships. Examples of duties owed on account of special relationships are:

- common carriers, to passengers
- innkeepers, to guests
- landlords, to tenants
- stores, to customers
- possessors of land open to the public, to members of the public lawfully present
- schools, to students
- employers, to employees
- jailers, to prisoner
- day-care providers, to the children or adults being cared for

A “common carrier,” by the way, is an entity that holds itself out for hire to carry passengers or goods. So examples would include Delta Airlines, FedEx, Greyhound Bus Lines, Metra – the commuter rail network around Chicago, and your everyday local taxicab company.

And “innkeepers” includes hotels, motels, resorts, etc.

So, for instance, if a hotel fire breaks out for reasons having nothing to do with negligence on the part of the hotel, the hoteliers are nonetheless under a duty to help patrons to safety. Similarly, if a customer in a store has a heart attack and falls to the floor, the storekeepers have an obligation to dial 911, clear a space, etc.

E.8. The Exception for Assumption of Duty

Another exception to the no-affirmative-duty rule is when a defendant assumes the duty. A motorist is driving along the highway when comes upon the scene of a car crash. In this instance, he is under no duty to stop. This is true even if no other help has yet arrived. But if the motorist does stop to render aid, then he has assumed a duty. This means that the driver is liable for any additional harm caused by his failure to take whatever affirmative steps are reasonable under the circumstances. Certainly such a duty would include calling 911, assuming there is cell phone service. Moreover, once the motorist has stopped, the he cannot “unassume” the duty by getting back in his car and driving away. Of course, once emergency responders have arrived, he could leave, since reasonable care would not require him to stick around.

One rationale the courts have articulated for the assumption-of-duty rule is that once a bystander voluntarily intercedes to render aid, this makes it less likely that other people will do so. So if a would-be rescuer comes to the aid of someone, but then acts carelessly or fails to follow through, the plaintiff will be left in a worse position than if the defendant had never stopped in the first place.

E.9. The *Tarasoff* Exception

E.9.a. Explanation

One particular exception to the no-affirmative-duty rule is unique enough that it is largely associated with the case that announced it: *Tarasoff v. UC Regents*. The case held that a psychotherapist has a duty to warn third persons of potential dangers that have been revealed in the course of psychotherapy. Thus, if a patient tells a therapist about difficult-to-control urges to do harm to a third person, then a duty running from the therapist to the third party may be triggered. This rule is distinguished from the special-relationship exception discussed above. Under the special-relationship rule, the psychotherapist has affirmative duties to a patient. The *Tarasoff* rule, by contrast, creates an affirmative duty on the part of the psychotherapist to a person with whom the psychotherapist has no relationship at all.

E.9.b. Case: *Tarasoff v. UC Regents* (Cal. 1976)

E.9.b.1. Advance Notes

The following case led a seachange in the law of liability for psychotherapists. And like *Boyd*, it is a good case to ask whether you find the court's use of precedent persuasive.

Some synopsising (unreviewed product of AI):

Dramatis Personae:

- Vitaly Tarasoff and Tatiana's mother: plaintiffs/appellants; Tatiana's parents, who filed separate but virtually identical second amended complaints
- Tatiana Tarasoff: not a party; the young woman killed by Poddar
- Prosenjit Poddar: not a party here; voluntary outpatient at Cowell Memorial Hospital who told his therapist he would kill Tatiana and then did so
- Dr. Lawrence Moore: defendant/respondent; psychologist at Cowell Memorial Hospital, Poddar's therapist; decided Poddar should be committed and notified the campus police
- Dr. Gold: defendant/respondent; psychiatrist who had initially examined Poddar and concurred in Moore's decision
- Dr. Yandell: defendant/respondent; psychiatrist, assistant to the director of the department of psychiatry; concurred in Moore's decision
- Dr. Harvey Powelson: defendant/respondent; Moore's superior and chief of the department of psychiatry; countermanded Moore, ordered no action to detain Poddar, had Moore's letter returned and his notes destroyed
- Regents of the University of California: defendant/respondent; employer of the therapists
- Officers Atkinson, Brownrigg, and Halleran, Chief William Beall, and Officer Teel: defendants/respondents; campus police who detained Poddar and released him on his promise to stay away from Tatiana; demurrer sustained without leave to amend, upheld on appeal

