COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

No. SJC-13138

TAMARA LANIER
PLAINTIFF-APPELLANT
v.
PRESIDENT AND FELLOWS OF HARVARD
COLLEGE & OTHERS
DEFENDANTS-APPELLEES

ON APPEAL FROM THE JUDGMENT
OF THE MIDDLESEX COUNTY SUPERIOR COURT—WOBURN

BRIEF FOR PLAINTIFF-APPELLANT
with ADDENDUM

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III. STATEMENT OF ISSUES

1) The trial court erred in allowing Harvard's[1] motion to dismiss Tamara Lanier's Second Amended Complaint ("SAC") and entering judgment in favor of Harvard;

2) The trial court erred in holding that, as a matter of law, Renty and Delia, hence Lanier, had no possessory, property, or equitable interest in the daguerreotypes;[2, 3, 4]

3) With regard to the timeliness of Lanier's claims of equitable restitution and prima facie tort, the trial court erred in: (a) deciding disputed issues of material fact; (b) incorrectly deciding said issues of fact; (c) failing to consider other applicable tolling doctrines; and (d) failing to apply the doctrine of laches;

4) The trial court erred in dismissing Lanier's constitutional claim.

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[1] The defendants, President and Fellows of Harvard College a/k/a Harvard Corporation, Harvard Board of Overseers, Harvard University, and the Peabody Museum of Archaeology and Ethnology will be referred to collectively and in the singular as "Harvard." The distinction between the parties is not relevant to this motion. Trial Court (Sarrouf, J.) Appendix Volume (AV) 2/14, n.1; Addendum (AD) 75. Since the trial court applied (and Harvard argued) the law of Massachusetts to this case, Lanier will do so likewise.

[2] The res at issue in this case are four daguerreotypes (the precursor to modern photographs) taken in 1850; two of Renty and two of Delia. These will be variously referred to as "daguerreotypes," "photographs" or" images."

[3] For the sake of simplicity, since Renty and Delia's legal interests are essentially identical, Lanier will primarily discuss Renty's legal interests, which discussion is intended to apply to Delia's interests as well.

[4] Note that the trial court used the terms "property interest," "possessory interest," and "interest" interchangeably.

IV. STATEMENT OF CASE

Tamara Lanier filed this action against Harvard in the Middlesex County Superior Court on March 20, 2019, alleging several causes of action involving the creation, possession and use of daguerreotypes of Renty and his daughter Delia, Lanier's ancestors. Lanier's SAC was filed on November 25, 2019. AV1/37. Lanier seeks recovery of these images together with just damages and other legal or equitable relief allowable. Harvard moved to dismiss the entirety of Lanier's SAC on December 4, 2019, arguing that she lacked any property interest in the images or viable causes of action regarding them and, further, that her claims were time-barred. AV1/63. Lanier opposed Harvard's motion on February 19, 2020 (AV1/99), Harvard filed a reply on March 11, 2020 (AV2/4), and oral argument was held on October 20, 2020. AV2/41. On March 1, 2021, the trial court, labelling this a case of "first impression" and indicating that it was "[u]nfortunately...constrained by current legal principles," allowed Harvard's motion and dismissed Lanier's SAC; thereafter, entering judgment in favor of Harvard on March 2, 2021. AV2/12; AD/60. Ms. Lanier filed her notice of appeal on March 17, 2021. AV2/30. On June 29, 2021, plaintiff's motion for direct appellate review by the Supreme Court was allowed; the case was docketed in this Court on June 30, 2021.

V. STATEMENT OF FACTS

> [Blacks] had for more than a century before [1776] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.

Scott v. Sandford, 60 U.S. 393, 407 (1856) (overruled by 14th Amendment).

Seven years before the U. S. Supreme Court flatly endorsed white supremacy and black inferiority as a matter of *law* in the *Dred Scott* decision, Harvard's prized scientist Louis Agassiz sought to prove that Blacks were inferior to Whites as a matter of *science*.[5, 6] Although it was common in Europe and America to view blacks as inferior, it had never been "scientifically" proven. Agassiz's Harvard gravitas made him the perfect candidate to do so. In so doing he would do the biding of not only white supremacists and slaveowners, but also of Harvard-educated northern textile magnates who had substantial financial interests in the low or no cost labor performed by blacks in the south. This in turn would line the pockets of

[5] Agassiz was employed by Harvard from 1847-1873; he was simultaneously appointed professor of Harvard's new Lawrence Scientific School, which was funded by cotton magnate Abbott Lawrence; and, Agassiz was the dedicatee of Harvard's Museum of Comparative Zoology in 1860; Agassiz's conduct in this case was within the scope of his employment by Harvard, who has endorsed and supported him throughout history. AV1/37 ¶¶ 22, 36-43, 54-59, 63, 126, 133-134.

[6] AV1/37 ¶¶ 2, 45-47, 49-52, 74-78.

Harvard as these men were eager to buy influence and curry favor with their alma mater.[7]

In addition to his reputation as a man of science, Agassiz's bona fides as a world class racist were clear when Harvard chose him to be its first head of science at the Lawrence School of Science: the first department of science at any college in North America.[8] Indeed, shortly after his arrival in Massachusetts, Agassiz glommed on to the fledgling theory of "polygenism"—the theory which held that Blacks and Whites were descended from different species and Whites were superior—with what was described as a "convert's zeal."[9]

From his perch at Harvard, Agassiz designed a "scientific study" in which he applied the same scientific discipline that had earned him acclaim abroad in his study of fish and insects.[10] This meant he needed "specimens" from what the Supreme Court would seven years later call the "unfortunate race"—in other words, the Black race. *Scott*, 407, 426. Agassiz travelled to Columbia, South Carolina, to the plantations of B.F. Taylor and others, all wealthy White slaveowners, in search of pure Africans to make part of his

[7] AV1/37 ¶¶ 54-61, 121-123.
[8] AV1/37 ¶¶ 60-63.
[9] AV1/37 ¶¶ 43-48, 70-72, 121.
[10] AV1/37 ¶ 41, 66-68, 70-73.

study.[11] At Taylor's plantation, Agassiz found his ideal specimens in the personhoods of Renty and his daughter Delia. There and elsewhere, Agassiz hand picked a total of seven enslaved black human beings.[12] Having successfully curated these human beings to be used at his whim, Agassiz then returned to Harvard to finish mapping out the plans for his study.

At Agassiz's direction, in March 1850, Renty and Delia were taken from Taylor's plantation against their will to the photography studio of J. T. Zealy in Columbia. Once there, they were stripped naked and forced into carefully chosen positions so that their likenesses could be taken from them in order to be used in furtherance of Agassiz's despicable and criminal experiment.[13] No matter how many times Harvard repeats it, Renty and Delia were not merely the subjects of photographs, they were subjects of human experimentation.[14] Indeed, the fabrication of the images, along with the images themselves had little in common with modern day photography and modern day photographs.

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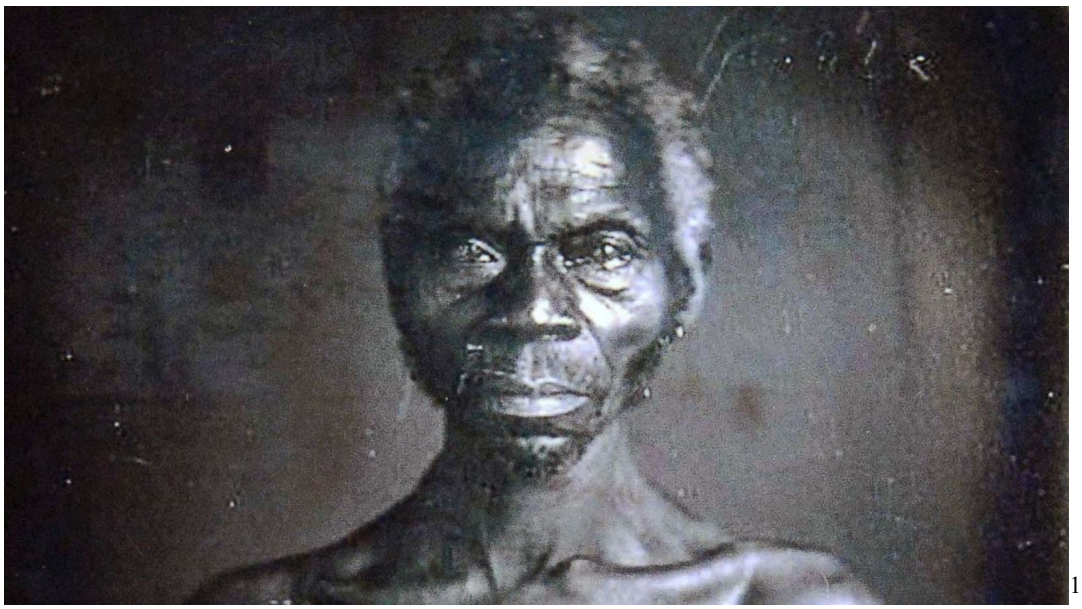
[11] AV1/37 ¶ 74-78.
[12] AV1/37 ¶¶ 74-78.
[13] AV1/37 ¶¶ 107-110.
[14] In an email to Lanier in 2017, Harvard inexplicably stated that the "photographs were commissioned by Dr. Robert W. Gibbs (sic) of Columbia, South Carolina in 1850 and sent to Louis Agassiz..." AV1/37 ¶¶ 198-200. Elsewhere, Harvard claimed Agassiz commissioned the images. AV1/37 ¶¶ 189.

The creation of a daguerreotype involved a long and tortuous process that required the subject to remain perfectly still for an inordinate amount of time.[15] Renty and Delia's submission to this process was likely induced by threat of punishment. The images themselves were captured not on a negative from which additional images could be easily replicated, but on a plate of silver and copper, resulting in a tangible item that was one of a kind.[16]

One of Renty's resulting images that was first used by Agassiz for his experiment and then used for decades by Harvard to serve its own interests looks like this:

 [17]

[15] AV1/103.
[16] *Id.*
[17] AV1/37 ¶¶ 183-186.

Harvard's widespread marketing of the image of Renty will likely lead some to recognize this image, but there are few who know the true story of the image's origin. That history has been successfully whitewashed by Harvard.[18] In total, there are four images at issue in this case: two of Renty, including the one above; and two of Delia.

In March 2017, Harvard made the Renty daguerreotype central to the conference it called "Universities and Slavery: Bound by History." While on the one hand Harvard used Renty's image on the cover of its brochure hyping the conference and looming on a large screen over the stage, on the other hand, Harvard buried the true history of its origin, i.e., one of white supremacy, black inferiority, and the perpetuation of slavery. In the conference program, Harvard carefully described the photograph's origin as being "taken for the Harvard professor Louis Agassiz as a part of Agassiz's scientific research." The description went on to boast that "while Agassiz earned acclaim, Renty returned to invisibility."[19] Neither the true circumstances in which Renty was photographed, nor the true nature of the so-called scientific study that earned Agassiz acclaim was explained, as if Renty

[18] Harvard has also cashed in on the notion that the daguerreotypes are among the earliest known images of enslaved Blacks. AV1/37 ¶¶ 8, 143.
[19] AV1/37 ¶¶ 187-192.

were posing of his own free will in the name of science and Agassiz were pursuing a legitimate scientific endeavor.

Shortly after the daguerreotypes were taken, Agassiz published the results of his human research in an article called *The Diversity of Origin of the Human Races*.[20] In it, Agassiz claimed to have proven his theory of White superiority and defense of racial inequality.[21] Agassiz concluded that Blacks were "submissive, obsequious, [and] imitative," possessing "a peculiar indifference to the advantages afforded by civilized society"; that "the brain of a negro is that of the imperfect brain of a 7 month's infant in the womb of a White."[22]

When the daguerreotypes themselves were unearthed in 1976 by Peabody Museum researcher Ellie Reichlin,[23] Harvard made no effort to locate the descendants of those depicted and Harvard's filings in this case demonstrate that it has no interest in changing course.[24] Indeed, in November 2017, Harvard informed Lanier that "[i]n 1936, the photographs were transferred to the Peabody Museum for proper care and study."[25] But Harvard has explained no further how the images

[20] AV1/37 ¶¶ 113-116, 121.
[21] *Id.*
[22] AV1/37 ¶¶ 50-52, 113-116, 121.
[23] AV1/37 ¶¶ 8, 141-42.
[24] AV1/37 ¶¶ 147.
[25] AV1/150.

came into its possession. Nor has it put forth any legal or equitable support for a right to possess them in the first instance, let alone one that is superior to Lanier's.

Tamara Lanier is Renty's great-great-great granddaughter.[26] The parties agree that her property claims are those that Renty and Delia would have had and that Lanier, as their descendant, now holds the same.[27] Lanier asks to be allowed to assert those rights before a jury. The daguerreotypes are all that remain of her ancestors Renty and Delia. Harvard's refusal to return Renty and Delia's images to Lanier is a continuation of Renty and Delia's enslavement and a perpetuation of Harvard's legacy of white supremacy. On March 17, 2011, Lanier initially requested Harvard's assistance in learning how Renty's images had and would be used by Harvard and asked Harvard to verify her claim of lineage.[28] Between March 17, 2011, and October 27, 2017, in several communications with Harvard, Lanier was encouraged to trust that Harvard would cooperate with her.[29]

On October 27, 2017, Lanier informed President Faust that Lanier realized Harvard would not voluntarily help her; consequently, Lanier demanded the return of the daguerreotypes.[30] On November 13, 2017, Harvard sent Lanier a non-

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[26] AV1/37 ¶¶ 9, 24-26, 81-106.
[27] AV1/68-69; AV2/18, n.6.
[28] AV1/37 ¶ 170; AV1/129-132, Aff. of Ms. Lanier, ¶¶ 4- 22 and exhibits.
[29] *Id.*
[30] *Id.*; AV1/37 ¶¶ 9-10, 195-201, 203-213 (Count One), 211-215 (Count Two), 203-205 (Count Three); AV2/16, 19-20.

responsive answer and failed to return the daguerreotypes; only then did Lanier learn that she had been legally harmed by Harvard.[31] This event marked the accrual of Lanier's causes of action.[32]

VI. SUMMARY OF ARGUMENT

The case presents the court with diametrically opposed views of the law and its application to the present dispute. Harvard's argument for dismissal rests on a view of the common law and, notably, the law of property as being one of immutability as if fixed in time and space, impervious to circumstance, and immune to changing social mores. That Agassiz was—at a minimum—a rank tortfeasor who conspired to commit and orchestrated multiple wrongs against the persons of Renty and Delia is of no moment to Harvard, and neither is the tort law maxim that redress is not to be obtained by doing a wrong. Likewise, it is of no legal significance to Harvard that Renty and Delia were forced to be part of Agassiz's racist and dehumanizing experiment to justify white supremacy in the guise of pseudo-science or that these wrongs included at least kidnapping, false imprisonment, assault, battery, and torture. In fact, Harvard does not now even dispute that Agassiz was a wrongdoer, acknowledging (albeit dismissively) that Agassiz's actions in appropriating

[31] AV1/37 ¶¶ 198-200; AV1/129-132, Aff. of Ms. Lanier, ¶¶ 4-22 and exhibits.
[32] AV2/18-19, n.7-9.

the images were "reprehensible" and that his theories of separate racial origin and White superiority derived therefrom were "utterly repugnant."[33]

Harvard's argument is simply that none of this matters. Indeed, Harvard ignores that Renty and Delia were compulsory subjects of Agassiz's research and recasts Renty and Delia simply as subjects of a photograph, who can never have a possessory interest in their own images. Harvard dismisses all other facts underlying this case as bearing on moral questions, not legal ones—as if the law were divorced from morality and justice. In its decision, the trial court sided with this fixed view in holding that "the law, as it currently stands, does not confer a property interest to the subject of a photograph...regardless of how objectionable the photograph's origins may be."[34]

The plaintiff categorically rejects this immutable, unyielding, and inverted view of the law of fixed outcomes that rewards wrongdoers—even criminals—and their sponsors with the spoils of their wrongdoing. To the contrary, the law of property is a collection of rights that is notably mutable, evolving over centuries, and flexible in its application to specific circumstances to achieve the fairness and justice upon which the entire legal

[33] AV1/68, 77.
[34] AV2/23-25; AD/71-73.

system is based. Indeed, as further discussed below, property rights are no more fixed or rigid than a "bundle of sticks."

While the facts of this case present an issue of first impression for this court, the allegations are rooted in long-standing principles of law and equity, any one of which is sufficient to reverse the trial court's decision and allow Lanier's case to proceed.

First, as set forth in Count One, the ancient law of replevin in its application to these facts compels that Renty had a possessory right to the daguerreotypes superior to Harvard's.

Second, under the equally established law of conversion, as set forth in Count Two, Harvard has unlawfully exercised ownership, control, or dominion over the daguerreotypes under the facts alleged in the complaint and converted the likenesses of Renty for its own purposes.

Third, foundational principles of equity—specifically equitable restitution and prima facie tort—compel the recognition of Renty's superior equitable rights to the daguerreotypes.

And fourth, Renty's constitutional rights were first violated in the creation of these daguerreotypes, next violated to the extent Harvard used them to justify its superiority, and finally violated insofar as the court's ruling prohibits the inter-generational transfer of his property. Lanier's constitutional rights were violated

as set forth in Count Four in that she is precluded from receiving the property of her ancestors.

One would be hard pressed to find more established causes of action that have survived—like the human race itself—only through adaptation and reasoned application of the law, not by its reduction to the syllogistic outcome Harvard seeks.

The remaining issue that will be addressed below is that while the trial court correctly held that Lanier's replevin and conversion claims were timely filed, it erred in its improper application of the discovery doctrine and other tolling doctrines to Lanier's legal claims and in its failure to apply laches to her equitable claims.

VII. ARGUMENT

A. Standard of review

Massachusetts appellate courts review an order on a motion to dismiss de novo. *Galiastro v. Mortgage Elec. Registration Sys.*, 467 Mass. 160, 164-65 (2014). Factual allegations are sufficient to survive a motion to dismiss if they plausibly suggest that the plaintiff is entitled to relief. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-36 (2008).

B. Property and possessory rights are not immutable but rather are a malleable "bundle of sticks"

The entirety of Harvard's argument and the trial court's holding rests on a static and immutable view of property rights. However, property rights are anything but fixed and finite. In fact, property rights are malleable and mutable, being constantly adapted to changing philosophies and to the particular social mores of their time.

John Locke (1632-1704) espoused that property was a natural right and that "[t]he great and chief end…of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property."[35] Sir William Blackstone (1723-1780) agreed with Locke that the origin of property was natural, but that society established the rules of ownership and possession: "The original of private property is probably founded in nature,...but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society..."[36]

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[35] *Second Treatise of Civil Government*, Ch. IX, § 124 (1690); *see also*, *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 443, n.1 (1986) (Lynch, J., dissenting (in part), quoting Locke: "the formation of the State is largely justified on the ground that it affords protection for property.").

[36] Blackstone, *Commentaries on the Laws of England: Of the Absolute Rights of Individuals*, 140-141 (1765).

The first modern constitutions, written in the late 1700s, enshrined property as a fundamental constitutional right. In 1780, John Adams drafted the constitution of the Commonwealth of Massachusetts, which recognized property as a natural and unalienable right, and that served as a model for the United States Constitution (written 1787, effective 1789.)[37] Massachusetts' Declaration of Rights, Article I, stated: "All men are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."[38, 39]

The current prevailing understanding of property in American legal philosophy describes the concept of property and property rights as a "bundle of sticks."[40] "[T]he bundle of sticks concept characterizes property as a bundle of

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[37] John Adams & the Massachusetts Constitution | Mass.gov

[38] This original language was replaced by Amendments, Article CVI, which changed "men" to "people" and added "Equality under the laws shall not be denied or abridged because of sex, race, color, creed or national origin." AD/80. Article I formed the basis for judicial abolition of slavery in Massachusetts circa 1783. AD/78. *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case,"* 5 Am. J. Legal Hist. 118 (1961); AD/19.

[39] *Holcombe v. Creamer*, 231 Mass. 99, 108-109 (1918); s*ee also Carew v. Rutherford*, 106 Mass. 1, 14 (1870).

[40] *The "Bundle of Rights" Picture of Property*, 43 UCLA L. Rev. 711, 712 (1996); *Property: A Bundle of Sticks or a Tree?*, 66 Vand. L. Rev. 869, 871 (2013).

entitlements regulating relations among persons concerning a valued resource. The metaphor suggests that a bundle is malleable (i.e., that private actors, courts, and lawmakers may add or remove sticks, and that the bundle structures relations among persons, only secondarily and incidentally involving a thing.)"[41]

> Property has ceased to describe any res, or object of sense, at all and has become merely a bundle of legal relations—rights, powers, privileges, immunities....The origins and the development of the idea that property is a bundle of rights have been thoroughly investigated by U.S. property scholars and legal historians....[T]he most important intuitions behind the bundle of sticks image...are fourfold: (1) property is a set of analytically distinct entitlements rather than a full and monolithic aggregate of rights; (2) property entails delicate relations among individuals concerning a given resource...; (3) an owner's entitlements are "bundled" and backed by the state, rather than derived from the law of nature; and (4) the property bundle is malleable (i.e., the owner's entitlements may be recombined into different bundles to achieve a variety of policy purposes).[42]

The second element focuses on the relational nature of property, i.e., that property is a jural relation among persons concerning a thing.[43]

Justice Sotomayor recently endorsed the view of property "as a bundle of sticks—a collection of individual rights which, in certain combinations, constitute property....[The rights to acquire,] to exclude and to use are [some] of the most

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[41] *Id.*, *see also Reframing* Roe*: Property over Privacy*, 27 Berkley J. Gender L. & Just. 28, 37 (2012) ("*Reframing* Roe").
[42] *Property: A Bundle of Sticks or a Tree?*, 877-78 (internal quotation marks omitted).
[43] *Id.*, 880-881.

crucial sticks in the bundle....State law determines...which sticks are in a person's bundle..., and therefore defining property itself is a state-law exercise."[44, 45]

That the daguerreotypes are property is beyond dispute; but just as unassailable is that all people hold property rights to their person and bodily integrity.[46] According to *Black's Law Dictionary*, 5th Ed., 1095, "[t]he word [property] is commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal...It extends to every species of valuable right or interest...and includes every invasion of one's property rights by actionable wrong." *Id.* Indeed, "the term 'property' has grown to comprise every form of possession—intangible, as well as tangible....This development of the law was inevitable. The intense

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[44] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1937-38 (2019) (internal quotation marks omitted) (dissenting opinion); *see also United States v. Craft*, 535 U.S. 274, 278 (2002); *Town of Johnston v. Fed. Hous. Fin. Agency*, 765 F.3d 80, 83 (1st Cir. 2014).

[45] *United States v. Craft*, 279 ("In looking into state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them."); *Texaco, Inc. v. Short*, 454 U.S. 516, 525 (1982) ("Property interests…are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law..."); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perullo v. Advisory Committee on Personnel Standards*, 476 Mass. 829, 841 (2017); *Hundley v. Marsh*, 459 Mass. 78, 81 (2011).

[46] *See Licata v. GGNSC Malden Dexter LLC*, 466 Mass. 793, 798 (2014) (Massachusetts recognized an individual's strong interest in being free from nonconsensual invasion of bodily integrity).

intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that...[t]houghts, emotions, and sensations demanded legal recognition..."[47]

That a person has a property interest in his own person and body is not a new recognition of the law. In the early seventeenth century, Hugo Grotius (1538-1645)—the legal theorist often credited for the modern natural rights theory of property—recognized a person's broad property right in his or her "life" and "limbs."[48] Locke wrote that "every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his."[49] James Madison also asserted that a person has property rights in the "safety and liberty of his person" and "the free use of his faculties and free choice of the objects on which to employ them."[50] And Justice Benjamin Cardozo agreed: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body...."[51]

If property can be said to represent a tangible or intangible thing, "possession" refers to the physical control over tangible property with the intent to

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[47] *The Right to Privacy*, 4 Harv. L. Rev. 193, 193-95 (1890).
[48] *Reframing* Roe, 40.
[49] *Property Rights & Taxation, Second Treatise of Government*, § 27 (1690).
[50] James Madison, *On Property* (1792).
[51] *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129 (1914), overruled on other grounds, *Bing v. Thunig*, 2 N.Y.2d 656 (1957).

exercise control.[52] "The import of the word 'possession' in law may depend on the circumstances."[53] A "possessory interest" is a right to exert control over specific property, a right to possess property by virtue of an interest created in the property though it need not be accompanied by title.[54] A possessory interest can be general or special; the former indicating absolute ownership and the latter a qualified, temporary or limited interest such as the right of a bailee in the article bailed.[55] A right need not be tangible to qualify as a possessory interest.[56] A "right" is "a legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act."[57] An "interest" is used "to denote the object

[52] *New England Box Co. v. C. R. Const. Co.*, 313 Mass. 696, 709-710 (1943).
[53] *Id.*, 709; *see also* Restatement, Torts, § 216; AD/98 ("[A] person who is in 'possession of a chattel' is...one who (a) has physical control of a chattel with the intent to exercise such control on his own behalf..., or (b) has been in physical control of a chattel with intent to exercise control although he is no longer in physical control, if (i) he has not abandoned it, and (ii) no other person has obtained possession..., or (c) has the right as against all person to the immediate physical control of a chattel, if no other person is in possession..."
[54] *Black's Law Dictionary*, 1049, 1096; *see also* Restatement Property, § 7; AD/96.
[55] *Evergreen Marine Corp. v. Six Consignments of Frozen Scallops*, 806 F. Supp. 291 (D. Mass., 1992), vacated on other grounds, 4 F.3d 90, 96 (1st Cir. 1993); *First National Bank v. Crocker*, 111 Mass. 163, 170 (1872).
[56] *Manhattan Community Access Corp.*, 1938, citing *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960).
[57] Restatement Property, § 7; AD/96.

of any human desire,"[58] and includes "varying aggregates of rights, privileges, powers and immunities and distributively to mean any of them."[59]

C. Regarding Lanier's replevin claim, the trial court erred in finding the law confers no possessory interest to Renty in holding that the subject of photography has no property interest in his own image, regardless of how objectionable the photograph's origins may be

Count One of the plaintiff's complaint asserts a cause of action for replevin. Pleading Renty's possessory interest in the images is an essential element of this claim.[60] Merely 10 years after Harvard's Agassiz made Renty his subject and stole from him his own images in Agassiz's twisted experiment, this Court articulated a guiding principle that prophetically stands in stark contrast to the argument now

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[58] Restatement (Second) Torts, § 1; AD/100

[59] *Id.*

[60] G. L. c. 247, § 7; AD/88 (first enacted in 1789) states in relevant part: "If goods exceeding twenty dollars in value are unlawfully taken or detained from the owner or person entitled to their possession..., the owner or such other person may cause them to be replevied." A replevin action may be brought by an "owner," or "person entitled to possession" who need not be the owner. *Evergreen Marine v. Six Consignments of Frozen Scallops*, 806 F. Supp. 291, 295-96 (D. Mass., 1992), vacated on other grounds, 4 F.3d 90 (1st Cir. 1993); 66 Am. Jur. 2d, Replevin, §§ 2, 11 (in some jurisdictions, a plaintiff may prevail in replevin without proof of title, upon evidence that the defendant took the property from his possession without his consent, if the defendant is unable to justify his taking by showing a title in himself), 13.

advanced by Harvard and accepted by the trial court, when the Supreme Court held:

> Remedies [like replevin] are always to be used and applied in subordination to the general principles of right, which it is the object of the law primarily to secure and protect. Redress is not to be obtained by doing a wrong.
>
> *Maxham v. Day*, 82 Mass. 213, 215 (1860).

The trial court's holding that the common law, "as it currently stands, does not confer a property interest to the subject of a photograph regardless of how objectionable [i.e., wrongfully derived] the photograph's origins may be" is plainly at odds with Massachusetts' law of replevin, which requires an application of the law that is subordinate to what is right. In other words, objectionable conduct that is wrongful very much matters in Massachusetts when a court is faced with how to resolve a claim for replevin.

Furthermore, the premise advanced by Harvard and relied on by the trial court that the common law simply does not confer a property interest to a subject of a photograph "no matter how objectionable the circumstances" (which is not particularly relevant in the first instance because Renty was a subject of a scientific experiment and not merely a subject of a photograph) is itself flatly not supported by case law. It appears that the basis of the trial court's finding that "the basic tenet of the common law [is] that the subject of a photograph has no interest" in a photograph taken of him is a smattering of cases in which courts found that under

the specific circumstances presented the subject did not have an absolute property right or at least a superior possessory right to the photographer. It bears mentioning that Agassiz was neither the photographer nor the subject, so it raises the question of how such a rule would lawfully allow Harvard to possess the images in the first place.

Even assuming for the sake of argument that this is a correct statement of the law, it is of no consequence to this case. Lanier does not argue that Renty acquired a possessory interest in the daguerreotypes simply because he was their subject. Rather, Renty's possessory interest in the daguerreotypes is premised on the "bundle of sticks" totality of his rights, and the invasions of the same by Harvard, in relation to the creation of the images, as viewed through the lens of contemporary social, political, and economic values.

Renty had several rights in relation to the daguerreotypes apart from his merely being what Harvard blithely refers to as a "subject of a photograph" and it is the invasion of these rights which gives rise to Renty's property interests in the daguerreotypes.

Obviously, Renty was a man—a person.

As a person, Renty had the right to be free from the violation of his rights, including, inter alia, his rights to the protection of his mind, body, and liberty.

At Agassiz's direction, to create the daguerreotypes, Renty was taken from the Taylor plantation against his will. This was kidnapping, which has been against the law in Massachusetts for over 100 years.[61] "Whoever, without lawful authority, forcibly or secretly confines or imprisons another person...against his will,...or forcibly seizes and confines or inveigles or kidnaps another person, with intent either to cause him to be secretly confined or imprisoned...against his will...or in any way held to service against his will, shall be" guilty of kidnapping.[62] The fact that Renty was kidnapped to be studied by Agassiz in order to create these daguerreotypes, gives Renty, not Harvard, a possessory interest in them.

At Agassiz's direction, to create these images Renty was brought to Zealy's photography studio and held there against his will. Consequently, Renty suffered a false imprisonment and trespass, torts that have been actionable in Massachusetts for over 100 years: "Where a man deprives another of his liberty, the injured party is entitled to maintain an action for false imprisonment, and it is for the defendant

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[61] *Commonwealth v. Dykens*, 438 Mass. 827, 841 (2003), habeas proceeding at *Dykens v. Allen*, 2005 U.S. Dist. LEXIS 14601 (D. Mass., 2005) ("any restraint of a person's liberty is a confinement or an imprisonment...Every such restraint of the liberty of a person, if not justified by law, is in the eye of the law a false imprisonment...") (internal quotation marks omitted); citing *Commonwealth v. Nickerson*, 87 Mass. 518, 525-26 (1862).

[62] G. L. c. 265, § 26; AD/92.

to justify his proceeding by showing that he had legal authority for doing that which he had done."[63] "Every imprisonment of a man is *prima facie* a trespass..."[64] The fact that Renty was falsely imprisoned by Agassiz in order to create these daguerreotypes, gives Renty, not Harvard, a possessory interest in them.

At Agassiz's direction, to create these photographs, Renty was forced to take his clothes off and made to pose naked. Thus, Renty suffered, at the very least, an assault and battery, invasion of his privacy, and infliction of emotional distress. "An assault and battery is the intentional and unjustified use of force upon the person of another, however slight."[65] An invasion of privacy is an invasion that is both unreasonable and substantial or serious.[66] Under Massachusetts law, an invasion of privacy can involve the public disclosure of private facts as well as simply an unreasonable intrusion into a person's "solitude" or "seclusion."[67] "The right...infringed upon is [the] right to be let alone."[68]

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[63] *Jackson v. Knowlton*, 173 Mass. 94, 95 (1899); *see also Beaumont v. Segal*, 362 Mass. 30, 32 (1972).
[64] *Bassett v. Porter*, 64 Mass. 418, 420 (1852) (citing earlier authorities).
[65] *Commonwealth v. Colas*, 486 Mass. 831, 841 (2021); *see also*, e.g., G. L. c. 265, §§ 13A et seq.; AD/91.
[66] *Polay v. McMahon*, 468 Mass. 379, 382 (2014); G. L. 214, § 1B; AD/87.
[67] *Polay*, 382.
[68] *Id.*, *see also The Right to Privacy*, 193.

That Renty was forced to pose for these daguerreotypes is beyond dispute.[69] "Personal autonomy demands that a competent adult consent to any invasion of his or her being."[70] As for Delia, specifically, whose age is unknown when she was photographed, she may have been further exploited and coerced into the creation of child pornography.[71] Harvard's actions giving rise to the creation of the daguerreotypes were also violations of Renty and Delia's procedural and substantive due process constitutional rights. That Renty and Delia were

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[69] In *From Site to Sight*, Harvard used Renty's image on the cover to sell books; at 56-58 Harvard stated that "Renty and Delia were slaves on a South Carolina plantation when these daguerreotypes were taken in 1850...to provide data for [Agassiz's] racial theories...[T]he...views...are rare images of American slavery and graphic reminders that not all studio photography in the nineteenth century was voluntary....The ...daguerreotypes...are unprecedented early examples of the scientific use of photography as well as extremely rare images of African Americans before the Civil War. These images raise disturbing questions about the anthropological camera as a weapon of power...While studio portraits were an index of social success for the prospering middle class of industrialized societies, the Zealy daguerreotypes were undertaken in a context of dominance and oppression. Their subjects presumably had little to say about the ways in which they were visually presented...Elizabeth Agassiz's comments...on her husband's research reveal the reluctance of the subjects..." *See also From Here I Saw What Happened and I Cried: Carrie Mae Weems' Challenge to the Harvard Archive*, 8 Harv. Unbound J of Legal L. 1, 55-56 (2012-13) ("[W]e know from recorded history as well as Delia, Jack, Renty, and Drana's facial expressions that they 'sat' for their portraits under a persistent threat of violence....People committed serious crimes in the course of taking these photographs.").

[70] *Feeley v. Baer*, 424 Mass. 875, 881 (1997); G. L. c. 111, § 70E; AD/82.

[71] *See* G. L. c. 272, § 29A; AD/94 ("Whoever...coerces [a child under the age of eighteen years]...to pose or to be exhibited in a state of nudity, for the purpose of representation or reproduction in any visual material" shall be guilty of child pornography.).

photographed without their consent under these circumstances at Agassiz's direction in order to create the daguerreotypes, give them, not Harvard, a possessory interest in the images.

What Harvard did to Renty was also an infliction of emotional distress. Infliction of emotional distress claims can be negligent or intentional. A negligent infliction occurs when there is negligence, emotional distress, causation, and physical harm manifested by objective symptomology. The standard used to evaluate such claims is that of the reasonable person.[72] Intentional infliction of emotional distress includes the following elements: "(1) that the defendant intended to cause, or should have known that his conduct would cause, emotional distress; (2) that the defendant's conduct was extreme and outrageous; (3) that the defendant's conduct caused the plaintiff emotional distress; and (4) that the plaintiff suffered severe distress."[73] "To be considered extreme and outrageous, the defendant's conduct must be 'beyond all bounds of decency and...utterly intolerable in a civilized community.'"[74] The fact that Renty suffered assault, battery, invasion of privacy, and infliction of emotional distress by Agassiz in

[72] *Helfman v. Northeastern University*, 485 Mass. 308, 327 (2020).
[73] *Sena v. Commonwealth*, 417 Mass. 250, 263-64 (1994).
[74] *Id.*

order to create these daguerreotypes, gives Renty, not Harvard, a possessory interest in them.

Once the daguerreotypes were created, they were sent to Agassiz and, based upon them, he publicly announced his theory that he had scientifically proven White superiority, Black inferiority, and the biological justification of slavery. Agassiz declared that Blacks were submissive, obsequious, uncivilized, and ignorant. As to Renty, these were acts of slander, libel, and defamation.[75] Papa Renty was an extraordinary man, self-educated, and *visible*.[76] The odious aftermath of Agassiz's claim to have proven that Whites are superior to Blacks, sadly, endures to this day.

Bundled together, the multiple tortious and criminal violations of Renty's rights by Agassiz, culminating in the creation and later use of the images, give Renty, not Harvard, a possessory interest in the daguerreotypes. As the bundle of sticks theory posits, society's recognition of property rights and possessory interests is more about regulating the relations among persons concerning a valued object and less about the thing itself. It is now 2021, not 1850, and

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[75] *Hipsaver, Inc. v. Kiel*, 464 Mass. 517, 522 (2013) ("A defamation action, which encompasses libel and slander, affords a remedy for damage to the reputation of the injured party"); *see also White v. Blue Cross & Blue Shield of Mass., Inc.*, 442 Mass. 64, 66 (2004).
[76] AV1/37 ¶¶ 189, 90-95.

acknowledgement of Renty's right to his own images is overdue. Massachusetts courts have long held that it is important both to consider the totality of the circumstances when deciding a case[77] and to compensate victims for the violation of their rights.[78] To create the daguerreotypes, Harvard kidnapped, falsely imprisoned, trespassed upon, assaulted, harmed, invaded the privacy of, inflicted emotional distress upon, slandered, libeled and defamed Renty—all in the name of White superiority so Agassiz could get "evidence" to use in his morally corrupt experiment. Undeniably, the circumstances under which these images were created were criminal, "beyond all bounds of decency and…utterly intolerable in a civilized community." Or, to use Harvard's own words, "reprehensible" and "repugnant." The circumstances matter.

Historically, the principles of property and property rights have evolved. During the last 2,500 years, the right to property has been variously considered to be divinely bestowed, reposited in the sovereign, derived from birth, won via conquest, or achieved by first possession. At times, property law has been deemed to be natural, conventional, constitutional or the result of value judgments and

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[77] *See*, e.g., *Commonwealth v. Blais*, 428 Mass. 294, 297 (1998) ("Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.").

[78] *Tinsley v. Framingham*, 485 Mass. 760, 766 (2020); *see also Jupin v. Kask*, 447 Mass. 141, 147 (2006).

cost-benefit analysis. The societal cost of applying a rule in this case that fails to recognize Renty's possessory interest in his images would far outweigh any potential benefit (of which there is none). "This is how the common law traditionally grows; it responds to the needs of the society it serves."[79] The needs of society, "for the good of the community," compel the recognition and protection of Renty's right to his own photograph.[80] Massachusetts law "abide[s] by the general maxim that [t]he more precious the right, the greater the protection [afforded.]"[81] Given that these four photographs are all that is left to connect Lanier to her ancestors, it cannot be gainsaid there is anything more dear to this family.

Furthermore, the court's sweeping generalization from a so-called "basic tenet" of the common law to the court's all-encompassing conclusion that the subject of a photograph can never acquire a possessory interest in the image is an example of *dicto simpliciter*.[82] For the court's reasoning to work, there would have to be no other way for a subject of a photograph to acquire a possessory interest in

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[79] *Roe v. Catholic Charities of the Diocese of Springfield*, 225 Ill. App. 3d 519, 524, 167 Ill. Dec. 713, 588 N.E. 2d 354 (1992); cited by *Mohr v. Commonwealth*, 421 Mass. 147, 159 (1995).
[80] *Vintimilla v. National Lumber Co.*, 84 Mass. App. Ct. 493, 506 (2013), further appellate review denied, 467 Mass. 1108 (2014).
[81] *Gillespie v. City of Northampton*, 460 Mass. 148, 156 (2011) (internal quotation marks omitted).
[82] AV2/24-25; AD/72-73.

the same other than as its subject and one's status as subject would have to *negate* all other possessory interests acquired via alternate routes.

D. Regarding Lanier's conversion claim, the trial court erred in finding the law confers no possessory interest to Renty in holding that the subject of photography has no property interest in his own image, regardless of how objectionable the photograph's origins may be

Conversion is the intentional exercise of dominion or control over personal property seriously interfering with the right of another to control it. The elements of conversion include that a plaintiff has an ownership or possessory right or interest in the property interfered with at the time of the defendant's wrongful act.[83] The plaintiff must show an immediate right to possession of the property at the time of the alleged conversion, even though title may be in another.[84]

The trial court grouped several of the plaintiff's claims together as "property-related," so it is difficult to ascertain whether it considered Lanier's conversion claim specifically. Nevertheless, this Court should allow the claim for conversion to proceed because Renty had a possessory interest in his body and personhood at the time his likenesses were wrongfully extracted and captured in the daguerreotypes. Thus, he maintained a possessory interest in the images.

[83] *Evergreen Marine*, 296.
[84] *Guttentag v. Huntley*, 245 Mass. 212, 215 (1923).

E. Regarding Lanier's claims of equitable restitution and prima facie tort, the trial court erred when it failed to recognize Renty's superior equitable rights to the daguerreotypes

In Count Five Lanier set forth a claim for prima facie tort and in Count Seven a claim of equitable restitution. The trial court dismissed these claims for the same reason it dismissed Lanier's other property-related claims and failed to analyze these claims under applicable principles of equity. Further, the court noted twice in passing that Massachusetts has yet to recognize such a claim or to adopt § 871 of the Restatement (Second) Torts.[85] Although the court's dismissal was not premised on a specific finding that no such cause of action exists in Massachusetts, Lanier will briefly explain the nature of this claim and its roots in this state.

Lanier's claim in Count Five was known at common law as a "prima facie tort."[86] The maxim *ubi jus ibi remedium* ("where there is a right, there is a remedy"), together with Article XI of the Massachusetts Constitution that "[e]very subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character," supports the recognition of a general tort category of claims to

[85] AV2/18, n.8, 20, n.9; AD/66, 68; AD/148.
[86] The Supreme Court held in *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904) that: "It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."

compensate for harmful and unjustified conduct not falling within an area of traditional tort actions. The Massachusetts Supreme Court in *Walker v. Cronin*, 107 Mass. 555, 562 (1871), was one of the earliest cases in this country to recognize this principle, citing *Carew*, 10-11. "One of the aims of the common law has always been to protect every person against the wrongful acts of every other person...and it has provided an action for injuries done by disturbing a person in the enjoyment of any right or privilege...."[87]

The concept of a prima facie tort is now embodied in Restatement (Second) of Torts § 871.[88] Section 871 recognizes the various tortious means by which harmful invasions of property interests are intentionally effected and states a general rule that applies where the defendant has done an unprivileged act that caused harm to another's legally protected interest in property, deprived another of said interest, or created liability against the defendant. *Id.* It applies where there has been harm to or the deprivation of a possessory or non-possessory interest. *Id.*

Although the Massachusetts court has not specifically adopted § 871, it has both approved of the concept that there exists a residue of general tort law from which can be formulated remedies for wrongs not previously encountered and

[87] *Prima Facie Tort*, 16 A.L.R.3d 1191; citing *Carew* and *Walker.*
[88] AD/148.

indicated a general proclivity toward embracing the Restatement of Torts.[89] Based on the foregoing, it appears likely that Massachusetts' law embodies, in sum and substance, a cause of action for a prima facie tort.

As to Lanier's claim of equitable restitution, the court was similarly cursory in its analysis. To the extent this court may find that a possessory interest in the daguerreotypes is an essential element of Lanier's equitable claims, she incorporates and reasserts by reference the above arguments. However, no applicable law specifically identifies proof of a possessory interest as an element of Lanier's equitable claims.[90] The trial court failed to analyze these claims by application of the principles of equity set forth herein.

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[89] For just a few examples of the Massachusetts Supreme Court's adoption of Restatement of Torts sections, *see e.g., Massachusetts Port Authority v. Turo Inc.*, 487 Mass. 235, 245 (2021) (adopted Restatement (Second) Torts ("R2T"), § 329); *Butcher v. University of Massachusetts*, 483 Mass. 742, 747 (2019) (adopted R2T, § 578); *Williams v. Steward Health Care System, LLC*, 480 Mass. 286, 295-97 (2018) (adopted Restatement (Third) Torts ("R3T"), § 41; *Correa v. Schoeck*, 479 Mass. 686, 697 (2018) (adopted R2T, § 299A); *Dzung Duy Nguyen v. Massachusetts Institute of Technology*, 479 Mass. 436, 449-454 (2018) (adopted R3T, § 40, R2T, § 314A); *Sarkisian v. Concept Restaurants, Inc.*, 471 Mass. 679, 682-84 (2015) (adopted R2T, §§ 343, 344); *Lev v. Beverly Enterprises-Massachusetts*, 457 Mass. 234, 242-46 (2010) (adopted R2T, § 315 (a)); *Leavitt v. Brockton Hosp., Inc.*, 454 Mass. 37, 40 (2009) (adopted R2T, § 315 (a)); *Jupin*, 147-52 (2006) (adopted R2T, §§ 302, 302B, 284); *Sheehan v. Roche Bros. Supermarkets*, 448 Mass. 780, 788 (2007) (adopted R2T, § 343); *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 266 (1993) (adopted R2T, § 566) ; AD/103-173.

[90] *Helfman*, 327.

F. The trial court erred in dismissing Lanier's constitutional law claim

The trial court's decision, which fails to recognize both Renty's right to transfer his property to his descendant Lanier and her right to receive the same is yet further perpetuation of the race-based imbalance of law rooted in America's "original sin"—slavery. In Count Four of her complaint, Lanier urges the court to recognize in her a substantive due process right to the daguerreotypes under G. L. c. 12, §11I, AD/81, which should be rightfully hers as part of inter-generational wealth transfer from Renty.