Fact synopsis: On August 20, 1969, Poddar told his therapist, Dr. Moore, that he was going to kill an unnamed but readily identifiable girl — Tatiana — when she returned from Brazil. Moore, with Gold's and Yandell's concurrence, decided Poddar should be committed and asked the campus police for help; the officers detained him briefly and released him, and Powelson then directed that no further action be taken. No one warned Tatiana or her parents, and on October 27, 1969, Poddar went to her residence and killed her.

Posture on appeal: The superior court sustained all defendants' demurrers to the second amended complaints without leave to amend, concluding that no cause of action was stated against the therapists, the police, or the Regents as employer. The parents appeal. The question is whether the complaints state, or can be amended to state, causes of action against the defendants.

Result: Plaintiffs/appellants prevail against the therapist defendants and the Regents; the complaints can be amended to allege breach of a duty to exercise reasonable care to protect Tatiana, because a therapist who determines, or under professional standards should determine, that a patient poses a serious danger of violence must use reasonable care to protect the intended victim. The police defendants prevail, no duty-creating relationship having been pleaded, and the therapists remain immune under Government Code § 856 as to the failure to confine Poddar.

E.g.b.2. Opinion

Tarasoff v. Regents of the University of California

Supreme Court of California

July 1, 1976

17 Cal. 3d 425. VITALY TARASOFF et al., Plaintiffs and Appellants, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents. S.F. No. 23042. Judges: Opinion by Tobriner, J., with Wright, C. J., Sullivan and Richardson, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J. Separate dissenting opinion by Clark, J., with McComb, J., concurring.

Justice MATHEW O. TOBRINER:

On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff. Plaintiffs, Tatiana's parents, allege that two months earlier Poddar confided his intention to kill Tatiana to Dr. Lawrence Moore, a

psychologist employed by the Cowell Memorial Hospital at the University of California at Berkeley. They allege that on Moore's request, the campus police briefly detained Poddar, but released him when he appeared rational. They further claim that Dr. Harvey Powelson, Moore's superior, then directed that no further action be taken to detain Poddar. No one warned plaintiffs of Tatiana's peril.

Concluding that these facts set forth causes of action against neither therapists and policemen involved, nor against the Regents of the University of California as their employer, the superior court sustained defendants' demurrers to plaintiffs' second amended complaints without leave to amend. "The therapist defendants include Dr. Moore, the psychologist who examined Poddar and decided that Poddar should be committed; Dr. Gold and Dr. Yandell, psychiatrists at Cowell Memorial Hospital who concurred in Moore's decision; and Dr. Powelson, chief of the department of psychiatry, who countermanded Moore's decision and directed that the staff take no action to confine Poddar. The police defendants include Officers Atkinson, Brownrigg and Halleran, who detained Poddar briefly but released him; Chief Beall, who received Moore's letter recommending that Poddar be confined; and Officer Teel, who, along with Officer Atkinson, received Moore's oral communication requesting detention of Poddar." This appeal ensued.

Plaintiffs' complaints predicate liability on two grounds: defendants' failure to warn plaintiffs of the impending danger and their failure to bring about Poddar's confinement pursuant to the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 *ff.*) Defendants, in turn, assert that they owed no duty of reasonable care to Tatiana and that they are immune from suit under the California Tort Claims Act of 1963 (Gov. Code, § 810 *ff.*).