By 1850, slavery had been deemed unconstitutional and illegal in Massachusetts for well over half a century. The Massachusetts courts outlawed slavery almost a decade *before ratification* of our federal Constitution. Jury instructions from the *Quock Walker* and *Jennison* cases have been recognized as the Commonwealth's judicial abolition of slavery. In 1783, in *Jennison*, Chief Justice William Cushing of the Supreme Judicial Court charged the jury as follows:

> Our Constitution of Government...sets out with declaring that all men are born free and equal—and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and property—and in short is totally repugnant to the idea of being born slaves. This being the case, I think the idea of slavery is inconsistent with our own conduct and Constitution.[91]

[91] https://www.pbs.org/wgbh/aia/part2/2h38t.html PBS African in America

Nonetheless, by moving to dismiss Lanier's constitutional claims, Harvard appears to contend that it can both ignore Lanier's right to inherit from Renty and—even more offensively—reward Agassiz's creation of the images in the first place!

Just as the descendants of Holocaust victims sought and were awarded multi-million-dollar compensation for those unspeakable horrors and innumerable indignities *visited on their ancestors* by the German National Socialist regime, Lanier has no less a claim to superior possessory rights in the images stolen of her enslaved ancestors, particularly those devised by Harvard as tools to justify their enslavement. Whether Lanier's claim is viewed as having accrued in her ancestors and passed to her through successive generations—only to emerge as potentially viable over a century later when the daguerreotypes surfaced and Harvard publicly acknowledged their existence—or as some independent claim akin to one by a Holocaust survivor's great-granddaughter to the only photos of her besieged ancestor, which happen to have been taken by the so-called scientist whose sadistic medical experiments involved photographing his victims *in extremis*, the result is the same: Harvard is equitably disqualified from claiming a possessory interest in the daguerreotypes, because it has unclean hands by creating them in the first instance.

Allowing Harvard to retain the daguerreotypes is like catching a thief red-handed and then letting him keep what he stole. Furthermore, the daguerreotypes constitute a crime in themselves and document other crimes—human enslavement and trafficking, kidnapping, assault and battery, to name a few—rendering them little different in principle than a gruesome trophy taken by a serial killer or exploitative images of under-aged children possessed by a pedophile pornographer. It would offend equity and justice to leave the daguerreotypes in Harvard's unclean hands.

G. <u>Distinguishing the cases cited by the trial court</u>

Although Lanier has just demonstrated the legal basis for Renty's possessory interest in the daguerreotypes, she indicated above that she would also discuss and distinguish the cases relied upon by the trial court in its decision. None of the cases relied upon by the trial court support its conclusion that the "subject of a photograph" does not acquire a property right "no matter how objectionable the circumstances." See *Thayer v. Worcester Post Co.*, 284 Mass. 160, 163-4 (1933) (plaintiff consented to have her photograph taken in a public place, with her knowledge); *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 882, 883 (9th Cir. 1988);cert. denied, 489 U.S. 1080 (1989) (means used by Hustler to obtain photograph was not actionable because plaintiff had agreed to be photographed by a newspaper and therefore not a privacy concern); *U.S. v.*

Jiles, 658 F.2d 194, 200 (3d Cir. 1981) (state statute requiring court order to obtain photograph of juvenile taken while in juvenile detention, did not create a constitutionally protected property or liberty interest in the defendant); *Grandal v. New York - Grandal v. City of New York*, 966 F. Supp. 197, 203 (S.D.N.Y. 1997) (criminal appellee had no property interest in booking photo from previous arrest); *Berger v. Hanlon*, 1996 U.S. Dist. LEXIS 22525 at *30-*32 (D. Mont. 1996)[92] (plaintiffs did not have basis for *conversion* claim where CNN accompanied federal authorities lawfully executing search warrant of plaintiffs' home, plaintiff consented to entry); *Zacchini v. Scripps-Howard Broad, Co.*, 47 Ohio St. 2d 224, 227 (1976), rev'd on other grounds, 433 U.S. 562 (1977) (fifteen-second broadcast of plaintiff's "human cannonball" act at state fair was neither appropriation nor invasion of right to publicity;it was a newsworthy matter of public interest). Indeed, none of these cases even involved a claim of tortious conduct *in the creation* of the images at issue.

[92] The correct cite to *Berger v. Hanlon*, AV2/24, AD/72 & 194, is LEXIS 22525, *not* 225. The court omitted reference to the extensive subsequent appellate history of the case. The District Court's decision was affirmed in part and reversed in part at 129 F.3d 505 (9th Cir. 1997); the Supreme Court vacated and remanded at *Hanlon v. Berger*, 526 U.S. 808 (1999); whereupon the judgment in favor of CNN was reversed on Berger's claims for trespass and intentional infliction of emotional distress at 188 F.3d 1155 (9th Cir. 1999).

The final case cited by the court, ostensibly in support of its conclusion that a subject can never acquire a possessory interest no matter how offensive the origin of the photograph, was the unpublished decision in *Brunette v. Humane Society*, 40 Fed. Appx. 594, 597 (9th Cir. 2002); AD/206. In *Brunette*, the plaintiff claimed that the defendant converted images of her property through photography. The court upheld the dismissal of the plaintiff's claim applying California law. *Id.* The only use of the word "offensive" in *Brunette* was with regard to the court's finding that that there was "no serious or offensive invasion of privacy" because the defendant entered Brunette's ranch legally, with consent. "Any illegal entry would be sufficiently serious and offensive to state a claim for invasion of privacy." *Id.*

None of the cases cited suggest in any way that a general rule would apply in circumstances where the subject was the compelled to be stripped and forced to have their images extracted from them for purposed of a human scientific study designed to debase them. It is true that in three of the cases cited, the courts commented on the property interests of the photographer vis-à-vis the subject, but these comments arise in the context of the specific factual circumstances of each case. In *Ault*, the court simply declared, without any support, that "while the photograph [of the plaintiff taken for a newspaper later used by Hustler] might be viewed as a chattel, it was the property of the

photographer, not of Ault, so there was no conversion of Ault's chattels." *Ault* at 883. In *Thayer*, the court noted that "the plaintiff's allegations show that the picture was not taken surreptitiously or without her knowledge, *or consent*. On the contrary she *voluntarily* posed for it as one of a party of five. The picture was taken at an airport which is presumably a public place." The court went on to conclude that "[o]ne who *under the conditions disclosed in these counts* poses for a photograph has no right to prevent its publication" and that the "title to the photograph was not in the plaintiff but some other person." *Id.* at 163 (emphasis added). Finally, *Berger* appears to simply overstate the fact-specific conclusions of other courts.

In short, the trial court failed to provide sufficient legal authority to establish its so-called "basic tenet" of the common law that the subject qua subject of a photograph does not acquire a possessory interest in the same, that consent or lack thereof is irrelevant, and that the subject can never acquire such an interest.

H. The trial court erred in its application of G. L. c. 260, § 2A to dismiss some of Lanier's claims as untimely

While the trial court correctly held that Lanier's replevin and conversion claims were timely filed, the court erred in holding that Lanier's

equitable restitution claim and *perhaps* her prima facie tort claim[93] were barred by the statute of limitations in G. L. c. 260, § 2A.[94] That statute allows three years from the date of accrual for filing actions within its purview. Applying the discovery rule, [95] the court held that Lanier's equitable claims accrued "as late as 2014,"[96] thus concluding they were untimely filed.[97] In making this determination, the court committed several errors.

First, the court erroneously decided disputed questions of fact, which it should have left for the jury to determine.[98] Further, the court decided said issues incorrectly. Specifically, the court found that Lanier "was aware of the circumstances surrounding the creation of the photographs and that she believed she had an interest in such images," in 2014.[99] This determination was contrary to Lanier's averments in her affidavit that she was unaware that

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[93] AV2/20, n.9; AD/68.
[94] AV2/18-23; AD/66-71 & 89.
[95] *See Albrecht v. Clifford*, 436 Mass. 706, 714-15 (2002); *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215, 228 (2009); *Riley v. Presnell*, 409 Mass. 239, 247-48 (1991).
[96] *Bowen v. Eli Lilly & Co.*, 408 Mass. 204, 207 (1990).
[97] AV2/23; AD/71.
[98] *Patsos v. First Albany Corp.*, 433 Mass. 323, 329 (2001) (when compliance with a statute of limitations is at issue, factual disputes concerning when a plaintiff knew or should have known of his causes of action are to be resolved by the jury); *Donovan*, 228; *Lindsay v. Romano*, 427 Mass. 771, 774 (1998) (question of fact for jury).
[99] AV2/22-23; AD/70-71.

Harvard may have caused her injury until after October 27, 2017. Up to that point, Harvard solicited Lanier's trust and she continued to believe Harvard would voluntarily work with her to answer her initial questions. Like Lanier's replevin and conversion claims, her equitable claims did not accrue until November 13, 2017, when she became aware that she had suffered harm as a result of Harvard's conduct. All of Lanier's claims were timely filed.

Second, the trial court failed to consider whether the application of any other tolling doctrines could forestall the accrual of Lanier's claims, e.g., *Doe v. Blandford*, 402 Mass. 831, 839 (1988) (continuing tort theory); *Passatempo v. McMenimen*, 461 Mass. 279, 294-95 (2012) (fraudulent concealment, G. L. c. 260, § 12; AD/90); *Genovesi v. Nelson*, 85 Mass. App. Ct. 43, 46-7, further appellate review denied, 468 Mass. 1102 (2014) (truth was inherently unknowable or undiscoverable); *Demoulas v. Demoulas Super Mkts.*, 424 Mass. 501, 519 (1997) (breach of fiduciary duty).

Third, the trial court failed to consider the application of laches to Lanier's equitable claims, rather than the statutory limitations period.[100] Whether laches or the statute of limitations applies depends on the nature of

[100] *Niles v. Graham*, 181 Mass. 41, 48 (1902) (since 1877, the Massachusetts Supreme Court has had jurisdiction in equity).

the underlying claim.[101] At the very least, the court should have applied laches to Lanier's equitable restitution claim. Restitution is an equitable remedy by which a person who has been unjustly enriched at the expense of another is required to compensate the injured party.[102] It is appropriate if the circumstances of the receipt or retention of property are such that, as between the two persons, it is unjust for one of them to retain it.[103] Restitution is "a restoration required to prevent unjust enrichment....The fundamental substantive basis for restitution is that the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff. Restitution rectifies unjust enrichment by forcing restoration to the plaintiff."[104]

Laches is an unjustified, unreasonable, and prejudicial delay in raising a claim.[105] In this case, any "delay" on Lanier's part in the commencement of this action was occasioned by Harvard's conduct. Applying the doctrine of laches, it

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[101] 27A Am. Jur. 2d Equity § 161.
[102] *Santagate v. Tower*, 64 Mass. App. Ct. 324, 329-30 (2005).
[103] *Id.*
[104] 1 Dobbs, Law of Remedies § 4.1(1)-(2), at 557 (2d ed. 1993); *see also Hitachi High Techs. Am., Inc. v. Bowler*, 455 Mass. 261, 268 (2009) (equitable restitution, in contrast to restitution at law, is designed to impose a constructive trust or equitable lien on particular property in the defendant's possession).
[105] *Moseley v. Briggs Realty Co.,* 320 Mass. 278, 283 (1946); *Srebnick v. Lo–Law Transit Mgmt., Inc.,* 29 Mass. App. Ct. 45, 49-50 (1990).

will one day be for a jury to decide whether Lanier's equitable restitution claim was timely filed.[106, 107]

For the foregoing reasons, the trial court incorrectly held that Lanier's equitable claims were untimely.

VIII. CONCLUSION

Renty and Delia's claim, hence Lanier's claim, to the daguerreotypes is based on the multiple invasions, both tortious and criminal, of Renty and Delia's rights that Harvard committed against them to create these images. "Reason is the life of the law; nay, the common law itself is nothing else but reason," according to Sir Edward Coke. In this matter of first impression, reason and the law compel the conclusion that the decision of the trial court be reversed and that this court permit Lanier to prove to a jury Renty and Delia's possessory interest in their images.

> It is one of the great merits and advantages of the common law, that...the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances...[W]hen new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must

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[106] *King v. Trustees of Boston Univ.*, 420 Mass. 52, 53 (1995); *Tehan v. Security Nat'l Bank*, 340 Mass. 176, 182-83 (1959).

[107] To the extent that the court dismissed Lanier's prima facie tort claim based on the statute of limitations, the court should also have applied laches to that claim; *see* Restatement (Second) Torts, § 871, comment a (within this section lie many situations in which the relief is ordinarily or solely equitable in nature); AD/148.

> be governed by the general principle[s]...modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances....[108]

How can a law based on principles of fairness, justice, and equity require any less than what Lanier seeks in this case?

For the foregoing reasons, Lanier respectfully requests this Court reverse the trial court's judgment in Harvard's favor based on its allowance of Harvard's motion to dismiss and further requests the Court remand this case for further proceedings.

[108]*Norway Plains Co. v. Boston & M. Railroad*, 67 Mass. 263, 267-68 (1854); *Matsuyama v. Birnbaum*, 452 Mass. 1, 23 (2008) ("Like all common-law causes of action, our common law of wrongful death evolves to meet changes in the evolving life of the Commonwealth.").

RESPECTFULLY SUBMITTED,

THE APPELLANT,
BY HER ATTORNEYS,

__/s/ Sarah Steinfeld_____

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Dated: July 21, 2021

Table of Contents

Addendum

CLERK'S NOTICE	DOCKET NUMBER 1981CV00784	Trial Court of Massachusetts The Superior Court

CASE NAME:
Lanier, Tamara vs. President and Fellows of Harvard College Also Known As Harvard Corporation et al

Michael A. Sullivan, Clerk of Court
Middlesex County

TO:
Sarah Elizabeth Rainier Steinfeld, Esq.
Koskoff, Koskoff & Bieder
350 Fairfield Ave
Bridgeport, CT 06604

COURT NAME & ADDRESS
Middlesex County Superior Court - Woburn
200 Trade Center
Woburn, MA 01801

You are hereby notified that on 03/02/2021 the following entry was made on the above referenced docket:

ORDER: Memorandum of decision and Order on Defendants Motion to Dismiss Second Amended Complaint For the foregoing reasons, it is hereby ORDERED that Harvard's motion to dismiss the second amended compliant is ALLOWED (see scanned 15 pages) dated 03/01/2021

Judge: Sarrouf, Camille

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
03/02/2021	**Camille Sarrouf**	**(781)939-2745**

Date/Time Printed: 03-02-2021 10:27:01

SCV016_X1\ 08/2014

CLERK'S NOTICE	DOCKET NUMBER 1981CV00784	Trial Court of Massachusetts The Superior Court

CASE NAME:
Lanier, Tamara vs. President and Fellows of Harvard College Also Known As Harvard Corporation et al

Michael A. Sullivan, Clerk of Court
Middlesex County

TO:
Sean K McElligott, Esq.
Koskoff, Koskoff & Bieder, P.C.
350 Fairfield Ave
Bridgeport, CT 06604

COURT NAME & ADDRESS
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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1981CV00784

TAMARA LANIER

vs.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, a/k/a Harvard Corporation, Harvard Board of Overseers, Harvard University, The Peabody Museum of Archaeology and Ethnology

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

The plaintiff, Tamara Lanier ("Lanier"), filed this action against the defendants, President and Fellows of Harvard College, also known as Harvard Corporation, Harvard Board of Overseers, Harvard University, and the Peabody Museum of Archaeology and Ethnology ("Peabody Museum" or "Peabody") (collectively, "Harvard"),[1] concerning photographs that a Harvard professor commissioned in 1850 depicting two slaves, Lanier's alleged ancestors. The matter is presently before the court on Harvard's motion to dismiss Lanier's Second Amended Complaint.[2] After hearing and careful review, for the following reasons, the motion to dismiss is **ALLOWED**.

BACKGROUND

The following is a brief recitation of the well-pleaded factual allegations in the complaint, which the court accepts as true. See Sisson v. Lhowe, 460 Mass. 705, 707 (2011). Certain additional facts are reserved for discussion below.

[1] Harvard contends that The President and Fellows of Harvard College is the legal entity that comprises the various named defendants and is the only proper party to this action. This distinction, however, is not relevant.
[2] The procedural history of this case and whether the operative complaint is Lanier's First or Second Amended Complaint is not relevant to the disposition of the motion.

Harvard is a private educational institution based in Cambridge, Massachusetts. It was founded in 1636. From 1847 until his death in 1873, Harvard employed Swiss natural scientist Louis Agassiz ("Agassiz"). Agassiz primarily studied comparative zoology, which entails grouping living things together based on anatomical characteristics and placing them in hierarchical order. Agassiz also supported polygenism, which is the theory that racial groups do not share a common origin and thus are fundamentally and categorically distinct. At a time when slavery was hotly debated in the United States, Agassiz believed that white and black people had different origins. Agassiz's views purportedly gave scientific legitimacy to the myth of white racial superiority and the importance of the separation of races.[3]

In an effort to legitimize polygenism, Agassiz focused on his perception of physical differences between white and black people. To prove that black people were biologically inferior to whites, Agassiz embarked on a tour of South Carolina plantations in search of subjects – racially "pure" slaves born in Africa – to collect empirical data. Agassiz was taken to the B.F. Taylor plantation in Columbia, South Carolina, where he selected several enslaved men and women to be photographed, including an older man Renty Taylor ("Renty"), also known as Papa Renty, and his daughter Delia. Lanier is a direct descendant of Renty and Delia[4]. Renty and Delia were stripped naked to the waist and photographed from the front, side, and back without their consent or compensation.[5] Shortly thereafter, Agassiz published his photographs and "research" in an article entitled *The Diversity of Origin of the Human Races*, which claimed to offer a scientific defense of racial inequality based on immutable physical characteristics.

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[3] During the American Civil War, polygenism was cited as evidence that slavery did not violate the spirit of the Declaration of Independence because Jefferson's reference to "all men" did not scientifically include black men.
[4] For the purpose of the present motion, Harvard does not dispute Lanier's claim of ancestry.
[5] The images captured are known as daguerreotypes, which is a type of photographic process that predated modern photography. For ease of reference, the court refers to the images as photographs.

In the years that followed, Agassiz continued his crusade of spreading polygenism by giving lectures and publishing additional papers; all the while, he remained employed by Harvard as the leader of Harvard's Lawrence Scientific School. Lanier alleges that Harvard steadfastly supported Agassiz and did not challenge or disavow his display of racist pseudoscience even after polygenism had been definitively disproven. She further claims that by supporting Agassiz and elevating him to the highest echelons of academia, Harvard promoted and legitimized white superiority.

Agassiz retained his professorship and served as director of the Harvard's Museum of Comparative Zoology until his death in 1873. However, even after his death, Agassiz's legacy at Harvard remained. As of March 20, 2019, Harvard's website continued to support and praise Agassiz as a "renowned teacher of natural history."

It was in 1976 that Harvard discovered that Agassiz's photographs of Renty and Delia were stored on its campus. This discovery made national headlines, as they were the earliest known photographs of American slaves. Lanier alleges that following the discovery, Harvard commenced a decades-long campaign to sanitize the history behind the images and exploit them for prestige and profit by displaying the photographs at the Peabody Museum.

Lanier asked Harvard to relinquish the photographs to her in a letter to then Harvard President Drew Faust ("President Faust") in October 2017, but, Harvard declined. Lanier claims that by denying her possession of the photographs, Harvard is perpetuating the systematic subversion of black property rights that began during slavery and continued for a century thereafter and is sanitizing its own historical involvement and association with slavery by exploiting and profiting from the photographs.

DISCUSSION

Lanier filed this action on March 20, 2019, alleging that the photographs were taken without Renty's and Delia's consent and thereafter unlawfully retained by Harvard. Lanier asserts seven claims. Count 1 asserts a writ of replevin, seeking to reclaim possession of the photographs as Renty's and Delia's next of kin. Count 2 asserts a claim for conversion. Count 3 asserts a claim for unauthorized use of name, picture, and/or portrait in violation of G. L. c. 214, § 3A. Count 4 asserts a Massachusetts Civil Rights claim, alleging that Harvard unlawfully advocated in favor of slavery in the nineteenth century. Count 5 alleges that Harvard's ownership and/or control over the photographs intentionally interferes with Lanier's property interest and rights. Count 6 asserts a claim for negligent infliction of emotional distress. Finally, Count 7 asserts a claim for equitable restitution, alleging that Harvard has been unjustly enriched through its possession of the photographs.

Harvard moves to dismiss these claims. With respect to Counts 1, 2, 5, 6, and 7 (hereinafter, "property-related claims"), Harvard contends that the claims are time-barred and that Lanier does not have a property interest in the photographs. As for Count 3, Harvard argues that this claim fails because the right to sue does not survive the death of the subject of an image. Finally, Harvard argues that Count 4 fails because the claim is time-barred and Lanier lacks standing to bring such a claim. Each of these arguments is addressed separately below.

A. Standard of Review

To withstand a motion to dismiss pursuant to Rule 12(b)(6), a claim must allege facts plausibly suggesting an entitlement to relief. Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). Rule 12(b)(6) imposes a relatively low standard for surviving a motion to dismiss. Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 (2004). Nevertheless, a plaintiff is

obligated to provide more than mere labels and conclusions. Iannacchino, 451 Mass. at 636. When considering a claim, the court accepts as true the allegations set forth in the complaint and draws any reasonable inferences in the plaintiff's favor. Sisson, 460 Mass. at 707.

B. Property-Related Claims: (Counts 1, 2, 5, 6 and 7)[6]

In support of its motion to dismiss, Harvard argues that the property-related claims fail because: (1) they are barred by the statute of limitations; and (2) Lanier does not have a property interest in the photographs. Each argument is addressed in turn below.

(1) Statute of Limitations

General Laws c. 260, § 2A provides that tort and replevin actions "shall be commenced only within three years next after the cause of action accrues." Each of the five property-related claims is subject to this three-year statute of limitations period.[7] See Cimino v. Milford Keg, Inc., 385 Mass. 323, 333 (1982); Clark v. First Resolution Inv. Corp., 2016 Mass. Super. LEXIS 22 at *3-*4 (Mass. Super. 2016) (unjust enrichment as basis for equitable restitution); Elms v. Osgood, 1998 Mass. Super. LEXIS 132 at *10-*11 (Mass. Super. 1998) (conversion).[8]

Generally, under what has become known as the "discovery rule," "a cause of action accrues when 'an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury.'" Donovan v. Phillip Morris USA, Inc., 455 Mass. 215, 228 (2009), quoting Bowen v. Eli Lilly & Co., 408 Mass. 204, 207 (1990). The law

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[6] As discussed in more detail below, Lanier's property-related claims are premised on the notion that Renty and Delia had a property interest in the photographs and that Lanier, as a descendant of Renty and Delia, now holds such property interest. For the sake of brevity, the court analyzes these claims together in this section.

[7] Reading the complaint in the light most favorable to Lanier, the negligent infliction of emotional distress claim (Count 6) appears to be based, in part, on conduct that occurred subsequent to Lanier's demand for the photographs. Therefore, the court excludes that portion of the allegations from the discussion regarding the statute of limitations.

[8] Although a claim for intentional interference with property rights has never been recognized in Massachusetts, it is based on the tort outlined in the Restatement (Second) of Torts §§ 870-871. See Ostroff v. FDIC, 1994 U.S. Dist. LEXIS 3608 at *27 n.3 (D. R.I. 1994). As such, it is subject to the three-year limitations period for tort actions set forth in G. L. c. 260, § 2A.

does not require the discovery of each of the elements of the cause of action; rather, the limitations period begins to run when a reasonably prudent person, reacting to any suspicious circumstances of which she might have been aware, should have discovered that she had been harmed. Id. A plaintiff "seeking the benefit of the discovery rule has the burden of showing (1) that she lacked actual knowledge of the basis for her claim and (2) that her lack of knowledge was objectively reasonable." Museum of Fine Arts v. Seger-Thomschitz, 623 F.3d 1, 7 (1st Cir. 2010) (hereinafter "Seger-Thomschitz"), cert. denied sub nom. Seger-Thomschitz v. Museum of Fine Arts, 562 U.S. 1271 (2011), citing Koe v. Mercer, 450 Mass. 97, 101 (2007).

In regards to Lanier's conversion and replevin claims (Counts 1, and 2), Lanier was put on "notice that someone may have caused her injury," Donovan, 455 Mass. at 228, when she demanded the return of the photographs and Harvard declined. Techbuilt Homes v. Framingham Sav. Bank, 1995 Mass. Super. LEXIS 184 at *14-16 (Mass. Super. 1995). See Aimtek, Inc. v. Norton Co., 69 Mass. App. 660, 663-664 (2007) (declaring conversion and replevin claims subject to same statute of limitations); MacCleave v. Merchant, 2002 Mass. Super. LEXIS 392 at *6 (Mass. Super. 2002) (same).

Conversion occurs when a defendant "intentionally or wrongfully exercises acts of ownership, control or dominion over personal property to which he has no right of possession at the time" (citation omitted). Bleicken v. Stark, 61 Mass. App. Ct. 619, 622 n.2 (2004). Where a defendant's possession is not wrongful at its inception, conversion occurs where there is a demand for the return of the property and the defendant refuses, which then puts the defendant in the position of a wrongdoer. Atlantic Fin. Corp. v. Galvam, 311 Mass. 49, 50-51 (1942). See Eunkyung Yoon v. Shin, 2016 Mass. App. Unpub. LEXIS 871 at *5 (Mass. App. 2016) (holding demand for return of property was necessary element to claim of conversion).

Here, reading the complaint in the light most favorable to Lanier, she does not allege nor do the allegations suggest that Harvard's original possession of the photographs was unlawful; therefore, Lanier's claims began to accrue when she demanded the return of the photographs and Harvard refused. See Surabian v. Billings, 2013 Mass. App. Unpub. LEXIS 870 at *1-3 (Mass. App. 2013) (where defendant's refusal occurred on same day complaint was filed, conversion claim was timely). Lanier demanded the return of the photographs in her October 27, 2017 letter to President Faust, and Harvard responded to her demand via email on November 13, 2017. Although Harvard did not expressly refuse to turn over the photographs to Lanier, its nonresponsive communication can be interpreted as such. Accordingly, Lanier's conversion and replevin claims began to accrue on November 13, 2017, and thus, these claims, which she filed on March 20, 2019, are timely.

Because demand and refusal is not an essential element of Lanier's three remaining property-related claims, these claims stand on different footing.[9] In missing art cases, which is akin to the circumstances here, courts applying the discovery rule "have tested the reasonableness of the claimant's lack of knowledge by asking whether the claimant acted with due diligence in pursuing his or her property" (quotations and citations omitted). Seger-Thomschitz, 623 F.3d at 7. Although the question of what a party knew or should have known is often a question of fact to be submitted to the jury, where the facts are clear and would not permit a reasonable jury to find in favor of the claimant, disposition is appropriate. Id. at 9.

[9] Because Massachusetts has never recognized a claim for intentional interference with property rights (Count 5), see *supra* note 7, it is unclear what elements comprise said cause of action. Nevertheless, the Restatement (Second) of Torts § 871, cmt. d, suggests that under certain circumstances, demand for the return of property may be an element to such a claim. Therefore, to the extent that the cause of action exists in this Commonwealth and demand for the return of photographs is a necessary element of the claim, the foregoing discussion regarding demand and refusal would apply.

In Seger-Thomschitz the plaintiff was the sole surviving heir of an Austrian-Jewish art collector and was seeking to recover possession of a valuable painting that the art collector formerly owned but was being held by the Museum of Fine Arts, Boston ("MFA"). 623 F.3d at 2. The subject painting was one of several that the art collector had to sell due to his persecution as a Jewish person under Nazi rule. Id. at 4. One central issue before the court was whether Seger-Thomschitz's claims were time-barred. Id. at 6-9. The court held that her claims were untimely. Id. at 9. Unlike many missing art cases, the location of the painting was not secret and it had been on public display at the MFA and was listed on two public databases;[10] therefore, the MFA's possession of the painting was long discoverable with minimal diligence. Id. at 7-8. Also, there was ample evidence that the art collector's family knew about the existence of the painting and that it was given up under conditions that may have amounted to duress, and by her own admission, Seger-Thomschitz learned, in the fall of 2003, that the Nazis had confiscated the art collector's works. Id. at 8. The court held that such information put Seger-Thomschitz on notice that she might have a claim to other artworks previously owned by the collector that may have been lost due to Nazi persecution; however, she did not demand the return of the painting from the MFA until 2007, well over three years later. Id. at 8-9. The court ultimately concluded that any reasonable jury confronted with this information would conclude that Seger-Thomschitz's cause of action accrued no later than the fall of 2003, when she learned that the Nazis confiscated artwork from the art collector and could then with reasonable diligence have discovered her claim to the painting. Id. at 9.

[10] Information about the painting, including the art collector's prior ownership of it, also was available on the MFA's website, on another art index, in several catalogues, and in a book published in Vienna with a transcription of a 1938 property declaration by the art collector listing the painting.

Here, as evidenced by Lanier's March 2011 letter to President Faust, Lanier knew that Harvard was in possession of the photographs.[11] She wrote that a Harvard associate discovered the photographs approximately thirty-seven years ago. She also stated, "I have historical and US Census information confirming that the two of these slaves [in the photographs] are, in fact, my ancestors," and that she wanted to "reaffirm" that Renty and Delia are her ancestors. Per Lanier's own admissions, she unequivocally was aware that Renty and Delia were her ancestors and that Harvard was in possession of the photographs. Therefore, as was the case in Seger-Thomschitz, Harvard's possession of the photographs was discoverable, and in fact, Lanier discovered such information.

The next question then is whether Lanier should have known about the circumstances in which they were taken, namely, without Renty's and Delia's consent, which is the legal basis for her property-related claims. In her March 2011 letter, Lanier acknowledged that Agassiz commissioned the photographs as evidence of the inferiority of black people, which now depict the "piercing and poignant images of the evils of the slavery." She further stated, "The slaves depicted in these daguerreotypes have touched the hearts and conscience of people worldwide." A few years later in 2014, Lanier was quoted in an article in her local newspaper stating, "I know [the photographs] are horrific pictures. There are some things that are very tragic about this story, but I'm grateful to have the images, so I can see my family." Lanier also discussed with the local news outlet tales of Renty's courage and strength while enslaved. These documents taken together show that Lanier was aware of the circumstances surrounding the creation of the photographs and that she believed she had an interest in such images. Therefore, although she

[11] The court may consider documents attached to the pleadings without converting the motion to one for summary judgment if the plaintiff had notice of these documents and relied on them in framing the complaint. Marram, 442 Mass. at 45 n.4.

did not expressly demand the return of the photographs from Harvard until October 2017, Lanier's statements in her March 2011 letter and the 2014 newspaper article indicate that after much diligence, she, in fact, discovered her claim to the photographs as late as 2014, which is outside the three-year statute of limitations period. See id. at 8-9 (where plaintiff demanded return of the painting well over three years after becoming aware of the existence of other works, the delay in demand for painting was not excused). Accordingly, Counts 5 through 7 are barred by the statute of limitations.

(2) Lanier's Property Interest in the Photographs

Notwithstanding the foregoing discussion, even if all of Lanier's property-related claims were timely filed, her claims, including the conversion and replevin claims, fail as a matter of law. As briefly mentioned above, Lanier's property-related claims are based on the legal assertion that Renty and Delia had a property interest in the photographs and that Lanier, as a descendant of Renty and Delia, currently holds such property interest.[12] The existence of a property interest is a necessary element of each of these property-related claims, without which the claims fail as a matter of law. The central question before the court then is whether Renty and Delia had a property interest in the photographs. This is a question of first impression.

[12] Specifically, Count 1 (replevin) and Count 2 (conversion) expressly allege that Lanier's right to possess the photographs is superior to Harvard's. See Portfolioscope, Inc. v. I-Flex Solutions Ltd., 473 F. Supp. 2d 252, 256 (D. Mass. 2007) ("[C]onversion and replevin . . . . claims require an allegation of wrongful possession of tangible property."). Count 5 (intentional interference) expressly alleges that Lanier "has a legally protected interest" in the photographs and that Harvard's ownership/control over the photographs interferes with Lanier's property interest and rights. Count 6 (negligent infliction of emotional distress) alleges that Harvard's appropriation of the photographs and denial of Lanier's claim of lineage inflicted emotional distress on her. Harvard argues and the court agrees that these actions cannot constitute a violation of a duty owed to Lanier unless she possesses a legally protected interest in the photographs. See Jupin v. Kask, 447 Mass. 141, 147 (2006) (stating every actor owes a duty to exercise reasonable care to avoid foreseeable danger to another). Finally, to prevail on Count 7 (equitable restitution), Lanier must show that "the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff." Santagate v. Tower, 64 Mass. App. Ct. 324, 336 (2005).

However, for the following reasons, the court finds that Renty and Delia did not possess an interest in the photographs, and as a result, Lanier has no such interest.

It is a basic tenet of common law that the subject of a photograph has no interest in the negative or any photographs printed from the negative, see Thayer v. Worcester Post Co., 284 Mass. 160, 163-164 (1933); rather, the negative and any photographs are the property of the photographer. Ault v. Hustler Magazine, 860 F.2d 877, 883 (9th Cir. 1988). This principle is true even where an image is taken without the subject's consent. See United States v. Jiles, 658 F.2d 194, 200 (3rd Cir. 1981) (holding juvenile did not show he was deprived of property interest when photograph was taken while in custody); Berger v. Hanlon, 1996 U.S. Dist. LEXIS 225 at *30-*32 (D. Mont. 1996) (rejecting conversion claim against CNN for images taken without consent on property raided by FBI); Zacchini v. Scripps-Howard Broad. Co., 47 Ohio St. 2d 224, 227 (1976), rev'd on other ground, 433 U.S. 562 (1977) ("[I]t has never been held that one's countenance or image is 'converted' by being photographed.").

Nevertheless, Lanier asks the court to recognize a possessory interest in light of the horrific circumstances in which the photographs of Renty and Delia were taken. Fully acknowledging the continuing impact slavery has had in the United States, the law, as it currently stands, does not confer a property interest to the subject of a photograph regardless of how objectionable the photograph's origins may be. See, e.g., Brunette v. Humane Soc'y, 40 Fed. Appx. 594, 597 (9th Cir. 2002) (unpublished decision) (rejecting conversion claim even if photographic image was serious or offensive invasion of privacy). Unfortunately, this Court is constrained by current legal principles, as it is the role of the Legislature or Massachusetts Appellate Courts to determine whether or not to recognize causes of action and to provide the

redress Lanier now seeks. Accordingly, because Renty and Delia did not possess a property interest in the photographs, Lanier, likewise, does not have a possessory interest in them.

For these reasons, Harvard's motion to dismiss the property-related claims is **ALLOWED**.

C. Unauthorized Use of an Image (Count 3)

Count 3 asserts a violation of G. L. c. 214, § 3A, which states, "Any person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action . . . to prevent and restrain the use thereof; and may recover damages for any injuries sustained by . . . such use." Harvard argues that Lanier's claim fails because the right recognized in Section 3A does not survive the subject's death. The court agrees.

Nothing contained in Section 3A states that the right provided therein survives death. As Harvard notes in its memorandum, there are several states that have extended the statutory right against the unauthorized use of an image, but these states have done so expressly via statute. (See Harvard's Memorandum at 16 n.17). Moreover, those states also have never extended that right for as long a period as Lanier would require for her claim to survive (e.g., over 100 years). Additionally, although not binding precedent, it is noteworthy that the only Massachusetts case that has considered whether Section 3A applies after the subject's death held that it does not. See Hanna v. Ken's Foods, Inc., 2007 Mass. App. Unpub. LEXIS 591 at *1-*2 n.4 (Mass. App. Ct. 2007) (Rule 1:28 decision). Accordingly, Harvard's motion to dismiss Count 3 (unauthorized use of an image) is **ALLOWED**.

D. Massachusetts Civil Rights (Count 4)

Count 4 asserts a claim under the Massachusetts Civil Rights Act, which states, in pertinent part:

> "Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States . . . or of the commonwealth, has been interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief . . . including the award of compensatory money damages."

G. L. c. 12, § 11I.

In support of her claim, Lanier alleges that although slavery was abolished in Massachusetts in 1781, Harvard continued to advocate in favor of slavery from 1846 to1861, through its overseers and administrators, including Agassiz. Lanier alleges that this conduct was unlawful and unconstitutional.

Harvard moves to dismiss this claim, arguing that the claim is barred by the statute of limitations. The court agrees. Civil rights claims are governed by the general three-year statute of limitations for tort actions set forth in G. L. c. 260, § 2A. Flynn v. Associated Press, 401 Mass. 776, 782 (1988); Pagulica v. Boston, 35 Mass. App. Ct. 820, 823 (1994). Here, the alleged conduct took place in the nineteenth century, which is well beyond the three-year statute of limitations period. Therefore, the claim is time barred.

Harvard also argues that Lanier lacks standing to assert this claim on Renty's and Delia's behalf. As quoted in full above, a person can assert a civil rights claim only "in his own name and on his own behalf." Pursuant to the plain language, Lanier cannot bring this claim on behalf of Renty and Delia.

Nevertheless, in her memorandum in opposition to the motion, Lanier contends that she asserts this claim on her own behalf as well. However, upon review of the complaint, it is clear

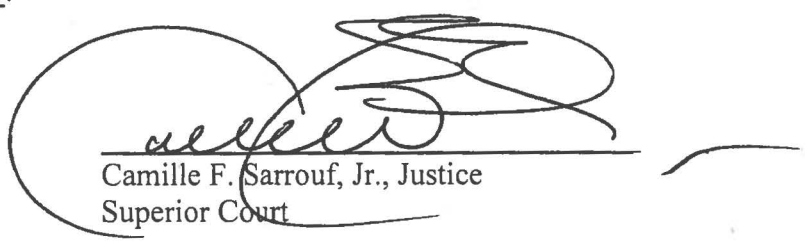
that Lanier has not asserted a claim on her own behalf, but even if she does, the claim fails because the allegations are not sufficient to state a plausible claim for relief.

To state a civil rights claim under Section 11I, which incorporates by reference G. L. c. 12, § 11H, Lanier must prove that Harvard used "threats, intimidation or coercion" to interfere with or attempt to interfere with her rights secured by the Constitution or laws of the United States or the Commonwealth of Massachusetts. Brum v. Dartmouth, 428 Mass. 684, 707 (1999). "A threat is the intentional exertion of pressure to make another fearful or apprehensive of injury or harm" (quotations and citation omitted). Mancuso v. Massachusetts Interscholastic Athletic Ass'n, Inc., 453 Mass. 116, 131 (2009). "A threat to use lawful means to reach an intended result is not actionable under [Section] 11I." Id. at 132. "Intimidation involves putting one in fear for the purpose of compelling or deterring conduct," and "[c]oercion is the application to another of force to constrain him to do against his will something he would not otherwise have done" (quotations and citations omitted). Id. at 131. Although the Massachusetts Civil Rights Act is "entitled to liberal construction of its terms," Batchelder v. Allied Stores Corp., 393 Mass. 819, 822 (1985), it is "not intended to create, nor may it be construed to establish, a 'vast constitutional tort.'" Buster v. George M. Moore, Inc., 438 Mass. 635, 645 (2003), quoting Bell v. Mazza, 394 Mass. 176, 182 (1985).

Here, even construing the allegations in the light most favorable to Lanier, the complaint fails to allege any threats, intimidation, or coercion by Harvard against Lanier, an essential element of the claim. Accordingly, Harvard's motion to dismiss Count 4 (Massachusetts Civil Rights claim) is **ALLOWED**.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Harvard's motion to dismiss the Second Amended Complaint is **ALLOWED**.



Camille F. Sarrouf, Jr., Justice
Superior Court

March 1, 2021

28

JUDGMENT ON MOTION TO DISMISS

Trial Court of Massachusetts
The Superior Court

Michael A. Sullivan, Clerk of Court
Middlesex County

DOCKET NUMBER
1981CV00784

CASE NAME
Lanier, Tamara
vs.
President and Fellows of Harvard College Also Known As Harvard Corporation et al

COURT NAME & ADDRESS
Middlesex County Superior Court - Woburn
200 Trade Center
Woburn, MA 01801

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)
President and Fellows of Harvard College Also Known As Harvard Corporation
Harvard Board of Overseers
Harvard University
The Peabody Museum of Archaeology and Ethnology

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)
Lanier, Tamara

This action came on before the Court, Camille Sarrouf, presiding, and upon review of the motion to dismiss pursuant to Mass. R.Civ.P. 12(b),

It is **ORDERED AND ADJUDGED:**

That the action be and hereby is DISMISSED

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
03/02/2021	X

Date/Time Printed: 03-02-2021 11:49:54

SCV083\ 03/2016

ALM Constitution Pt. 1, Art. I

Current through June 7, 2021.

Annotated Constitution of Massachusetts > A CONSTITUTION OR FORM OF GOVERNMENT > PART THE FIRST A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

Art. I. Equality and Natural Rights of All People.

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

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ALM Constitution Pt. 1, Art. XI

Current through June 7, 2021.

Annotated Constitution of Massachusetts > A CONSTITUTION OR FORM OF GOVERNMENT > PART THE FIRST A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

Art. XI. Remedies, by Recourse to the Law, to be Free, Complete and Prompt.

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

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Art. CVI. Art. I of Part the First Annulled and New Article Adopted.

Article I of Part the First of the Constitution is hereby annulled and the following is adopted:—

[For text of this article, see Pt. 1, Art. 1.]

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ALM GL ch. 12, § 11I

Current through Chapter 19 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH (Chs. 6 - 28A) > TITLE II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH (Chs. 6 — 28A) > Chapter 12 Department of the Attorney General and the District Attorneys (§§ 1 — 35)

§ 11*I*. Impairment of Civil Rights; Private Remedy.

Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

History

1979, 801, § 1.

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ALM GL ch. 111, § 70E

Current through Chapter 19 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts* > *PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182)* > *TITLE XVI PUBLIC HEALTH (Chs. 111 - 114)* > *TITLE XVI PUBLIC HEALTH (Chs. 111 — 114)* > *Chapter 111 Public Health (§§ 1 — 242)

§ *70E*. Patients' Rights — Health Care Facilities.

As used in this section, "facility" shall mean any hospital, institution for the care of unwed mothers, clinic, infirmary maintained in a town, convalescent or nursing home, rest home, or charitable home for the aged, licensed or subject to licensing by the department; any state hospital operated by the department; any "facility" as defined in section three of chapter one hundred and eleven B; any private, county or municipal facility, department or ward which is licensed or subject to licensing by the department of mental health pursuant to section nineteen of chapter nineteen; or by the department of developmental services pursuant to section fifteen of chapter nineteen B; any "facility" as defined in section one of chapter one hundred and twenty–three; the Soldiers Home in Holyoke, the Soldiers' Home in Massachusetts; and any facility set forth in section one of chapter nineteen or section one of chapter nineteen B.

The rights established under this section shall apply to every patient or resident in said facility. Every patient or resident shall receive written notice of the rights established herein upon admittance into such facility, except that if the patient is a member of a health maintenance organization and the facility is owned by or controlled by such organization, such notice shall be provided at the time of enrollment in such organization, and also upon admittance to said facility. In addition, such rights shall be conspicuously posted in said facility.

Every such patient or resident of said facility shall have, in addition to any other rights provided by law, the right to freedom of choice in his selection of a facility, or a physician or health service mode, except in the case of emergency medical treatment or as otherwise provided for by contract, or except in the case of a patient or resident of a facility named in section fourteen A of chapter nineteen; provided, however, that the physician, facility, or health service mode is able to accommodate the patient exercising such right of choice.

Every such patient or resident of said facility in which billing for service is applicable to such patient or resident, upon reasonable request, shall receive from a person designated by the facility an itemized bill reflecting laboratory charges, pharmaceutical charges, and third party credits and shall be allowed to examine an explanation of said bill regardless of the source of payment. This information shall also be made available to the patient's attending physician.

Every patient or resident of a facility shall have the right:

(a) upon request, to obtain from the facility in charge of his care the name and specialty, if any, of the physician or other person responsible for his care or the coordination of his care;

(b) to confidentiality of all records and communications to the extent provided by law;

(c)to have all reasonable requests responded to promptly and adequately within the capacity of the facility;

(d)upon request, to obtain an explanation as to the relationship, if any, of the facility to any other health care facility or educational institution insofar as said relationship relates to his care or treatment;

(e)to obtain from a person designated by the facility a copy of any rules or regulations of the facility which apply to his conduct as a patient or resident;

(f)upon request, to receive from a person designated by the facility any information which the facility has available relative to financial assistance and free health care;

(g)upon request, to inspect his medical records and to receive a copy thereof in accordance with section seventy, and the fee for said copy shall be determined by the rate of copying expenses, except that no fee shall be charged to any applicant, beneficiary or individual representing said applicant or beneficiary for furnishing a medical record if the record is requested for the purpose of supporting a claim or appeal under any provision of the Social Security Act or federal or state financial needs–based benefit program, and the facility shall furnish a medical record requested pursuant to a claim or appeal under any provision of the Social Security Act or any federal or state financial needs–based benefit program within thirty days of the request; provided, however, that any person for whom no fee shall be charged shall present reasonable documentation at the time of such records request that the purpose of said request is to support a claim or appeal under any provision of the Social Security Act or any federal or state financial needs–based benefit program;

(h)to refuse to be examined, observed, or treated by students or any other facility staff without jeopardizing access to psychiatric, psychological, or other medical care and attention;

(i)to refuse to serve as a research subject and to refuse any care or examination when the primary purpose is educational or informational rather than therapeutic;

(j)to privacy during medical treatment or other rendering of care within the capacity of the facility;

(k)to prompt life saving treatment in an emergency without discrimination on account of economic status or source of payment and without delaying treatment for purposes of prior discussion of the source of payment unless such delay can be imposed without material risk to his health, and this right shall also extend to those persons not already patients or residents of a facility if said facility has a certified emergency care unit;

(l)to informed consent to the extent provided by law;

(m)upon request to receive a copy of an itemized bill or other statement of charges submitted to any third party by the facility for care of the patient or resident and to have a copy of said itemized bill or statement sent to the attending physician of the patient or resident;

(n)if refused treatment because of economic status or the lack of a source of payment, to prompt and safe transfer to a facility which agrees to receive and treat such patient. Said facility refusing to treat such patient shall be responsible for: ascertaining that the patient may be safely transferred; contacting a facility willing to treat such patient; arranging the transportation; accompanying the patient with necessary and appropriate professional staff to

assist in the safety and comfort of the transfer, assure that the receiving facility assumes the necessary care promptly, and provide pertinent medical information about the patient's condition; and maintaining records of the foregoing; and

(o)if the patient is a female rape victim of childbearing age, to receive medically and factually accurate written information prepared by the commissioner of public health about emergency contraception; to be promptly offered emergency contraception; and to be provided with emergency contraception upon request.