We shall explain that defendant therapists cannot escape liability merely because Tatiana herself was not their patient. When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

In the case at bar, plaintiffs admit that defendant therapists notified the police, but argue on appeal that the therapists failed to exercise reasonable care to protect Tatiana in that they did not confine Poddar and did not warn Tatiana or others likely to apprise her of the danger. Defendant therapists, however, are public employees. Consequently, to the extent that plaintiffs seek to predicate liability upon the therapists' failure to bring about Poddar's confinement, the therapists can claim immunity under Government Code section 856. No specific statutory provision, however, shields them from liability based upon failure to warn Tatiana or others likely to apprise her of the danger, and Government Code section 820.2 does not protect such failure as an exercise of discretion.

Plaintiffs therefore can amend their complaints to allege that, regardless of the therapists' unsuccessful attempt to confine Poddar, since they knew that Poddar was at large and dangerous, their failure to warn Tatiana or others likely to apprise her of the danger constituted a breach of the therapists' duty to exercise reasonable care to protect Tatiana.

Plaintiffs, however, plead no relationship between Poddar and the police defendants which would impose upon them any duty to Tatiana, and plaintiffs suggest no other basis for such a duty. Plaintiffs have, therefore, failed to show that the trial court erred in sustaining the demurrer of the police defendants without leave to amend.

1. Plaintiffs' complaints

Plaintiffs, Tatiana's mother and father, filed separate but virtually identical second amended complaints. The issue before us on this appeal is whether those complaints now state, or can be amended to state, causes of action against defendants. We therefore begin by setting forth the pertinent allegations of the complaints.

Plaintiffs' first cause of action, entitled "Failure to Detain a Dangerous Patient," alleges that on August 20, 1969, Poddar was a voluntary outpatient receiving therapy at Cowell Memorial Hospital. Poddar informed Moore, his therapist, that he was going to kill an unnamed girl, readily identifiable as Tatiana, when she returned home from spending the summer in Brazil. Moore, with the concurrence of Dr. Gold, who had initially examined Poddar, and Dr. Yandell, assistant to the director of the department of psychiatry, decided that Poddar should be committed for observation in a mental hospital. Moore orally notified Officers Atkinson and Teel of the campus police that he would request commitment. He then sent a letter to Police Chief

William Beall requesting the assistance of the police department in securing Poddar's confinement.

Officers Atkinson, Brownrigg, and Halleran took Poddar into custody, but, satisfied that Poddar was rational, released him on his promise to stay away from Tatiana. Powelson, director of the department of psychiatry at Cowell Memorial Hospital, then asked the police to return Moore's letter, directed that all copies of the letter and notes that Moore had taken as therapist be destroyed, and "ordered no action to place Prosenjit Poddar in 72-hour treatment and evaluation facility."

Plaintiffs' second cause of action, entitled "Failure to Warn On a Dangerous Patient," incorporates the allegations of the first cause of action, but adds the assertion that defendants negligently permitted Poddar to be released from police custody without "notifying the parents of Tatiana Tarasoff that their daughter was in grave danger from Posenjit Poddar." Poddar persuaded Tatiana's brother to share an apartment with him near Tatiana's residence; shortly after her return from Brazil, Poddar went to her residence and killed her.~

2. Plaintiffs can state a cause of action against defendant therapists for negligent failure to protect Tatiana.

The second cause of action can be amended to allege that Tatiana's death proximately resulted from defendants' negligent failure to warn Tatiana or others likely to apprise her of her danger. Plaintiffs contend that as amended, such allegations of negligence and proximate causation, with resulting damages, establish a cause of action. Defendants, however, contend that in the circumstances of the present case they owed no duty of care to Tatiana or her parents and that, in the absence of such duty, they were free to act in careless disregard of Tatiana's life and safety.

In analyzing this issue, we bear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. As stated in *Dillon v. Legg* (1968) 68 Cal.2d 728, 734: "The assertion that liability must ... be denied because defendant bears no 'duty' to plaintiff 'begs the essential question - whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. ... [Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to

say that the particular plaintiff is entitled to protection.’ (Prosser, Law of Torts [3d ed. 1964] at pp. 332-333.)”