Every patient or resident of a facility shall be provided by the physician in the facility the right:

(a)to informed consent to the extent provided by law;

(b)to privacy during medical treatment or other rendering of care within the capacity of the facility;

(c)to refuse to be examined, observed, or treated by students or any other facility staff without jeopardizing access to psychiatric, psychological or other medical care and attention;

(d)to refuse to serve as a research subject, and to refuse any care or examination when the primary purpose is educational or informational rather than therapeutic;

(e)to prompt life saving treatment in an emergency without discrimination on account of economic status or source of payment and without delaying treatment for purposes of prior discussion of source of payment unless such delay can be imposed without material risk to his health;

(f)upon request, to obtain an explanation as to the relationship, if any, of the physician to any other health care facility or educational institutions insofar as said relationship relates to his care or treatment, and such explanation shall include said physician's ownership or financial interest, if any, in the facility or other health care facilities insofar as said ownership relates to the care or treatment of said patient or resident;

(g)upon request to receive an itemized bill including third party reimbursements paid toward said bill, regardless of the sources of payment;

(h)in the case of a patient suffering from any form of breast cancer, to complete information on all alternative treatments which are medically viable.

Except in cases of emergency surgery, at least ten days before a physician operates on a patient to insert a breast implant, the physician shall inform the patient of the disadvantages and risks associated with breast implantation. The information shall include, but not be limited to, the standardized written summary provided by the department. The patient shall sign a statement provided by the department acknowledging the receipt of said standardized written summary. Nothing herein shall be construed as causing any liability of the department due to any action or omission by said department relative to the information provided pursuant to this paragraph. The department of public health shall:

(1)develop a standardized written summary, as set forth in this paragraph in layman's language that discloses side effects, warnings, and cautions for a breast implantation operation within three months of the date of enactment of this act;

(2)update as necessary the standardized written summary;

(3)distribute the standardized written summary to each hospital, clinic, and physician's office and any other facility that performs breast implants; and

(4)provide the physician inserting the breast implant with a statement to be signed by the patient acknowledging receipt of the standardized written summary.

Every maternity patient, at the time of pre–admission, shall receive complete information from an admitting hospital on its annual rate of primary caesarian sections, annual rate of repeat caesarian sections, annual rate of total caesarian sections, annual percentage of women who have had a caesarian section who have had a subsequent successful vaginal birth, annual percentage of deliveries in birthing rooms and labor–delivery–recovery or labor–delivery–recovery–postpartum rooms, annual percentage of deliveries by certified nurse–midwives, annual percentage which were continuously externally monitored only, annual percentage which were continuously internally monitored only, annual percentage which were monitored both internally and externally, annual percentages utilizing intravenous, inductions, augmentation, forceps, episiotomies, spinals, epidurals and general anesthesia, and its annual percentage of women breast–feeding upon discharge from said hospital.

Every facility shall require all persons who provide care to victims of sexual assault to be provided with medically and factually accurate written information prepared by the commissioner about emergency contraception. Every female rape victim of childbearing age who presents at a facility after a rape shall promptly be provided with medically and factually accurate written information prepared by the commissioner about emergency contraception. Facilities that provide emergency care shall promptly offer emergency contraception at the facility to each female rape victim of childbearing age, and shall initiate emergency contraception upon her request. For each facility initiating emergency contraception, the administrator, manager or other person in charge thereof shall annually report to the department of public health the number of times emergency contraception is administered to victims of rape under this section. Reports made pursuant to this section shall not identify any individual patient, shall be confidential and shall not be public records as defined by clause twenty-sixth of *section 7 of chapter 4*. The department of public health shall promulgate regulations to carry out this annual reporting requirement.

A facility shall require all persons, including students, who examine, observe or treat a patient or resident of such facility to wear an identification badge which readily discloses the first name, licensure status, if any, and staff position of the person so examining, observing or treating a patient or resident; provided, however, that for the purposes of this paragraph, the word facility shall not include a community day and residential setting licensed or operated by the department of developmental services.

Any person whose rights under this section are violated may bring, in addition to any other action allowed by law or regulation, a civil action under sections sixty B to sixty E, inclusive, of chapter two hundred and thirty–one.

No provision of this section relating to confidentiality of records shall be construed to prevent any third party reimburser from inspecting and copying, in the ordinary course of determining eligibility for or entitlement to benefits, any and all records relating to diagnosis, treatment, or other services provided to any person, including a minor or incompetent, for which coverage, benefit or reimbursement is claimed, so long as the policy or certificate under which the claim is made provides that such access to such records is permitted. No provision of this section relating

to confidentiality of records shall be construed to prevent access to any such records in connection with any peer review or utilization review procedures applied and implemented in good faith.

No provision herein shall apply to any institution operated by and for persons who rely exclusively upon treatment by spiritual means through prayer for healing, in accordance with the creed or tenets of a church or religious denomination, or patients whose religious beliefs limit the forms and qualities of treatment to which they may submit.

A resident, who requests a hearing pursuant to *section 48 of chapter 118E*, shall not be discharged or transferred from a nursing facility licensed under section 71 of this chapter, unless a referee determines that the nursing facility has provided sufficient preparation and orientation to the resident to ensure safe and orderly transfer or discharge from the facility to another safe and appropriate place.

No provision herein shall be construed as limiting any other right or remedies previously existing at law.

History

1979, 214; 1979, 720; 1983, 295; 1985, 714, § 1; 1986, 107; 1986, 599, § 30; 1987, 480, §§ 1, 2; 1989, 155; 1989, 341, § 66; *1992, 311, § 2*; *1993, 110, § 146*; *1996, 202, § 2*; *1996, 445*; *1998, 194, § 151*; *2005, 91, §§ 3, 4*; *2008, 251*; *2008, 451, § 67*.

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ALM GL ch. 214, § 1B

Current through Chapter 21 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts > PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES (Chs. 211 - 262) > TITLE I COURTS AND JUDICIAL OFFICERS (Chs. 211 - 222) > TITLE I COURTS AND JUDICIAL OFFICERS (Chs. 211 — 222) > Chapter 214 Equity Jurisdiction (§§ 1 — 18)

§ 1B. Right of Privacy; Remedy to Enforce.

A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

History

1973, 941; 1974, 193, § 1.

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§ 7. Replevin of Other Property — Goods Unlawfully Taken or Attached.

If goods exceeding twenty dollars in value are unlawfully taken or detained from the owner or person entitled to their possession, or if goods of that value, which have been attached on mesne process or taken on execution, are claimed by a person other than the defendant in the action in which they have been so attached or taken, the owner or such other person may cause them to be replevied.

History

CL 132, § 1; 1789, 26, § 4; RS 1836, 113, § 27; GS 1860, 143, § 10; PS 1882, 184, § 10; RL 1902, 190, § 8.

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ALM GL ch. 260, § 2A

Current through Chapter 19 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts > PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES (Chs. 211 - 262) > TITLE V STATUTES OF FRAUDS AND LIMITATIONS (Chs. 259 - 260) > TITLE V STATUTES OF FRAUDS AND LIMITATIONS (Chs. 259 — 260) > Chapter 260 Limitation of Actions (§§ 1 — 36)

§ 2A. Tort Actions, Contract Actions to Recover for Personal Injuries, and Replevin Actions.

Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.

History

1948, 274, § 2; 1973, 777, § 1.

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ALM GL ch. 260, § 12

Current through Chapter 19 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts > PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES (Chs. 211 - 262) > TITLE V STATUTES OF FRAUDS AND LIMITATIONS (Chs. 259 - 260) > TITLE V STATUTES OF FRAUDS AND LIMITATIONS (Chs. 259 — 260) > Chapter 260 Limitation of Actions (§§ 1 — 36)

§ 12. Tolling or Suspension — Fraudulent Concealment.

If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action.

History

RS 1836, 120, § 12; GS 1860, 155, § 12; PS 1882, 197, § 14; RL 1902, 202, § 11.

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ALM GL ch. 265, § 13A

Current through Chapter 19 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts > PART IV CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES (Chs. 263 - 280) > TITLE I CRIMES AND PUNISHMENTS (Chs. 263 - 274) > TITLE I CRIMES AND PUNISHMENTS (Chs. 263 — 274) > Chapter 265 Crimes Against the Person (§§ 1 — 60)

§ 13A. Assault and Assault and Battery.

(a) Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than 2½ years in a house of correction or by a fine of not more than $1,000.

A summons may be issued instead of a warrant for the arrest of any person upon a complaint for a violation of any provision of this subsection if in the judgment of the court or justice receiving the complaint there is reason to believe that he will appear upon a summons.

(b) Whoever commits an assault or an assault and battery:

(i) upon another and by such assault and battery causes serious bodily injury;

(ii) upon another who is pregnant at the time of such assault and battery, knowing or having reason to know that the person is pregnant; or

(iii) upon another who he knows has an outstanding temporary or permanent vacate, restraining or no contact order or judgment issued pursuant to section *18*, *section 34B* or *34C of chapter 208*, *section 32 of chapter 209*, *section 3*, *4* or *5* of chapter 209A, or *section 15* or *20 of chapter 209C*, in effect against him at the time of such assault or assault and battery; shall be punished by imprisonment in the state prison for not more than 5 years or in the house of correction for not more than 2½ years, or by a fine of not more than $5,000, or by both such fine and imprisonment.

(c) For the purposes of this section, "serious bodily injury" shall mean bodily injury that results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death.

History

1943, 259, § 1, 1945, 230; *2002, 35, § 1*.

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§ 26. Kidnapping.

Whoever, without lawful authority, forcibly or secretly confines or imprisons another person within this commonwealth against his will, or forcibly carries or sends such person out of this commonwealth, or forcibly seizes and confines or inveigles or kidnaps another person, with intent either to cause him to be secretly confined or imprisoned in this commonwealth against his will, or to cause him to be sent out of this commonwealth against his will or in any way held to service against his will, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two years. Whoever commits any offence described in this section with the intent to extort money or other valuable thing thereby shall be punished by imprisonment in the state prison for life or for any term of years.

Whoever commits any offense described in this section while armed with a firearm, rifle, shotgun, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than ten years or in the house of correction for not more than two and one–half years. The provisions of the preceding sentence shall not apply to the parent of a child under 18 years of age who takes custody of such child. Whoever commits such offense described in this section while being armed with a firearm, rifle, shotgun, machine gun or assault weapon with the intent to extort money or other valuable thing thereby shall be punished by imprisonment in the state prison for life or for any term of years but not less than 20 years.

Whoever commits any offense described in this section while armed with a dangerous weapon and inflicts serious bodily injury thereby upon another person or who sexually assaults such person shall be punished by imprisonment in the state prison for not less than 25 years. For purposes of this paragraph the term “serious bodily injury” shall mean bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ or substantial risk of death. For purposes of this paragraph, the term “sexual assault” shall mean the commission of any act set forth in sections 13B, 13B½, 13B¾, 13F, 13H, 22, 22A, 22B, 22C, 23, 23A, 23B, 24 or 24B.

Whoever, without lawful authority, forcibly or secretly confines or imprisons a child under the age of 16 within the commonwealth against his will or forcibly carries or sends such person out of the commonwealth or forcibly seizes and confines or inveigles or kidnaps a child under the age of 16 with the intent either to cause him to be secretly confined or imprisoned in the commonwealth against his will or to cause him to be sent out of the commonwealth against his will or in any way held to service against his will, shall be punished by imprisonment in the state prison for not more

than 15 years. The provisions of the preceding sentence shall not apply to the parent of a child under 16 years of age who takes custody of such child.

History

BL 94, § 10; CL 15, § 10; 1784, 72, § 10; 1787, 48, § 1; 1836, 125, § 20; 1860, 160, § 30; 1882, 202, § 30; 1901, 428; 1902, 207, § 26; 1931, 426, § 43; 1934, 1; 1971, 900; 1979, 465, § 1; *1998, 180, § 63*; *1999, 74, §§ 11, 12*; *2010, 267, § 61*.

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§ 29A. Child Pornography — Enticement, Solicitation, Employment of Children.

(a) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, and with lascivious intent, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity, for the purpose of representation or reproduction in any visual material, shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand nor more than fifty thousand dollars, or by both such fine and imprisonment.

(b) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to participate or engage in any act that depicts, describes, or represents sexual conduct for the purpose of representation or reproduction in any visual material, or to engage in any live performance involving sexual conduct, shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand nor more than fifty thousand dollars, or by both such fine and imprisonment.

(c) In a prosecution under this section, a minor shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted.

(d) For the purposes of this section, the determination whether the person in any visual material prohibited hereunder is under eighteen years of age may be made by the personal testimony of such person, by the testimony of a person who produced, processed, published, printed or manufactured such visual material that the child therein was known to him to be under eighteen years of age, or by expert medical testimony as to the age of the person based upon the person’s physical appearance, by inspection of the visual material, or by any other method authorized by any general or special law or by any applicable rule of evidence.

History

1977, 917, § 2; 1982, 364, § 2; 1982, 603, § 4; 1984, 189, § 165; 1987, 294, §§ 1, 2; 1988, 226, § 1.

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Restat 1st of Property, § 7

Restatement of the Law, Property - Official Text > Rules and Principles > Division 1- Introduction > Chapter 1- Definition of Certain General Terms

§ 7 Possessory Interests in Land

A possessory interest in land exists in a person who has

(a) a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land; or

(b) interests in the land which are substantially identical with those arising when the elements stated in Clause (a) exist.

COMMENTS & ILLUSTRATIONS

Comment:

a. Nonpossessory interests. Any interest in land other than those described in this Section is a nonpossessory interest.

Comment on Clause (a):

b. Variation in physical relation and intent. Possession of land ordinarily involves two elements. The first element is a physical relation to the land that to a certain extent is adapted to give control over the land and to exclude other persons therefrom. The exact nature of the physical relation and the degree of control necessary to constitute this element of possession vary according to the nature of the interests that may be involved in any particular situation, and facts that constitute possession for some purposes do not do so for others.

The second element is an intent to exclude other persons in general from the physical occupation of the land. This intent may exist either upon the part of the person having the physical relation to the land that is regarded as sufficient to satisfy that element of possession or upon the part of some other person occupying such a relation to the first person that the intent of the second has the same legal effect.

While possession of land ordinarily involves the two elements discussed in the preceding paragraph, there are situations in which, although either one or both of these two elements are lacking, many of the same interests exist that would exist had the two elements herein mentioned been present. The aspect of the concept of "possession" in which one or both of the elements previously referred to are lacking is referred to as "constructive possession."

The law of possession, both actual and constructive, is not treated in any one portion of this Restatement. There are many aspects of the law of real property that involve a consideration of these doctrines of constructive and actual possession. Whereever in this Restatement an examination of such questions is involved, the rules of both constructive and actual possession, so far as they relate to the topic under consideration, are stated in full.

Illustrations:

1. A owns land in fee simple absolute. A transfers the land to B for ten years. B takes possession. A has a nonpossessory and B a possessory interest in the land.

2. A, the owner of land in fee simple absolute, is disseised by B who takes possession under a claim of right. A has a nonpossessory and B has a possessory interest in the land.

3. A owns land in fee simple absolute. B obtains a judgment against A, takes out execution and levies upon the land. A has a possessory and B a nonpossessory interest in the land.

4. A owns land in fee simple absolute.

I. B is entitled to cut all trees now growing on the land. A has a possessory and B a nonpossessory interest in the land.

II. B is the owner in fee simple absolute of an adjacent piece of land to which is appurtenant an easement of way over the land owned by A. A has a possessory and B a nonpossessory interest in the land owned by A.

5. A dies, never having been in actual physical possession of a certain piece of land, but having therein complete property. B, A's heir, is unaware of both A's ownership and A's death and is not in physical occupation of the land. B has constructive possession of the land.

c. Operative fact of "possession" differentiated from "possessory interest." The operative fact of possession, important as a basis for an action of trespass on land, is defined in the Restatement of the Law of Torts, § 157. The legal relation, known as a "possessory interest" and important chiefly for its difference from the legal relation known as a future interest, is defined in this Section. These differences in approach and objective require the existing differences in the contents of the two Sections.

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Restatement of the Law, Torts § 216

Restatement of the Law, Torts > Division One- Intentional Harms to Persons, Land and Chattels > Chapter 9- Intentional Invasions of Interests in the Present and Future Possession of Chattels > Topic 1- The Interest in the Physical Condition of Chattels

§ 216, Definition of Possession of a Chattel

In the Restatement of this Subject, a person who is in "possession of a chattel" is one who

(a) has physical control of a chattel with the intent to exercise such control on his own behalf, or, otherwise than as servant, on behalf of another, or

(b) has been in physical control of a chattel with intent to exercise such control, although he is no longer in physical control, if

(i) he has not abandoned it, and

(ii) no other person has obtained possession as stated in Clause (a), or

(c) has the right as against all persons to the immediate physical control of a chattel, if no other person is in possession as stated in Clauses (a) and (b).

COMMENTS & ILLUSTRATIONS

Comment:

a. The word "possession" as used in the Restatement of this Subject states a legal concept. The phrase "physical control" may mean the manual custody of, or the present physical ability immediately to deal with it if no one else is in physical control.

Comment on Clause (a):

b. One who has the physical control of a chattel with intent to exercise such control either on his own behalf or, otherwise than as servant, on behalf of another is in possession of a chattel. Thus, an agent may have possession of a chattel for his master, and a bailee at will may have possession on behalf of his bailor. A servant, however, has only the custody of a chattel and does not have possession of it either on his own behalf or on behalf of his master. Comment on Clause (b):

c. One who has been but who no longer is in physical control of a chattel with the intention described in Clause (a), if he has not abandoned it, continues to have the possession of it so long as no other person obtains possession by acquiring physical control over the chattel with the intention of exercising such control on his own behalf or on behalf of another. What constitutes an abandonment is not within the scope of the Restatement of this Subject to state.

Illustration:

1. A drives his automobile to his office and parks it on the street for the day. The automobile is in A's possession.

Comment on Clause (c):

d. One who has the right, as against all persons, to the immediate physical control of a chattel has the possession of it, if no other person has physical control over it. Even though another has physical

control, the person with the right thereto has the possession of a chattel if the one with manual custody or control does not have the intention described in Clause (a).

Illustrations:

2. A's mare, being with foal, escapes from A's field. While the mare is wandering on the highway, the colt is born. At the moment of the colt's birth, A has possession of it.

3. A's chauffeur drives him to his office and remains in the car to wait for A. During his absence from the car, A is in possession thereof.

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Restat 2d of Torts, § 1

Restatement of the Law, Torts 2d - Official Text > Division 1- Intentional Harms to Persons, Land, and Chattels > Chapter 1- Meaning of Terms Used Throughout the Restatement of Torts

§ 1 Interest

The word "interest" is used throughout the Restatement of this Subject to denote the object of any human desire.

COMMENTS & ILLUSTRATIONS

Comment:

a. As defined in this Section, the word "interest" is used to denote anything which is the object of human desire. It carries no implication that the interest is or is not given legal protection, that is, that the realization of the desire is regarded as of sufficient social importance to lead the law to protect the interest by imposing liability on those who thwart its realization. Thus emotional tranquillity, for which the great mass of mankind feels a keen desire, is as much an "interest," as "interest" is defined in this Section, as is the interest in the possession of land or the security of one's person. While these are all "interests," they differ in that the former is given relatively little protection, while the common law from its very beginning has given the fullest protection to these latter interests.

The object of desire must be distinguished from the thing in respect to which the desire is entertained. Thus, everyone desires that his body shall be free from material harm. The object of this desire is the security of the body and not the body itself. The body, the security of which is desired, is the subject of the desire and not its object.

b. "Interest" as distinguished from "right." In so far as an "interest," as defined in this Section, is protected against any form of invasion, the interest becomes the subject matter of a "right" that either all the world or certain persons or classes of its inhabitants shall refrain from the conduct against which the interest is protected, or shall do such things as are required for its protection.

c. "Interest" and "desire." Society may regard a particular desire as improper and may, therefore, by common law or by statute impose criminal responsibility or civil liability upon an effort to satisfy the desire by realizing its object. On the other hand, society may recognize the desire as so far legitimate as to make criminally punishable or civilly liable those who defeat its realization. Between these two extremes there are two other types of desire: (1) those which are recognized as so far legitimate that one who acts for the purpose of satisfying them is protected from criminal responsibility or civil liability which would otherwise attach to his conduct, but which are not recognized as so important as to make the interference with their realization a criminal offense or a civil wrong; (2) those as to which the law stands completely neutral, neither protecting the interest nor recognizing it as creating a privilege to satisfy it without liability, nor on the other hand, imposing criminal responsibility or civil liability upon one who seeks to gratify the desire of which the interest is the object.

d. Legally protected interests. If society recognizes a desire as so far legitimate as to make one who interferes with its realization civilly liable, the interest is given legal protection, generally against all the world, so that everyone is under a duty not to invade the interest by interfering with the realization of the desire by certain forms of conduct. Thus the interest in bodily security is protected against not only intentional invasion but against negligent invasion or invasion by the mischances inseparable

from an abnormally dangerous activity. Every man has a right, as against every other, not to have his interest in bodily security invaded in any of these manners. On the other hand, the interest in freedom from merely offensive bodily contacts is protected only against acts done with the intention stated as necessary in that part of the Restatement which deals with liability for such contacts. (See § 18.) Therefore, there is a right to freedom from only such contacts as are so caused, and there is no duty other than a duty not to cause offensive touchings by acts done with the intention there described.

e. Rationale. The entire history of the development of tort law shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all. Naturally, this tendency is not uniform in every common law jurisdiction. The interest of a wife in the consortium of her husband was not recognized at common law as worthy of protection even against acts intended to deprive the wife of such consortium. On the other hand, this interest was protected against intentional invasion in Ohio during the latter part of the last century, and within a few years thereafter substantially every American jurisdiction joined in so protecting it. In several recent decisions this interest has even been given protection against negligent conduct.