In the landmark case of *Rowland v. Christian* (1968) 69 Cal.2d 108, Justice Peters recognized that liability should be imposed “for injury occasioned to another by his want of ordinary care or skill” as expressed in section 1714 of the Civil Code. (3) Thus, Justice Peters, quoting from *Heaven v. Pender* (1883) 11 Q.B.D. 503, 509 stated: “‘whenever one person is by circumstances placed in such a position with regard to another ... that if he did not use ordinary care and skill in his own conduct ... he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.’”

We depart from “this fundamental principle” only upon the “balancing of a number of considerations”; major ones “are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.”

The most important of these considerations in establishing duty is foreseeability. As a general principle, a “defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.” As we shall explain, however, when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim. Since the relationship between a therapist and his patient satisfies this requirement, we need not here decide whether foreseeability alone is sufficient to create a duty to exercise reasonable care to protect a potential victim of another’s conduct.

Although, as we have stated above, under the common law, as a general rule, one person owed no duty to control the conduct of another, the courts have carved out an exception to this rule in cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct. Applying this exception to

the present case, we note that a relationship of defendant therapists to either Tatiana or Poddar will suffice to establish a duty of care; as explained in section 315 of the Restatement Second of Torts, a duty of care may arise from either “(a) a special relation ... between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relation ... between the actor and the other which gives to the other a right of protection.”

Although plaintiffs’ pleadings assert no special relation between Tatiana and defendant therapists, they establish as between Poddar and defendant therapists the special relation that arises between a patient and his doctor or psychotherapist. Such a relationship may support affirmative duties for the benefit of third persons. Thus, for example, a hospital must exercise reasonable care to control the behavior of a patient which may endanger other persons. A doctor must also warn a patient if the patient’s condition or medication renders certain conduct, such as driving a car, dangerous to others.

Although the California decisions that recognize this duty have involved cases in which the defendant stood in a special relationship *both* to the victim and to the person whose conduct created the danger, we do not think that the duty should logically be constricted to such situations. “[For example,] *Ellis v. D’Angelo* (1953) 116 Cal.App.2d 310, upheld a cause of action against parents who failed to warn a babysitter of the violent proclivities of their child; *Johnson v. State of California* (1968) 69 Cal.2d 782, upheld a suit against the state for failure to warn foster parents of the dangerous tendencies of their ward; *Morgan v. County of Yuba* (1964) 230 Cal.App.2d 938, sustained a cause of action against a sheriff who had promised to warn decedent before releasing a dangerous prisoner, but failed to do so.”

Decisions of other jurisdictions hold that the single relationship of a doctor to his patient is sufficient to support the duty to exercise reasonable care to protect others against dangers emanating from the patient’s illness. The courts hold that a doctor is liable to persons infected by his patient if he negligently fails to diagnose a contagious disease, or, having diagnosed the illness, fails to warn members of the patient’s family.

Since it involved a dangerous mental patient, the decision in *Merchants Nat. Bank & Trust Co. of Fargo v. United States* (D.N.D. 1967) 272 F.Supp. 409 comes closer to the issue. The Veterans Administration arranged for the patient to work on a local farm, but did not inform the farmer of the man’s background. The farmer consequently permitted the patient to come and go freely during

nonworking hours; the patient borrowed a car, drove to his wife's residence and killed her. Notwithstanding the lack of any "special relationship" between the Veterans Administration and the wife, the court found the Veterans Administration liable for the wrongful death of the wife.

In their summary of the relevant rulings Fleming and Maximov conclude that the "case law should dispel any notion that to impose on the therapists a duty to take precautions for the safety of persons threatened by a patient, where due care so requires, is in any way opposed to contemporary ground rules on the duty relationship. On the contrary, there now seems to be sufficient authority to support the conclusion that by entering into a doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient." (Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 CAL. L. REV. 1025, 1030.)