It is altogether unlikely that this tendency to give protection to hitherto unprotected interests and to extend a greater protection to those now infrequently protected has ceased. In the Restatement of Torts the word "interest" as defined in this Section readily lends itself to an analysis of tort liability which indicates the extent to which the law at present protects the realization of the desires of human beings. Because of the probability that the tendency to give legal protection to interests now unprotected and to increase the protection given to those now imperfectly protected will continue, the Restatement of this Subject contains numerous "Caveats." These call attention to the fact that the Institute takes no position as to whether the protection given to a particular interest by the rule stated in the Section to which the Caveat applies should or should not be extended to other analogous situations which have not been the subject of judicial consideration.

f. The word "interest" is used in the various Restatements in two senses: the one the sense here defined, the other denoting the beneficial side of legal relations, both generically to include the aggregate of "rights," "powers," "privileges," and "immunities," and distributively to mean any one of them. There is this fundamental difference between the two usages. As the word "interest" is used in this Restatement, it carries no implication as to whether it is legally recognized or not. When used in the second sense, the word "interest" denotes advantages which are legally recognized as incident to the possession or ownership of property and the like. Indeed "rights," "powers," "privileges," and "immunities" are not only recognized but created by law. For the reasons given in Comment *e*, it is necessary in restating the law of Torts to use the word "interest" in the sense here defined. In the Restatement of other Subjects, it is more convenient to use the word "interest" in the latter of the two senses. Occasionally it is necessary in the Restatement of this Subject to use the word "interest" in the sense of an aggregate of rights, powers, privileges, and immunities or any one of them. When the word is used in this sense, it is preceded by the adjective "legal" or the adjective "proprietary." (See §§ 160 and 161.) The adjective "proprietary" is not used unless it is desired to emphasize the fact that the person having the "interest" is a person commonly spoken of as owner of the thing in relation to which the interest exists.

The word "interest" is also used to indicate the rate of return on a loan of money, the context always indicating clearly this use.

Cross Reference

ALR Annotations:

Wife's right of action for loss of consortium. *23 A.L.R.2d 1378.*

Husband's right to damages for loss of consortium due to injury to wife. 21 A.L.R. 1517, s. 133 A.L.R. 1156.

Husband's recovery for loss of medical, earnings or impairment of earning capacity due to wife's personal injury. 66 A.L.R. 1189; 151 A.L.R. 479.

Protection of right of privacy. 138 A.L.R. 22, s. 168 A.L.R. 446, 14 A.L.R.2d 751.

Digest System Key Numbers:

Torts 3

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§ 284 Negligent Conduct; Act or Failure to Act

Negligent conduct may be either:

(a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or

(b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

COMMENTS & ILLUSTRATIONS

Comment on Clause (a):

a. The actor, as a reasonable man, should realize that his act involves an unreasonable risk of causing an invasion of an interest of another, if a reasonable man knowing so much of the circumstances surrounding the actor at the time of his act as the actor knows or should know, would realize the existence of the risk and its unreasonable character. The conditions under which the actor should realize the existence and extent of the risk involved in his conduct are stated in §§ 289 and 290. The considerations which determine whether such a risk is unreasonable are stated in §§ 291-293.

b. If the actor is a child of tender years, his conduct is not required to conform to the standard of a "reasonable man." Such a child is not guilty of negligence, unless the risk and its unreasonable character are recognizable by a child of his age, intelligence, and experience. (See § 283 A.) As to the negligence of an insane or mentally deficient person, see § 283 B.

Comment on Clause (b):

c. The conditions which create a duty of positive action for the protection or assistance of another are stated in §§ 314-324 A.

Cross Reference

Digest System Key Numbers:

Negligence 1 et seq.

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§ 299A Undertaking in Profession or Trade

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

COMMENTS & ILLUSTRATIONS

Comment:

a. Skill, as the word is used in this Section, is something more than the mere minimum competence required of any person who does an act, under the rule stated in § 299. It is that special form of competence which is not part of the ordinary equipment of the reasonable man, but which is the result of acquired learning, and aptitude developed by special training and experience. All professions, and most trades, are necessarily skilled, and the word is used to refer to the special competence which they require.

b. Profession or trade. This Section is thus a special application of the rule stated in § 299. It applies to any person who undertakes to render services to another in the practice of a profession, such as that of physician or surgeon, dentist, pharmacist, oculist, attorney, accountant, or engineer. It applies also to any person who undertakes to render services to others in the practice of a skilled trade, such as that of airplane pilot, precision machinist, electrician, carpenter, blacksmith, or plumber. This Section states the minimum skill and knowledge which the actor undertakes to exercise, and therefore to have. If he has in fact greater skill than that common to the profession or trade, he is required to exercise that skill, as stated in § 299, Comment *e*.

c. Undertaking. In the ordinary case, the undertaking of one who renders services in the practice of a profession or trade is a matter of contract between the parties, and the terms of the undertaking are either stated expressly, or implied as a matter of understanding. The rule here stated does not, however, depend upon the existence of an enforceable contract between the parties. It applies equally where professional services are rendered gratuitously, as in the case of a physician treating a charity patient, or without any definite understanding, as in the case of one who renders services to a patient who is unconscious, in an emergency. The basis of the rule is the undertaking of the defendant, which may arise apart from contract.

This undertaking is not necessarily a matter of the requirements of the particular task undertaken, although that task will of course have its bearing upon what is understood. A highly skilled individual, as for example, a certified public accountant, may undertake to perform services which normally require little skill, as for example to do ordinary bookkeeping, and in performing those services he may, or may not, undertake to exercise his unusually high skill. On the other hand a bookkeeper with little or no accounting skill may undertake to do work which would normally call for a certified public accountant, and he may, or may not, undertake in doing it to exercise the skill of

such an accountant. It is a matter of the skill which he represents himself to have, or is understood to undertake to have, rather than of the skill which he actually possesses, or which the task requires.

d. Special representation. An actor undertaking to render services may represent that he has superior skill or knowledge, beyond that common to his profession or trade. In that event he incurs an obligation to the person to whom he makes such a representation, to have, and to exercise, the skill and knowledge which he represents himself to have. Thus a physician who holds himself out as a specialist in certain types of practice is required to have the skill and knowledge common to other specialists. On the other hand the actor may make it clear that he has less than the minimum of skill common to the profession or trade; and in that case he is required to exercise only the skill which he represents that he has. Thus a layman who attempts to perform a surgical operation in an emergency, in the absence of any surgeon, and who makes it clear that he does not have the skill or knowledge of a surgeon, is not required to exercise such skill or knowledge. The rule stated in this Section applies only where there is no such special representation.

e. Standard normally required. In the absence of any such special representation, the standard of skill and knowledge required of the actor who practices a profession or trade is that which is commonly possessed by members of that profession or trade in good standing. It is not that of the most highly skilled, nor is it that of the average member of the profession or trade, since those who have less than median or average skill may still be competent and qualified. Half of the physicians of America do not automatically become negligent in practicing medicine at all, merely because their skill is less than the professional average. On the other hand, the standard is not that of the charlatan, the quack, the unqualified or incompetent individual who has succeeded in entering the profession or trade. It is that common to those who are recognized in the profession or trade itself as qualified, and competent to engage in it.

f. Schools of thought. Where there are different schools of thought in a profession, or different methods are followed by different groups engaged in a trade, the actor is to be judged by the professional standards of the group to which he belongs. The law cannot undertake to decide technical questions of proper practice over which experts reasonably disagree, or to declare that those who do not accept particular controversial doctrines are necessarily negligent in failing to do so. There may be, however, minimum requirements of skill applicable to all persons, of whatever school of thought, who engage in any profession or trade. Thus any person who holds himself out as competent to treat human ailments must have a minimum skill in diagnosis, and a minimum knowledge of possible methods of treatment. Licensing statutes, or those requiring a basic knowledge of science for the practice of a profession, may provide such a minimum standard.

g. Type of community. Allowance must be made also for the type of community in which the actor carries on his practice. A country doctor cannot be expected to have the equipment, facilities, experience, knowledge or opportunity to obtain it, afforded him by a large city. The standard is not, however, that of the particular locality. If there are only three physicians in a small town, and all three are highly incompetent, they cannot be permitted to set a standard of utter inferiority for a fourth who comes to town. The standard is rather that of persons engaged in similar practice in similar localities, considering geographical location, size, and the character of the community in general.

Such allowance for the type of community is most frequently made in professions or trades where there is a considerable degree of variation in the skill and knowledge possessed by those practicing it in different localities. It has commonly been made in the cases of physicians or surgeons, because of the difference in the medical skill commonly found in different parts of the United States, or in different types of communities. In other professions, such as that of the attorney, such variations

either do not exist or are not as significant, and allowance for them has seldom been made. A particular profession may be so uniform, in different localities, as to the skill and knowledge of its members, that the court will not feel required to instruct the jury that it must make such allowance.

REPORTER'S NOTES

This Section has been added to the first Restatement.

Comment b: In addition to physicians and surgeons, the rule stated has been applied to other professions. *United Dentists v. Bryan, 158 Va. 880, 164 S.E. 554 (1932),* dentist; *McCullough v. Sullivan, 102 N.J.L. 381, 132 A. 102, 43 A.L.R. 928, 25 N.C.C.A. 834 (1926),* attorney; *Humboldt Bldg. Ass'n v. Ducker's Ex'r, 111 Ky. 759, 64 S.W. 671 (1901),* same; *Citizens Loan Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075, 7 L.R.A. 669, 18 Am. St. Rep. 320 (1890),* same; *Cowles v. City of Minneapolis, 128 Minn. 452, 151 N.W. 184 (1915),* engineer; *Louisville & N. R. Co. v. Perry's Adm'r, 173 Ky. 213, 190 S.W. 1064 (1917),* engineer; *Smith v. London Assur. Corp., 109 App. Div. 882, 96 N.Y. Supp. 820 (1905),* accountant; *L.B. Laboratories v. Mitchell, 39 Cal. 2d 56, 244 P.2d 385 (1952),* same; *City of East Grand Forks v. Steele, 121 Minn. 296, 141 N.W. 181, 45 L.R.A. N.S. 205,* Ann. Cas. 1914C 720 (1913), same; *Stern v Lanng, 106 La. 738, 31 So. 303 (1901),* oculist; *Kahn v. Shaw, 65 Ga. App. 563, 16 S.E.2d 99 (1941),* optometrist; *Allan v. State S. S. Co., 132 N.Y. 91, 30 N.E. 482, 15 L.R.A. 166, 28 Am. St. Rep. 556 (1892),* pharmacist; *Ballance v. Dunnington, 241 Mich. 383, 217 N.W. 329,* 57 A.L.R. 262 (1928), X-ray operator; *The Tom Lysle, 48 F. 690 (D. Pa. 1892),* pilot; *Lane v. Calvert, 215 Md. 457, 138 A.2d 902 (1958),* dentist; *Hurley v. Johnston, 143 Conn. 364, 122 A. 2d 732 (1956),* same; *Wintersteen v. Semler, 197 Or. 601, 250 P.2d 420, 255 P.2d 138 (1952),* same; *Hammer v. Rosen, 7 N.Y.2d 376, 198 N.Y.S.2d 65, 165 N.E.2d 756 (1960),* psychiatrist; *Ward v. Arnold, 52 Wash. 2d 581, 328 P.2d 164 (1958),* attorney; *Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144, 45 A.L.R.2d 1 (1954),* same.

Also to skilled trades: *Jackson v. Central Torpedo Co., 117 Okla. 245, 246 P. 426,* 46 A.L.R. 338 (1926), shooting oil well; *Van Nortwick v. Holbine, 62 Neb. 147, 86 N.W. 1057 (1901),* thresher; *Louis Pizitz Dry Goods Co. v. Waldrop, 237 Ala. 208, 186 So. 151 (1939),* restaurant; *Milliken v. Woodward, 64 N.J.L. 444, 45 A. 796 (1900),* insurance agent.

Comment d: As to those holding themselves out as specialists, see *Adkins v. Ropp, 105 Ind. App. 331, 14 N.E.2d 727 (1938); Rayburn v. Day, 126 Or. 135, 268 P. 1002,* 59 A.L.R. 1062 (1928); *Rann v. Twitchell, 82 Vt. 79, 71 A. 1045, 20 L.R.A. N.S. 1030 (1909); Atkins v. Clein, 3 Wash. 2d 168, 100 P.2d 1, 104 P.2d 489 (1940); Worster v. Caylor, 231 Ind. 625, 110 N.E.2d 337 (1953); Rule v. Cheeseman, 181 Kan. 957, 317 P. 2d 472 (1957); Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953).* As to those representing that they have less than the standard skill or knowledge, see *Higgins v. McCabe, 126 Mass. 13, 30 Am. Rep. 642 (1878),* midwife; *Spead v. Tomlinson, 73 N.H. 46, 59 A. 376, 68 L.R.A. 432 (1904); Cummins v. Donley, 173 Kan. 463, 249 P.2d 695 (1952),* osteopath; *Josselyn v. Dearborn, 143 Me. 328, 62 A.2d 174 (1948),* same.

Comment e: The rule stated is supported by *Butler v. Rule, 29 Ariz. 405, 242 P. 436 (1926); Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654 (1918); Ries v. Reinard, 47 Cal. App. 2d 116, 117 P.2d 386 (1941); Lake v. Baccus, 59 Ga. App. 656, 2 S.E.2d 121 (1939); Howell v. Jackson, 65 Ga. App. 422, 16 S.E. 2d 45 (1941); Holtzman v. Hoy, 118 Ill. 534, 8 N.E. 832, 59 Am. Rep. 390 (1886);* Comeaux v. Miles, 9 La. App. 66, 118 So. 786 (1928); *Johnson v. Colp, 211 Minn. 245, 300 N.W. 791 (1941); Dunn v. Beck, 80 Mont. 414, 260 P. 1047 (1927); Buckner v. Wheeldon, 225 N.C. 62, 33 S.E.2d 480 (1945).*

Comment f: As to schools of medical thought, see *Force v. Gregory, 63 Conn. 167, 27 A. 1116, 22 L.R.A. 343, 38 Am. St. Rep. 371 (1893),* homeopath; *Nelson v. Dahl, 174 Minn. 574, 219 N.W. 941 (1928),* chiropractor; *Willett v. Rowekamp, 134 Ohio St. 285, 12 Ohio Op. 91, 16 N.E.2d 457 (1938),* same; *Atkinson v. American School of Osteopathy, 240 Mo. 338, 144 S.W. 816 (1912),* osteopath; *Hilgedorf v. Bertschinger, 132 Or. 641, 285 P. 819 (1930),* naturopath.

As to minimum basic standards of diagnosis and treatment, see *Whipple v. Grandchamp, 261 Mass. 40, 158 N.E. 270,* 57 A.L.R. 974 (1927), licensing statute; *Hardy v. Dahl, 210 N.C. 530, 187 S.E. 788 (1936); Spead v. Tomlinson, 73 N.H. 46, 59 A. 376, 68 L.R.A. 432 (1904); Monahan v. Devinny, 223 App. Div. 547, 249 N.Y. Supp. 60 (1928); Harris v. Graham, 124 Okla. 196, 255 P. 710 (1926); Kelly v. Carroll, 36 Wash. 2d 482, 219 P.2d 79, 19 A.L.R.2d 1174 (1950),* certiorari denied, *340 U.S. 892, 71 S. Ct. 208, 95 L. Ed. 646; Treptau v. Behrens Spa, Inc., 247 Wis. 438, 20 N.W.2d 108, 19 N.C.C.A. N.S. 1 (1945); Dowell v. Mossberg, 226 Or. 173, 355 P.2d 624, 359 P.2d 541 (1960).*

Comment g: The rule stated is supported by *Weintraub v. Rosen, 93 F.2d 544 (7 Cir. 1937); Sinz v. Owens, 33 Cal. 2d 749, 205 P.2d 3, 8 A.L.R.2d 757 (1949); Geraty v. Kaufman, 115 Conn. 563, 162 A. 33 (1932); McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950); Michael v. Roberts, 91 N.H. 499, 23 A.2d 361 (1941); Nation v. Gueffroy, 172 Or. 673, 142 P.2d 688, 144 P.2d 296 (1943); Hoover v. Goss, 2 Wash. 2d 237, 97 P.2d 689 (1940); Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183,* 132 A.L.R. 379 (1940); *Montgomery v. Stary, 84 So. 2d 34 (Fla. 1955); Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953); Hodgson v. Bigelow, 335 Pa. 497, 7 A.2d 338 (1939).*

Cross Reference

ALR Annotations:

Standard of skill and care required of medical or surgical specialist. 59 A.L.R. 1071.

Liability of physician for injury to esophagus or other internal organs occurring in course of gastroscopic examination. *88 A.L.R.2d 297.*

Physician's duty to inform patient of nature and hazards of disease or treatment. *79 A.L.R.2d 1028.*

Duty to advise patient of the possibility or probability of better results from treatment by specialist or by a mode of treatment which he is not qualified to give. 132 A.L.R. 392.

Malpractice of physician or surgeon:

-- diagnosis and treatment of fractures or dislocations. *54 A.L.R.2d 200.*

-- diagnosis and treatment of brain injuries, diseases, or conditions. *29 A.L.R.2d 501.*

-- diagnosis and treatment of male urinary tract and related organs. *88 A.L.R.2d 309.*

-- diagnosis or treatment of tuberculosis. *75 A.L.R.2d 814.*

-- treatment and surgery of the ear. *76 A.L.R.2d 783.*

-- leaving sponge or other foreign matter in incision. 65 A.L.R. 1023.

-- treatment and surgery of eye. *68 A.L.R.2d 426.*

-- nose and throat treatment and surgery. *58 A.L.R.2d 216.*

-- pregnancy and childbirth cases. 141 A.L.R. 111.

-- treatment of skin disease, disorder, blemish, or scar. *45 A.L.R.2d 1271.*

-- administering medicine to which patient is unusually susceptible or allergic. *64 A.L.R.2d 1281.*

Liability of physician for permitting exposure to infectious or contagious disease. 5 A.L.R. 926.

Liability of physician who abandons case. *57 A.L.R.2d 432.*

Liability of physician for lack of diligence in attending patient. *57 A.L.R.2d 379.*

Liability for injury or death from blood transfusion. *59 A.L.R.2d 768.*

Liability for injury by X-ray. *41 A.L.R.2d 329.*

Duty and liability of anesthetist. *53 A.L.R.2d 142.*

Liability of dentist to patient. *83 A.L.R.2d 7.*

Liability of drugless practitioner or healer for malpractice. *19 A.L.R. 2d 1188.*

Liability for results of medical or surgical treatment by one not licensed as required by law. 44 A.L.R. 1418, 57 A.L.R. 978.

Nurse's liability for her own negligence or malpractice. *51 A.L.R.2d 970.*

Veterinarian's liability for malpractice. *38 A.L.R.2d 503.*

Attorney's liability for negligence in preparing or conducting litigation. *45 A.L.R.2d 5.*

Attorney's liability for mistake or error in drafting contract, will, or the like. 43 A.L.R. 932.

Architect's liability for personal injury or death from improper plans or design. *59 A.L.R.2d 1081.*

Architect's responsibility for defects or insufficiency of work attributable to plans. *25 A.L.R.2d 1085.*

Liability of barber, beauty shop or specialist, barber college, or school of beauty culture, for injury to patron. *14 A.L.R.2d 860.*

Liability of proprietor of reducing salon, gymnasium, or other physical fitness institution for injury to patron. *88 A.L.R.2d 1112.*

Competency of physician or surgeon from one community to testify as to standard of care required of defendant practicing in another community. *8 A.L.R.2d 772.*

Digest System Key Numbers:

Negligence 1 et seq.

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Restat 2d of Torts, § 302

Restatement of the Law, Torts 2d - Official Text > Division 2- Negligence > Chapter 12- General Principles > Topic 4- Types of Negligent Acts

§ 302 Risk of Direct or Indirect Harm

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

(a) the continuous operation of a force started or continued by the act or omission, or

(b) the foreseeable action of the other, a third person, an animal, or a force of nature.

COMMENTS & ILLUSTRATIONS

Comment:

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

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

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

Illustrations:

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

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

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

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

Illustration:

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

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

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

Illustration:

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

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

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

Illustration:

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

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

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

REPORTER'S NOTES

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

Cross Reference

Digest System Key Numbers:

Negligence 56(1) et seq.

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§ 302B Risk of Intentional or Criminal Conduct

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

COMMENTS & ILLUSTRATIONS

Comment:

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

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

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

Illustration:

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

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

Illustration:

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

e. There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise

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

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

Illustration:

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

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

Illustrations:

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

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

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

Illustrations:

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

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

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

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

Illustrations:

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

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

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

Illustration:

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

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

Illustration:

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

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

Illustrations:

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

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

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

Illustration:

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

f. It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence (see §§ 291-293), it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered

are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it.

Illustration:

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

REPORTER'S NOTES

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

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

Illustration 2 is based on *Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954).* In accord are *Curtis v. Jacobson, 142 Me. 351, 54 A.2d 520 (1947); Lustbader v Traders Delivery Co., 193 Md. 433, 67 A.2d 237 (1949); Roberts v. Lundy, 301 Mich. 726, 4 N.W.2d 74 (1942); Gower v. Lamb, 282 S.W.2d 867 (Mo. App 1955); Saracco v. Lyttle, 11 N.J. Super. 254, 78 A.2d 288 (1951); Castay v. Katz & Besthoff, 148 So. 76 (La. App. 1933); Walter v. Bond, 267 App. Div. 779, 45 N.Y.S.2d 378 (1943),* affirmed, *292 N.Y. 574, 54 N.E.2d 691 (1944); Wagner v. Arthur, 11 Ohio Op. 2d 403, 73 Ohio L. Abs. 16, 134 N.E.2d 409 (Ohio C.P. 1956); Rapczynski v. W. T. Cowan, Inc., 138 Pa. Super. 392, 10 A.2d 810 (1940); Teague v Pritchard, 38 Tenn. App. 686, 279 S.W.2d 706 (1955).* Contra, *Schaff v. R. W. Claxton, Inc., 79 App. D.C. 207, 144 F.2d 532 (1944).* See Notes, 1951 Wis. L. Rev. 740; 24 Tenn. L. Rev. 395 (1956); 43 Calif. L. Rev. 140 (1955); 21 Mo. L. Rev. 197 (1956).

Special circumstances may impose the duty. Compare Illustration 14.

Illustration 3: Compare *Silverblatt v. Brooklyn Tel. & Messenger Co., 73 Misc. 38, 132 N.Y. Supp. 253 (1911),* reversed, *150 App. Div. 268, 134 N.Y.Supp. 765.*

Illustration 4 is based on *McFadden v. Bancroft Hotel Corp., 313 Mass. 56, 46 N.E.2d 573 (1943).* See also *Hillman v. Georgia R.R. & Banking Co. 126 Ga. 814, 56 S.E. 68, 8 Ann. Cas. 222 (1906); Quigley v. Wilson Line, Inc., 338 Mass. 125, 154 N.E.2d 77, 77 A.L.R.2d 499 (1958); Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326 (5 Cir. 1959); Jones v. Yellow Cab & Baggage Co., 176 Kan. 558, 271 P.2d 249 (1954); Dickson v. Waldron, 135 Ind. 507, 34 N.E. 506, 35 N.E. 1, 24 L.R.A. 483, 41 Am. St. Rep. 440 (1893); Mastad v. Swedish Brethren, 83 Minn. 40, 85 N.W. 913, 53 L.R.A. 803, 85 Am. St. Rep. 446 (1901); Liljegren v. United Railways of St. Louis, 227 S.W. 925 (Mo. App. 1921);*

Peck v. Gerber, 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996 (1936); *Sinn v. Farmers Deposit Savings Bank, 300 Pa. 85, 150 A. 163 (1930).*

Compare, as to premises held open to the public: *Stotzheim v. Dios, 256 Minn. 316, 98 N.W.2d 129 (1959); Wallace v. Der-Ohanian, 199 Cal. App. 2d 141, 18 Cal. Rptr. 892 (1962); Grasso v. Blue Bell Waffle Shop, Inc., 164 A.2d 475* (D.C. Munic. Ct. App.) (1960); *Corcoran v. McNeal, 400 Pa. 14, 161 A.2d 367 (1960).* See Note, 9 Vand. L. Rev. 106 (1955).

Illustration 6 is taken from *Garceau v. Engel, 169 Minn. 62, 210 N.W. 608 (1926).* Cf. *Southwestern Bell Tel. Co. v. Adams, 199 Ark. 254, 133 S.W.2d 867 (1939); Jesse French Piano & Organ Co. v. Phelps, 47 Tex. Civ. App. 385, 105 S.W. 225 (1907).* Apparently contra are *Andrews v. Kinsel, 114 Ga 390, 40 S.E. 300, 88 Am. St. Rep. 25 (1901); Bresnahan v. Hicks, 260 Mich. 32, 244 N.W. 218,* 84 A.L.R. 390 (1932).

Illustration 7 is taken from *Brower v. New York Central & H. R. R. Co., 91 N.J.L. 190, 103 A. 166,* 1 A.L.R. 734 (1918). See also *Filson v. Pacific Express Co., 84 Kan. 614, 114 P. 863 (1911); Morse v. Homer's, Inc., 295 Mass. 606, 4 N.E.2d 625 (1936); White-head v. Stringer, 106 Wash. 501, 180 P. 486,* 5 A.L.R. 358 (1919); *National Ben Franklin Ins. Co. v. Careccta, 21 Misc. 2d 279, 193 N.Y.S.2d 904 (1959).*

Illustration 8 is taken from Marshall v. Caledonian Ry., [1899] 1 Fraser 1060.

Illustration 9 is taken from *Hall v. Smathers, 240 N.Y. 486, 148 N.E. 654 (1925).* See also *Kendall v. Gore Properties, 98 App. D.C. 378, 236 F.2d 673 (1956);* Note, 42 Va. L. Rev. 842 (1956); *Hipp v. Hospital Authority of City of Marietta, 104 Ga. App. 174, 121 S.E.2d 273 (1961); Georgia Bowling Enterprises, Inc. v. Robbins, 103 Ga. App. 286, 119 S.E.2d 52(1961).* Cf. De la Bere v. Pearson, Ltd., [1908] 1 K.B. 483, affirmed, [1908] 1 K.B. 280 (C.A.).

Illustration 10 is taken from *Hines v. Garrett, 131 Va. 125, 108 S.E. 690 (1921).* See also *Neering v. Illinois Central R. Co., 383 Ill. 366, 50 N.E.2d 497, 14 N.C.C.A. N.S. 621 (1943); McLeod v. Grant County School District, 42 Wash. 2d 316, 255 P.2d 360 (1953).*

Illustration 11 is based on *Dixon v. Bell, 5 M. & S. 198, 105 Eng. Rep. 1023 (1816); Binford v. Johnston, 82 Ind. 426, 42 Am. Rep. 508 (1882); Meers v. McDowell, 110 Ky. 926, 62 S.W. 1013, 53 L.R.A. 789, 96 Am. St. Rep. 475 (1901); Carter v. Towne, 98 Mass. 567, 96 Am. Dec. 682 (1868).*

Illustration 12 is taken from *Austin W. Jones Co. v. State, 122 Me. 214, 119 A. 577 (1923).* In accord are *Missouri, K. & T.R. Co. v. Wood, 95 Tex. 223, 66 S.W. 449, 56 L.R.A. 592, 93 Am. St. Rep. 834 (1902),* smallpox patient; *Finkel v. State, 37 Misc. 2d 757, 237 N.Y.S.2d 66 (1962).*

Illustration 14 was suggested by *Glassey v. Worcester Consol. St. R. Co., 185 Mass. 315, 70 N.E. 199 (1904),* where, however, the meddling was not on Halloween, and it was held there was no liability. In accord with the Illustration are, however, *Richardson v. Ham, 44 Cal. 2d 772, 285 P.2d 269 (1955); Zuber v. Clarkson Const. Co., 363 Mo. 352, 251 S.W. 2d 52 (1952).*

Illustration 15 is taken from *International & G.N. R. Co. v. Johnson, 23 Tex. Civ. App. 160, 203, 55 S.W. 772 (1900).* See also *St. Louis S. F. R. Co. v. Mills, 3 F.2d 882 (5 Cir. 1924),* reversed, *271 U.S. 344, 46 S. Ct. 520, 70 L. Ed. 979; Green v. Atlanta & C. A. L. R. Co., 131 S.C. 124, 126 S.E. 441,* 38 A.L.R. 1448 (1925); *Harpell v. Public Service Coordinated Transport, 35 N.J. Super. 354, 114 A.2d 295 (1955),* affirmed, *20 N.J. 309, 120 A.2d 43.*

Illustration 16 is taken from *Williams v. State, 308 N.Y. 548, 127 N.E.2d 545 (1955).*

Cross Reference

ALR Annotations:

Liability of carrier to passenger for assault by third person. *77 A.L.R. 2d 504.*

Liability for furnishing or leaving gun accessible to child for injury inflicted by child. *68 A.L.R.2d 782.*

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Restat 2d of Torts, § 314A

Restatement of the Law, Torts 2d - Official Text > Division 2- Negligence > Chapter 12- General Principles > Topic 7- Duties of Affirmative Action

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

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

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

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

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

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

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

Caveat:

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

COMMENTS & ILLUSTRATIONS

Comment:

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

b. This Section states exceptions to the general rule, stated in § 314, that the fact that the actor realizes or should realize that his action is necessary for the aid or protection of another does not in itself impose upon him any duty to act. The duties stated in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. There may be other such relations, as for example that of husband and wife, where the duty is recognized by the criminal law, but there have as yet been no decisions allowing recovery in tort in jurisdictions where negligence actions between husband and wife for personal injuries are permitted. The question is therefore left open by the Caveat, preceding Comment *a* above. The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.

c. The rules stated in this Section apply only where the relation exists between the parties, and the risk of harm, or of further harm, arises in the course of that relation. A carrier is under no duty to one who

has left the vehicle and ceased to be a passenger, nor is an innkeeper under a duty to a guest who is injured or endangered while he is away from the premises. Nor is a possessor of land under any such duty to one who has ceased to be an invitee.

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

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

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

Illustrations:

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

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

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

4. A, a child six years old, accompanies his mother, who is shopping in B's department store. Without any fault on the part of B, A runs and falls, and gets his fingers caught in the mechanism of thestore escalator. B's employees see what has occurred, but unreasonably delay in shutting off the escalator. As a result, A's injuries are aggravated in a manner which would have been avoided if the

escalator had been shut off with reasonable promptness. B is subject to liability to A for the aggravation of his injuries.

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

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

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

REPORTER'S NOTES

This Section has been added to the first Restatement.

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

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

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

Illustration 3 is based on *Dove v. Lowden, 47 F. Supp. 546 (W.D.Mo. 1942); West v. Spratling, 204 Ala. 478, 86 So. 32 (1920); Stewart v. Weiner, 108 Neb. 49, 187 N.W. 121 (1922); Texas Hotel Co. of*

Longview v. Cosby, 131 S.W.2d 261 (Tex. Civ. App. 1939), error dismissed; cf. *Hercules Powder Co. v. Crawford, 163 F.2d 968 (8 Cir. 1947).*

Compare, as to the duty of an innkeeper to protect his guests from dangers arising from the conduct of third persons: *Knott Corp. v. Furman, 163 F.2d 199 (4 Cir. 1947),* certiorari denied, *332 U.S. 809, 68 S. Ct. 111, 92 L. Ed. 387,* rehearing denied, *332 U.S. 826, 68 S. Ct. 164, 92 L. Ed. 401; Fortney v. Hotel Rancroft, 5 Ill. App. 2d 327, 125 N.E.2d 544 (1955); McFadden v. Bancroft Hotel Corp., 313 Mass. 56, 46 N.E.2d 573 (1943); Gurren v. Casperson, 147 Wash. 257, 265 P. 472 (1928); Miller v. Derusa, 77 So. 2d 748 (La. App. 1955).*

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

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

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

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

Compare, as to the duty of one who has taken custody of another to protect him against third persons: *People ex rel. Coover v. Guthner, 105 Colo. 37, 94 P.2d 699 (1939); Ratliff v. Stanley, 224 Ky. 819, 7 S.W.2d 230,* 61 A.L.R. 566 (1928); *Lamb v. Clark, 282 Ky. 167, 138 S.W.2d 350 (1940); Honeycutt v. Bass, 187 So. 848 (La. App. 1939); Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940); Scolavino v. State, 187 Misc. 253, 62 N.Y.S.2d 17 (1946),* modified, *271 App. Div. 618, 67 N.Y.S.2d 202 (1946),* affirmed, *297 N.Y. 460, 74 N.E.2d 174 (1946); Hixon v. Cupp, 5 Okla. 545, 49 P. 927 (1897); Taylor*

v. Slaughter, 171 Okla. 152, 42 P.2d 235 (1935); Browning v. Graves, 152 S.W.2d 515 (Tex. Civ. App. 1941), error refused; *Kusah v. McCorkle, 100 Wash. 318, 170 P. 1023,* L.R.A. 1918C, 1158 (1918); *Eberhart v. Murphy, 110 Wash. 158, 188 P. 17 (1920),* reversed on other grounds, *113 Wash. 449, 194 P. 415.*

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

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

Cross Reference

ALR Annotations:

Carrier's duties to passenger who becomes sick or is injured en route. *92 A.L.R.2d 656.*

Liability of carrier to passenger for assault by third person. *77 A.L.R.2d 504.*

Duty of airplane owner or operator to furnish aircraft with navigational and flight safety devices. *50 A.L.R.2d 898.*

Liability of keeper of inn or restaurant for injury to guest or patron by other persons. *70 A.L.R.2d 628.*

Liability of innkeeper for loss or damage to property of a guest resulting from fire. *63 A.L.R.2d 495.*

Liability to social guest injured otherwise than by condition of premises. 79 A.L.R.2d 993.

Civil liability of sheriff or other officer charged with keeping jail or prison for death or injury of prisoner. *14 A.L.R.2d 353.*

Liability of one undertaking to care for child for injury to child. 27 A.L.R. 1018.

Duty and liability of one who voluntarily undertakes to care for injured person. *64 A.L.R.2d 1179.*

Liability for loss of property deposited by customer in place of business. *1 A.L.R.2d 802.*

Digest System Key Numbers:

Carriers 280(1) et seq.

Innkeepers 10.1 et seq.

Negligence 32(2.1) et seq.

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Restat 2d of Torts, § 315

Restatement of the Law, Torts 2d - Official Text > Division 2- Negligence > Chapter 12- General Principles > Topic 7- Duties of Affirmative Action > Title A- Duty to Control Conduct of Third Persons

§ 315 General Principle

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

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

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

COMMENTS & ILLUSTRATIONS

Comment:

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

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

Comment on Clauses (a) and (b):

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

Cross Reference

Digest System Key Numbers:

Negligence 14, 15

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Restat 2d of Torts, § 329

Restatement of the Law, Torts 2d - Official Text > Division 2- Negligence > Chapter 13- Liability for Condition and Use of Land > Topic 1- Liability of Possessors of Land to Persons on the Land > Title A- Definitions

§ 329 Trespasser Defined

A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise.

COMMENTS & ILLUSTRATIONS

Comment:

a. One may be privileged to enter land in the possession of another without the possessor's consent for the purpose of advancing or protecting his own private interests or those of the public, as when he enters to take possession of his boat wrecked upon the possessor's foreshore or enters in pursuit of a felon. As to the possessor's duty toward persons entering in the exercise of such privileges, see § 345. As to the circumstances under which such a privilege exists, see §§ 191-211.

b. Unless a lessee of land other than a tenant at will or at sufferance consents to his lessor's entry upon the particular occasion or by a right of entry reserved in the lease, or unless the lessor enters pursuant to a privilege created otherwise than by the lessee's consent, the lessor or a person entering by his direction or with his consent is a trespasser upon the lessee's possession.

c. In determining whether the person who enters or remains on land is a trespasser within the meaning of this Section, the question whether his entry has been intentional, negligent, or purely accidental is not material, except as it may bear upon the existence of a privilege to enter. Such a person will himself become liable in an action for the tort of trespass to land, under the rules stated in §§ 158, 165 and 166, only if his intrusion has been intentional, or negligent, or the result of an abnormally dangerous activity in which he is engaged. So far as the liability of the possessor of the land to the intruder is concerned, however, the possessor's duty, and liability, will be the same regardless of the manner of entry, so long as the entry itself is not privileged. The determining fact is the presence or absence of a privilege to enter or to remain on the land, and the status of an accidental trespasser is still that of a trespasser.

Illustration:

1. Without any negligence on his part A, standing on the platform of a subway station of the X Company, slips and falls onto the tracks. While there he is run over by the train of X Company, and injured. A is a trespasser, and the liability to him is determined by the rules stated in §§ 333 and 336, notwithstanding the accidental character of his intrusion.

REPORTER'S NOTES

Illustration 1 is taken from *Frederick v. Philadelphia Rapid Transit Co., 337 Pa. 136, 10 A.2d 576 (1940).*

Cross Reference

ALR Annotations:

Duty of innkeeper to visitor of registered guest. *58 A.L.R.2d 1201.*

Digest System Key Numbers:

Negligence 33(2)

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Restat 2d of Torts, § 343

Restatement of the Law, Torts 2d - Official Text > Division 2- Negligence > Chapter 13- Liability for Condition and Use of Land > Topic 1- Liability of Possessors of Land to Persons on the Land > Title E- Special Liability of Possessors of Land to Invitees

§ 343 Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

COMMENTS & ILLUSTRATIONS

Comment:

a. This Section should be read together with § 343 A, which deals with the effect of the fact that the condition is known to the invitee, or is obvious to him, as well as the fact that the invitee is a patron of a public utility. That Section limits the liability here stated. In the interest of brevity, the limitation is not repeated in this Section.

b. Distinction between duties to licensee and invitee. One who holds his land open for the reception of invitees is under a greater duty in respect to its physical condition than one who permits the visit of a mere licensee. The licensee enters with the understanding that he will take the land as the possessor himself uses it. Therefore such a licensee is entitled to expect only that he will be placed upon an equal footing with the possessor himself by an adequate disclosure of any dangerous conditions that are known to the possessor. On the other hand an invitee enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation. He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances.

As stated in § 342, the possessor owes to a licensee only the duty to exercise reasonable care to disclose to him dangerous conditions which are known to the possessor, and are likely not to be discovered by the licensee. To the invitee the possessor owes not only this duty, but also the additional duty to exercise reasonable affirmative care to see that the premises are safe for the reception of the visitor, or at least to ascertain the condition of the land, and to give such warning that the visitor may decide intelligently whether or not to accept the invitation, or may protect himself against the danger if he does accept it.

As stated in § 342, the possessor is under no duty to protect the licensee against dangers of which the licensee knows or has reason to know. On the other hand, as stated in § 343 A, there are some situations in which there is a duty to protect an invitee against even known dangers, where the possessor should anticipate harm to the invitee notwithstanding such knowledge.

c. As to invitees who go beyond the scope of the invitation, as to either time or place, see § 332, Comment *l*.

d. What invitee entitled to expect. An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein. Therefore an invitee is not required to be on the alert to discover defects which, if he were a mere licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to discover a defect, as well as in determining whether the defect is one which the possessor should believe that his visitor would not discover, and as to which, therefore, he must use reasonable care to warn the visitor.

e. Preparation required for invitee. In determining the extent of preparation which an invitee is entitled to expect to be made for his protection, the nature of the land and the purposes for which it is used are of great importance. One who enters a private residence even for purposes connected with the owner's business, is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors. On the other hand, one entering a store, theatre, office building, or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors. So too, one who goes on business to the executive offices in a factory, is entitled to expect that the possessor will exercise reasonable care to secure his visitor's safety. If, however, on some particular occasion, he is invited to go on business into the factory itself, he is not entitled to expect that special preparation will be made for his safety, but is entitled to expect only such safety as he would find in a properly conducted factory.

f. Appliances used on land. A possessor who holds his land open to others must possess and exercise a knowledge of the dangerous qualities of the place itself and the appliances provided therein, which is not required of his patrons. Thus, the keeper of a boardinghouse is negligent in providing a gas stove to be used in an unventilated bathroom, although the boarder who is made ill by the fumes uses the bathroom with knowledge of all the circumstances, except the risk of so doing. This is true because the boardinghouse keeper, even though a man of the same class as his boarders, is required to have a superior knowledge of the dangers incident to the facilities which he furnishes to them.

g. As to the duty of a possessor of business premises to protect his invitees from harm threatened thereon by third persons, see § 344.

REPORTER'S NOTES

This Section has been changed from the first Restatement by condensing and rewording it. The former Clause (c) (ii) as to public utilities is now covered by § 343 A.

Clause (a): The plaintiff invitee has the burden of proving that the defendant possessor either knew or had reason to know of the condition, or that by the exercise of reasonable care he would have discovered it. Where the condition is temporary in its nature, this burden may require proof that it has existed for a sufficient length of time to permit the inference that reasonable care would have led to its discovery. *Oldenburg v. Sears, Roebuck & Co., 152 Cal. App. 2d 733, 314 P.2d 33 (1957); Moran v Gershow's Super Markets, Inc., 102 Ohio App. 408, 2 Ohio Op. 2d 419, 143 N.E.2d 723 (1956),*

appeal dismissed, *166 Ohio St. 300, 2 Ohio Op. 2d 203, 141 N.E.2d 765; Parks v. Montgomery Ward & Co., 198 F.2d 772 (10 Cir. 1952); F.W. Woolworth Co. v. Goldston, 155 S.W.2d 830 (Tex. Civ. App. 1941),* error refused; *Gold v. Arizona Realty & Mortg. Co., 12 Cal. App. 2d 676, 55 P.2d 1254 (1936); J.C. Penney Co. v. Norris, 250 F.2d 385 (5 Cir. 1957); Frank v. J.C. Penney Co., 133 Cal. App. 2d 123, 283 P.2d 291 (1955).*

Comment b: The invitee is entitled to expect reasonable care in the original construction of the premises. *Rose v. Melody Lane of Wilshire, 39 Cal. 2d 481, 247 P.2d 335 (1952); Magnolia Petroleum Co. v. Barnes, 198 Okla. 406, 179 P.2d 132 (1946); De Weese v. J.C. Penney Co., 5 Utah 2d 116, 297 P.2d 898, 65 A.L.R.2d 399 (1956).*

Also in the present arrangement: *Dean v. Safeway Stores, Inc., 300 S.W.2d 431 (Mo. 1957); Johnston v. De La Guerra Properties, Inc., 28 Cal. 2d 394, 170 P.2d 5 (1946); Kmiotek v. Anast, 350 Pa. 593, 39 A.2d 923 (1944); Donahoo v. Kress House Moving Corp., 25 Cal. 2d 237, 153 P.2d 349 (1944).*

Also in their present use: *Schwartzman v. Lloyd, 65 App. D.C. 216, 82 F.2d 822 (D.C. Cir. 1936); Greenley v. Miller's, Inc., 111 Conn. 584, 150 A. 500 (1930); Cejka v. R. H. Macy's, Inc., 155 N.Y.S.2d 565 (Sup. Ct. 1956),* reversed on other grounds, *3 App. Div. 2d 535, 162 N.Y.S.2d 207,* affirmed, *4 N.Y.2d 785, 173 N.Y.S.2d 24, 149 N.E.2d 525; Lee v. National League Baseball Club of Milwaukee, 4 Wis. 2d 168, 89 N.W.2d 811 (1958); Rowell v. City of Wichita, 162 Kan. 294, 176 P.2d 590 (1947); Philpot v. Brooklyn Nat. League Baseball Club, 303 N.Y. 116, 100 N.E.2d 164 (1951).*

The possessor's duty includes inspection of the premises to discover possible unknown defects. *Dickey v. Hochschild, Kohn & Co., 157 Md. 448, 146 A. 282 (1929); Stark v. Great Atl. & Pac. Tea Co., 102 N.J.L. 694, 133 A. 172* (Ct. Err. & App. 1926); *Maehlman v. Reuben Realty Co., 32 Ohio App. 54, 166 N.E. 920 (1928); Durning v. Hyman, 286 Pa. 376, 133 A. 568,* 53 A.L.R. 851 (1926); *Kallum v. Wheeler, 129 Tex. 74, 101 S.W.2d 225 (1937).*

Comment e: As to the difference between the preparation necessary in a private residence and premises open to the public, see *Criterion Theatre Corp. v. Starns, 194 Okla. 624, 154 P.2d 92 (1944).*

Cross Reference

ALR Annotations:

Liability of proprietor of store, office, or other business premises:

-- for injury to customer or patron caused by pushing, crowding, etc., of other patrons. *20 A.L.R.2d 8.*

-- for injury to customer or other invitee by falling of displayed, stored, or piled objects. *20 A.L.R.2d 95.*

-- for injury in consequence of passing through wrong doorway. 20 A.L.R. 1147, 27 A.L.R. 585, 42 A.L.R. 1098.