Defendants contend, however, that imposition of a duty to exercise reasonable care to protect third persons is unworkable because therapists cannot accurately predict whether or not a patient will resort to violence. In support of this argument amicus representing the American Psychiatric Association and other professional societies cites numerous articles which indicate that therapists, in the present state of the art, are unable reliably to predict violent acts; their forecasts, amicus claims, tend consistently to overpredict violence, and indeed are more often wrong than right. Since predictions of violence are often erroneous, amicus concludes, the courts should not render rulings that predicate the liability of therapists upon the validity of such predictions.

The role of the psychiatrist, who is indeed a practitioner of medicine, and that of the psychologist who performs an allied function, are like that of the physician who must conform to the standards of the profession and who must often make diagnoses and predictions based upon such evaluations. Thus the judgment of the therapist in diagnosing emotional disorders and in predicting whether a patient presents a serious danger of violence is comparable to the judgment which doctors and professionals must regularly render under accepted rules of responsibility.

We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence. Obviously, we do not require that the therapist, in making

that determination, render a perfect performance; the therapist need only exercise “that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances.” Within the broad range of reasonable practice and treatment in which professional opinion and judgment may differ, the therapist is free to exercise his or her own best judgment without liability; proof, aided by hindsight, that he or she judged wrongly is insufficient to establish negligence.

In the instant case, however, the pleadings do not raise any question as to failure of defendant therapists to predict that Poddar presented a serious danger of violence. On the contrary, the present complaints allege that defendant therapists did in fact predict that Poddar would kill, but were negligent in failing to warn.

Amicus contends, however, that even when a therapist does in fact predict that a patient poses a serious danger of violence to others, the therapist should be absolved of any responsibility for failing to act to protect the potential victim. In our view, however, once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger. While the discharge of this duty of due care will necessarily vary with the facts of each case, in each instance the adequacy of the therapist’s conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances. As explained in Fleming and Maximov, *The Patient or His Victim: The Therapist’s Dilemma* (1974) 62 CAL. L. REV. 1025, 1067: “... the ultimate question of resolving the tension between the conflicting interests of patient and potential victim is one of social policy, not professional expertise. ... In sum, the therapist owes a legal duty not only to his patient, but also to his patient’s would-be victim and is subject in both respects to scrutiny by judge and jury.”~

The risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved. We would hesitate to hold that the therapist who is aware that his patient expects to attempt to assassinate the President of the United States would not be obligated to warn the authorities because the therapist cannot predict with accuracy that his patient will commit the crime.

Defendants further argue that free and open communication is essential to psychotherapy; that “Unless a patient ... is assured that ... information [revealed by him] can and will be held in utmost

confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment ... depends.” (Sen. Com. on Judiciary, comment on Evid. Code, § 1014.) The giving of a warning, defendants contend, constitutes a breach of trust which entails the revelation of confidential communications.

~Counsel for defendant Regents and amicus American Psychiatric Association predict that a decision of this court holding that a therapist may bear a duty to warn a potential victim will deter violence-prone persons from seeking therapy, and hamper the treatment of other patients.~ In *In re Lifschutz*, counsel for the psychiatrist argued that if the state could compel disclosure of some psychotherapeutic communications, psychotherapy could no longer be practiced successfully. We rejected that argument, and it does not appear that our decision in fact adversely affected the practice of psychotherapy in California. Counsels’ forecast of harm in the present case strikes us as equally dubious.~

We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy, and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault. The Legislature has undertaken the difficult task of balancing the countervailing concerns. In Evidence Code section 1014, it established a broad rule of privilege to protect confidential communications between patient and psychotherapist. In Evidence Code section 1024, the Legislature created a specific and limited exception to the psychotherapist-patient privilege: “There is no privilege ... if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.”~

Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest. For the foregoing reasons, we

find that plaintiffs' complaints can be amended to state a cause of action against defendants Moore, Powelson, Gold, and Yandell and against the Regents as their employer, for breach of a duty to exercise reasonable care to protect Tatiana.~

E.g.b.3. Concurrency/dissent by Mosk

Justice STANLEY MOSK, concurring and dissenting:

I concur in the result in this instance only because the complaints allege that defendant therapists did in fact predict that Poddar would kill and were therefore negligent in failing to warn of that danger. Thus the issue here is very narrow: we are not concerned with whether the therapists, pursuant to the standards of their profession, "should have" predicted potential violence; they allegedly did so in actuality. Under these limited circumstances I agree that a cause of action can be stated.

Whether plaintiffs can ultimately prevail is problematical at best. As the complaints admit, the therapists *did* notify the police that Poddar was planning to kill a girl identifiable as Tatiana. While I doubt that more should be required, this issue may be raised in defense and its determination is a question of fact.

I cannot concur, however, in the majority's rule that a therapist may be held liable for failing to predict his patient's tendency to violence if other practitioners, pursuant to the "standards of the profession," would have done so. The question is, what standards? Defendants and a responsible amicus curiae, supported by an impressive body of literature discussed at length in our recent opinion in *People v. Burnick* (1975) 14 Cal.3d 306, demonstrate that psychiatric predictions of violence are inherently unreliable.

In *Burnick*, at pages 325-326, we observed: "In the light of recent studies it is no longer heresy to question the reliability of psychiatric predictions. Psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession. It must be conceded that psychiatrists still experience considerable difficulty in confidently and accurately *diagnosing* mental illness. Yet those difficulties are multiplied manifold when psychiatrists venture from diagnosis to prognosis and undertake to predict the consequences of such illness~.

I would restructure the rule designed by the majority to eliminate all reference to conformity to standards of the profession in predicting violence. If a psychiatrist does in fact predict violence, then a duty to

warn arises. The majority's expansion of that rule will take us from the world of reality into the wonderland of clairvoyance.

E.9.b.3. Dissent by Clark

Justice William Patrick Clark, Jr., dissenting:

Until today's majority opinion, both legal and medical authorities have agreed that confidentiality is essential to effectively treat the mentally ill, and that imposing a duty on doctors to disclose patient threats to potential victims would greatly impair treatment. Further, recognizing that effective treatment and society's safety are necessarily intertwined, the Legislature has already decided effective and confidential treatment is preferred over imposition of a duty to warn.

The issue whether effective treatment for the mentally ill should be sacrificed to a system of warnings is, in my opinion, properly one for the Legislature, and we are bound by its judgment. Moreover, even in the absence of clear legislative direction, we must reach the same conclusion because imposing the majority's new duty is certain to result in a net increase in violence.~

The tragedy of Tatiana Tarasoff has led the majority to disregard the clear legislative mandate of the Lanterman-Petris-Short Act. Worse, the majority impedes medical treatment, resulting in increased violence from – and deprivation of liberty to – the mentally ill.

We should accept legislative and medical judgment, relying upon effective treatment rather than on indiscriminate warning.~

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E.9.c. Questions to Ponder About *Tarasoff*

A. Both Tarasoff and Boyd implicate questions about the effect that the court's decision may have on future behavior. For instance, in Boyd there was a concern that finding a duty would encourage the use of hostages in future hold-ups. In Tarasoff, there is a concern that finding a duty will cause future psychotherapy patients to be less revelatory in therapy sessions, thereby making therapy less effective, which ultimately will cause society greater harm than the occasional harm done to third parties that

might have been prevented with a warning. What do you think of that concern? Is there a difference between Boyd and Tarasoff on this score?

B. This case, like many, raises the question of whether the courts or legislatures are better equipped to deal with the competing concerns raised in considering a change to tort law. In what ways might legislatures be better than courts in making such changes? In what ways might courts be better than legislatures?

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