-- for injury from defect in or fall of seat. *21 A.L.R.2d 420.*

-- for injury from object projecting into aisle or passageway. *26 A.L.R.2d 675.*

-- for injury of customer by another customer's use or handling of stock or equipment. *42 A.L.R.2d 1103.*

-- for injury from fall due to presence of litter or debris on floor. *61 A.L.R.2d 6.*

-- for injury from fall due to presence of obstacle placed or dropped on floor, steps or stairway. *61 A.L.R.2d 110; 61 A.L.R.2d 174; 61 A.L.R.2d 205.*

-- for injury from fall on floor or steps made slippery by tracked-in or spilled water, oil, mud, snow, and the like. *62 A.L.R.2d 6; 62 A.L.R.2d 131.*

-- for injury from fall on floor or steps made slippery by washing, cleaning, waxing or oiling. *63 A.L.R.2d 591; 63 A.L.R.2d 694; 63 A.L.R.2d 737.*

-- for injury from fall due to defect in floor or floor covering. *64 A.L.R.2d 335.*

-- for injury from fall due to defect in stairway. *64 A.L.R.2d 398.*

-- for fall on steps slippery by nature or through wear. *64 A.L.R.2d 471.*

-- for injury from fall on ramp or inclined floor. *65 A.L.R.2d 420.*

-- for injury from fall on stepdown or other one-step change in floor level. *65 A.L.R.2d 471.*

-- for injury from fall down open stairway, or into trap door or similar floor-level opening. *66 A.L.R.2d 331.*

-- for injury on, or in connection with escalator. *66 A.L.R.2d 496.*

-- for injury from fall due to improper lighting of steps or stairway. *66 A.L.R.2d 443.*

-- for injury occasioned by one walking into or colliding with glass or plastic door, panel, or wall. *68 A.L.R.2d 1204.*

-- for injury from fall on exterior walk, ramp, or passageway connected with the building in which the business is conducted. *81 A.L.R.2d 750.*

-- for injury sustained when customer or patron strikes head (or other portion of body) on overhead beam or similar overhead structure or projection. *90 A.L.R.2d 329.*

-- for injuries from electrically operated door. *99 A.L.R.2d 725.*

Storekeeper's duty and liability to one passing through store to another destination. *23 A.L.R.2d 1135.*

Hospital's liability to visitor injured as result of condition of exterior walks, steps, or grounds. *71 A.L.R.2d 427.*

Liability of owner or operator of parking lot or station for personal injuries. *14 A.L.R.2d 780.*

Liability of "self-service" laundry for personal injury of patron from defect in washing machine or wringer. *69 A.L.R.2d 1228.*

Liability for injury by revolving door. 169 A.L.R. 1346.

Liability of private owner or operator of picnic ground for injury or death of patron. *67 A.L.R.2d 965.*

Liability of proprietor of business, premises or place of amusement, for injury to one using baby stroller, shopping cart, or the like, furnished by defendant. *76 A.L.R.2d 1342.*

Liability of owner or proprietor of place of amusement, theatre, etc. for injuries to patron, generally. 22 A.L.R. 610, 98 A.L.R. 558.

-- from lighting conditions in theater. 143 A.L.R. 61.

-- for injuries on scenic railway, roller coaster, or miniature railway. *66 A.L.R.2d 689.*

-- for injury from slide or chute. *69 A.L.R.2d 1067.*

-- for injury to one on or near merry-go-round. *75 A.L.R.2d 792.*

-- for injury or death on or near loop-o-plane, ferris wheel, miniature car, or similar rides. *86 A.L.R.2d 350.*

-- for injury from racing operations or condition of premises. *87 A.L.R.2d 1179.*

-- for injury by condition of or defect in lavatory, restroom, or toilet facilities. *88 A.L.R.2d 1090.*

Liability of private owner or operator of bathing resort or swimming pool for injury or death of patron. *48 A.L.R.2d 104, 116.*

Liability of owner or operator of skating rink for injury to patron. 168 A.L.R. 896.

Liability of owner or operator of public gasoline filling station for injury to person or damage to property. 116 A.L.R. 1205.

Liability of innkeeper to guest:

-- injuries occasioned by defects in furnishings or other conditions in room or suite. *18 A.L.R.2d 973.*

-- injury in using hall or similar passageway. *27 A.L.R.2d 822.*

-- injury while using ramp, steps or stairs. *58 A.L.R.2d 1173; 58 A.L.R.2d 1178.*

-- injury in using exterior passageways or walks. *69 A.L.R.2d 1107.*

Digest System Key Numbers:

Negligence 32(2.3) et seq.

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Restat 2d of Torts, § 344

Restatement of the Law, Torts 2d - Official Text > Division 2- Negligence > Chapter 13- Liability for Condition and Use of Land > Topic 1- Liability of Possessors of Land to Persons on the Land > Title E- Special Liability of Possessors of Land to Invitees

§ 344 Business Premises Open to Public: Acts of Third Persons or Animals

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

COMMENTS & ILLUSTRATIONS

Comment:

a. Premises open to public for business purposes. A possessor of land is subject to liability, under the rule stated in this Section, only when he holds his land open to the public for entry for his business purposes, and then only to those who come upon the land for the purposes for which it is thus held open to the public. Such persons are commonly called business visitors. (See § 332, Comment *a*.) The rule stated here had its origin in cases of carriers who failed to protect their passengers against the acts of third persons. As it has developed, however, it is no longer limited to carriers, or other public utilities, and it applies to theatres, restaurants, shops and stores, business offices, and any other premises held open to the public for admission for the business purposes of the possessor.

The fact that the possessor is a public utility and the visitor is his patron may, however, be important in determining the care required of the possessor. See Comment *e*.

b. "Third persons" include all persons other than the possessor of the land, or his servants acting within the scope of their employment. It includes such servants when they are acting outside of the scope of their employment, as well as other invitees or licensees upon the premises, and also trespassers on the land, and even persons outside of the land whose acts endanger the safety of the visitor. The Section also applies to the acts of animals which so endanger his safety.

c. Independent contractors and concessionaires. The rule stated applies to the acts of independent contractors and concessionaires who are employed or permitted to carry on activities upon the land. The possessor is required to exercise reasonable care, for the protection of the public who enter, to supervise the activities of the contractor or concessionaire, including the original installation of his appliances and their operation, and his methods.

d. Reasonable care. A public utility or other possessor of land who holds it open to the public for entry for his business purposes is not an insurer of the safety of such visitors against the acts of third persons, or the acts of animals. He is, however, under a duty to exercise reasonable care to give them protection. In many cases a warning is sufficient care if the possessor reasonably believes that it will

be enough to enable the visitor to avoid the harm, or protect himself against it. There are, however, many situations in which the possessor cannot reasonably assume that a warning will be sufficient. He is then required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the likelihood that third persons, or animals, may conduct themselves in a manner which will endanger the safety of the visitor.

e. Public utilities. In determining whether the possessor has exercised reasonable care, the fact that the possessor is a public utility, and the visitor is his patron, must be taken into account. This Section should be read together with § 343 A, under Subsection (2) of which the fact that the patron is entitled to make use of the facilities is a factor of importance to be considered in determining whether it may reasonably be anticipated that he will fail to avoid harm from dangers which are known or obvious to him. Thus it may reasonably be expected that a passenger on a bus will not leave the bus even though he is aware that his safety is endangered by another drunken passenger, and even though he could achieve complete safety by doing so. In such a case it may not be enough for the servants of the public utility to give a warning, which might be sufficient if it were merely a possessor holding its land open to the public for its private business purposes. The utility may then be required to take additional steps to control the conduct of the third person, or otherwise to protect the patron against it.

f. Duty to police premises. Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Illustrations:

1. At rush hours the passengers upon the A Street Railway Company are accustomed to crowd into the cars in a manner likely to cause injury to some one in the crowd. The A Company fails to provide a sufficient staff of guards to prevent this practice. B, a passenger, is hurt in such a rush, after a single guard has warned him of the danger. The A Company is subject to liability to B.

2. The A Railway Company, knowing that the students of a local college intend to welcome its victorious football team at the railway station, and knowing from previous experience of the boisterous character of such occasions, fails to assemble a sufficient number of its employees upon the platform to control the students. The students, in joke, hustle and injure B, a passenger who is awaiting his train. The A Company is subject to liability to B.

g. The rule stated in this Section applies not only to make it the possessor's duty to protect his visitors after they have entered the land, but also to warn them before their entry of any acts or threatened acts of third persons which may endanger them if they enter.

REPORTER'S NOTES

This Section has been changed from the first Restatement by broadening it to include the matter formerly covered by § 348, which Section is now omitted.

Comment b: See *Easler v. Downie Amusement Co., 125 Me. 334, 133 A. 905,* 53 A.L.R. 847 (1926), servants outside scope of employment; *Blakeley v. White Star Line, 154 Mich. 635, 118 N.W. 482, 19 L.R.A. N.S. 772, 129 Am. St. Rep. 496 (1908),* other invitee; *Hill v. Merrick, 147 Or. 244, 31 P.2d 663 (1934),* same; *Sinn v. Farmers Deposit Savings Bank, 300 Pa. 85, 150 A. 163 (1930),* trespasser;

Greco v. Sumner Tavern, Inc., 333 Mass. 144, 128 N.E.2d 788 (1955), drunken customers; *Naegele v. Dollen, 158 Neb. 373, 63 N.W.2d 165, 42 A.L.R.2d 1099 (1954),* customer; *Adamson v. Hand, 93 Ga. App. 5, 90 S.E.2d 669 (1955); Exton v. Central R. Co. of N.J., 62 N.J.L. 7, 42 A. 486, 56 L.R.A. 508 (1898),* affirmed, *63 N.J.L. 356, 46 A. 1099, 56 L.R.A. 512; Miller v. Derusa, 77 So. 2d 748 (La. App. 1955); Winn v. Holmes, 143 Cal. App. 2d 501, 299 P.2d 994 (1956); Corcoran v. McNeal, 400 Pa. 14, 161 A.2d 367 (1960); Peck v. Gerber, 154 Or. 126, 59 P.2d 675,* 106 A.L.R. 996 (1936).

Comment c: See *Stickel v. Riverview Sharpshooters Park Co., 250 Ill. 452, 95 N.E. 445, 34 L.R.A. N.S. 659 (1911); Thornton v. Maine State Agricultural Society, 97 Me. 108, 53 A. 979, 94 Am. St. Rep. 488 (1902); Corrigan v. Elsinger, 81 Minn. 42, 83 N.W. 492 (1900); Smith v. Cumberland County Agricultural Society, 163 N.C. 346, 79 S.E. 632,* Ann. Cas. 1915B, 544 (1913); *McCordic v. Crawford, 23 Cal. 2d 1, 142 P.2d 7 (1943).*

Comment d: See *Schwartzman v. Lloyd, 65 App. D.C. 216, 82 F.2d 822 (1936); Chicago, T. H. & S. E. R. Co. v. Fisher, 61 Ind. App. 10, 110 N.E. 240 (1915); Terre Haute, Indianapolis & Eastern Traction Co. v. Scott, 91 Ind. App. 690, 170 N.E. 341, 172 N.E. 659 (1930); Champlin Hardware Co. v. Clevinger, 158 Okla. 10, 12 P.2d 683 (1932).*

Comment f: See *Mears v. Kelley, 59 Ohio App. 159, 12 Ohio Ops. 142, 27 Ohio L. Abs. 48, 17 N.E.2d 386 (1938); Sims v. Strand Theater, 150 Pa. Super. 627, 29 A.2d 208 (1942); Weihert v. Piccione, 273 Wis. 448, 78 N.W.2d 757 (1956); Stockwell v. Board of Trustees, 64 Cal. App. 2d 197, 148 P.2d 405 (1944).*

As to Illustration 2, compare *Schubart v. Hotel Astor, 168 Misc. 431, 5 N.Y.S.2d 203 (1938),* affirmed in *255 App. Div. 1012, 8 N.Y.S.2d 567,* affirmed mem., *281 N.Y. 597, 22 N.E.2d 167.*

Cross Reference

ALR Annotations:

Liability of store proprietor for injury to customer by pushing, crowding, etc. of other customers. *20 A.L.R.2d 8.*

Liability of storekeeper for injury of customer by another customer's use or handling of stock or equipment. *42 A.L.R.2d 1103.*

Liability of innkeeper for injury by object thrown or falling because of conduct of guest. *74 A.L.R.2d 1241.*

Liability of proprietor of store, office, or similar business premises for injury from fall on floor or steps made slippery by tracked-in or spilled water, oil, mud, snow, and the like. *62 A.L.R.2d 6; 62 A.L.R.2d 131.*

Liability of proprietor of business premises for injury from fall due to presence of obstacle placed or dropped on steps. *61 A.L.R.2d 205.*

Liability of keeper of inn or restaurant for injury to guest or patron by other persons. *70 A.L.R.2d 628.*

Duty and liability of owner or keeper of place of amusement respecting injuries to patrons. 22 A.L.R. 610, 38 A.L.R. 357, 44 A.L.R. 203, 61 A.L.R. 1289, 98 A.L.R. 557.

Liability of private owner or operator of bathing resort or swimming pool for injury or death of patron. *48 A.L.R.2d 104, 116.*

Liability of owner or operator of skating rink for injury to patron. 168 A.L.R. 896.

Liability for injury on, or in connection with escalator. *66 A.L.R.2d 496.*

Digest System Key Numbers:

Animals 66 et seq.

Negligence 37 et seq.

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Restat 2d of Torts, § 566

Restatement of the Law, Torts 2d - Official Text > Division 5- Defamation > Chapter 24- Invasions of Interest in Reputation > Topic 3- Types of Defamatory Communication

§ 566 Expressions of Opinion

A defamatory communication may consist of a statement in the form of an opinion, but astatement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

COMMENTS & ILLUSTRATIONS

Comment:

a. Opinion as defamatory at common law. Under the law of defamation, an expression of opinion could be defamatory if the expression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. (See § 559). The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory. (See § 558). This position was maintained even though the truth or falsity of an opinion -- as distinguished from a statement of fact -- is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation. (See § 581A).

If the expression of opinion was on a matter of public concern, it was a form of privileged criticism, customarily known by the name of fair comment. The privilege extended to an expression of opinion on a matter of public concern so long as it was the actual opinion of the critic and was not made solely for the purpose of causing harm to the person about whom the comment was made, regardless of whether the opinion was reasonable or not. According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion.

b. Types of expressions of opinion. There are two kinds of expression of opinion. The simple expression of opinion, or the pure type, occurs when the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character. The statement of facts and the expression of opinion based on them are separate matters in this case, and at common law either or both could be defamatory and the basis for an action for libel or slander. The opinion may be ostensibly in the form of a factual statement if it is clear from the context that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated.

The pure type of expression of opinion may also occur when the maker of the comment does not himself express the alleged facts on which he bases the expression of opinion. This happens when both parties to the communication know the facts or assume their existence and the comment is clearly based on those assumed facts and does not imply the existence of other facts in order to justify the comment. The assumption of the facts may come about because someone else has stated them or because they were assumed by both parties as a result of their notoriety or otherwise.

The second kind of expression of opinion, or the mixed type, is one which, while an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication. Here the expression of the opinion gives rise to the inference that there are undisclosed facts that justify the forming of the opinion expressed by the defendant. To say of a person that he is a thief without explaining why, may, depending upon the circumstances, be found to imply the assertion that he has committed acts that come within the common connotation of thievery. To declare, without an indication of the basis for the conclusion, that a person is utterly devoid of moral principles may be found to imply the assertion that he has been guilty of conduct that would justify the reaching of that conclusion.

It was the first, or pure, type of expression of opinion to which the privilege of fair comment was held to apply. Some courts and commentators took the position that the true explanation of the defense of fair comment was not that the statement was made on a privileged occasion but that, not being actually a false statement of fact, it could not be a defamatory communication. The first Restatement of Torts set out the principles of the privilege of fair comment in §§ 606-610; it did not espouse this position. For the second, or mixed, type of expression of opinion the privilege of fair comment was held to be inapplicable; and the privileges that were available were those set forth in §§ 585-598, for defamatory statements of fact.

c. Effect of the Constitution. The common law rule that an expression of opinion of the first, or pure, type may be the basis of an action for defamation now appears to have been rendered unconstitutional by U.S. Supreme Court decisions. As the Court says in *Gertz v. Robert Welch, Inc., (1974) 418 U.S. 323, 339:* "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." This categoric statement was not necessary to the decision in the case in which it is found, and the Supreme Court's indications that an expression of opinion cannot be the basis of a defamation action have involved public communications on matters of public concern. Although it is thus possible that private communications on private matters will be treated differently, the logic of the constitutional principle would appear to apply to all expressions of opinion of the first, or pure, type.

The distinction between the two types of expression of opinion, as explained in Comment *b*, therefore becomes constitutionally significant. The requirement that a plaintiff prove that the defendant published a defamatory statement of fact about him that was false (see § 558) can be complied with by proving the publication of an expression of opinion of the mixed type, if the comment is reasonably understood as implying the assertion of the existence of undisclosed facts about the plaintiff that must be defamatory in character in order to justify the opinion. A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability. The defendant cannot insist that the undisclosed facts were not defamatory but that he unreasonably formed the derogatory opinion from them. This is like the case of a communication subject to more than one meaning. As stated in § 563,

the meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express.

It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether that meaning was attributed to it by the recipient of the communication. (See § 614).

Illustrations:

1. A, a real estate developer, was attempting to persuade the city council to grant a zoning variance on certain land which he owned. The city desired to purchase another tract of land owned by him for a school site. In negotiations about the purchase price, A indicated that his agreeing to the city's offer might depend on his getting the variance. At a council meeting this position was described by a council member as blackmail. B, a newspaper, carries a full and accurate account of the council meeting, including a statement of A's negotiating position. It quotes the "blackmail" statement, and itself uses that term and the term "skulduggery." The statement cannot be construed as charging that A committed the crime of blackmail and B is not liable for defamation.

2. A, an employee, refused to become a member of the union recognized as the collective bargaining agent. The union publishes statements calling A a scab. In one statement to this effect it publishes a well-known definition of a scab, characterizing him, among other things, as a "traitor to his God, his country, his family and his class." The language cannot be construed as a charge that A was guilty of treason and B is not liable for defamation.

3. A writes to B about his neighbor C: "I think he must be an alcoholic." A jury might find that this was not just an expression of opinion but that it implied that A knew undisclosed facts that would justify this opinion.

4. A writes to B about his neighbor C: "He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic." The statement indicates the facts on which the expression of opinion was based and does not imply others. These facts are not defamatory and A is not liable for defamation.

5. A says to B about C, a city official: "He and his wife took a trip on city business a month ago and he added her expenses in as a part of his own." B responds: "If he did that he is really a thief." B's expression of opinion does not assert by implication any defamatory facts, and he is not liable to C for defamation.

By way of recapitulation, the effect of the rule that there can be no recovery in defamation for a pure expression of opinion can be set forth by applying it to four fact patterns:

(1) If the defendant bases his expression of a derogatory opinion of the plaintiff on his own statement of false and defamatory facts, he is subject to liability for the factual statement but not for the expression of opinion.

(2) If the defendant bases his expression of a derogatory opinion of the plaintiff on his own statement of facts that are not defamatory, he is not subject to liability for the factual statement -- nor for the expression of opinion, so long as it does not reasonably indicate an assertion of the existence of other, defamatory, facts that would justify the forming of the opinion. The same result is reached if the statement of facts is defamatory but the facts are true (see § 581B), or if the defendant is not shown to

be guilty of the requisite fault regarding the truth or defamatory character of the statement of facts (see §§ 580A and 580B), or if the statement of facts is found to be privileged. (See §§ 593-612).

(3) If the defendant bases his expression of a derogatory opinion on the existence of "facts" that he does not state but that are assumed to be true by both parties to the communication, and if the communication does not give rise to the reasonable inference that it is also based on other facts that are defamatory, he is not subject to liability, whether the assumed facts are defamatory or not.

(4) If the defendant expresses a derogatory opinion without disclosing the facts on which it is based, he is subject to liability if the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts. It makes no difference whether this is explained by holding that there was thus a publication of false, defamatory facts (thus making § 565 applicable) or that an expression of a mixed opinion can itself be a defamatory communication.

Should it be a significant issue whether the expression of opinion was the actual opinion of the defendant? Though an asserted factual statement that it is the actual opinion of the defendant may be held to be implied, its truth or falsity would apparently have no effect on the defamatory character of the communication.

d. Ridicule. One common form of defamation has been ridicule that exposes the plaintiff to contempt or derision. Humorous writings, verses, cartoons or caricatures that carry a sting and cause adverse rather than sympathetic or neutral merriment may be defamatory. But the distinction drawn in Comment *b* is applicable to ridicule. If all that the communication does is to express a harsh judgment upon known or assumed facts, there is no more than an expression of opinion of the pure type, and an action of defamation cannot be maintained. For maintaining the action it is required that the expression of ridicule imply the assertion of a factual charge that would be defamatory if made expressly.

In addition, the communication may be understood only as good-natured fun, not intended to be taken seriously and in no way intended to reflect upon the individual. Thus a narration by a toastmaster at a banquet of some entirely fictitious and ridiculous incident involving the speaker whom he is introducing is not reasonably to be understood as defamation but only as a jest. But if the same narrative is reported in a newspaper in such a way as to fail to make clear to its readers the circumstances under which it was related, it may become defamatory.

e. Verbal abuse. There are some statements that are in form statements of opinion, or even of fact, which cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse. A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult. Thus when, in the course of an altercation, the defendant loudly and angrily calls the plaintiff a bastard in the presence of others, he is ordinarily not reasonably to be understood as asserting the fact that the plaintiff is of illegitimate birth but only to be abusing him to his face. No action for defamation will lie in this case.

The circumstances under which verbal abuse is uttered affect the determination of how it is reasonably to be understood. Words uttered face to face during an altercation may well be understood merely as abuse or insult, while words written after time for thought or published in a newspaper may be taken to express the defamatory charge and to be intended to be taken seriously.

f. Cross references. The Constitution has been held to impose other limitations on actions for defamation besides eliminating a cause of action for a mere expression of opinion. See § 580A (requirement of knowledge or reckless disregard as to truth or falsity in an action by a public official

or public figure), § 580B (requirement of negligence in a defamation action by a private person), § 621 (limitation of recoverable damages to actual harm). The fault requirements of §§ 580A and 580B apply to any undisclosed statement of fact which is found to be implied from an expression of opinion.

On the requirement of falsity, see § 518A. In the case of a derogatory comment implying the existence of undisclosed facts that justify the opinion, it is the truth or falsity of these facts that is in issue. (See § 581A, Comment *c*).

In the case of ridicule or abuse (Comments *d* and *e*), other tort actions than defamation may be pertinent. Thus, see §§ 46-48 (intentional infliction of mental suffering) §§ 652A-652J (unreasonable interference with right of privacy). These torts, too, are subject to the restrictions of the First Amendment.

REPORTER'S NOTES

This Section combines former §§ 566 and 567 and provides that there can be no recovery for the expression of pure opinion.

At common law, it was held that a mere expression of opinion may be actionable in defamation. No reference was made to the requirement that the defamatory statement be false. *Smith v. Levitt, 227 F.2d 855 (9 Cir. 1955); Powers v. Durgin-Snow Pub. Co., 154 Me. 108, 144 A.2d 294 (1958); Triggs v. Sun Printing & Pub. Ass'n, 179 N.Y. 144, 71 N.E. 739 (1904);* Thomas v. Bradbury, Agnew & Co., [1906] 2 K.B. 627.

This position was alleviated at common law by the "privilege" of fair comment or "privileged criticism," in §§ 606-610 of the first Restatement. Section 607, covering privileged criticism of public officers and candidates was replaced by *New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686,* motion denied, *376 U.S. 967, 84 S.Ct. 1130, 12 L.Ed.2d 83 (1964).*

Comment c: Now the statement in *Gertz v. Robert Welch, Inc., 418 U.S. 323, 339, 94 S.Ct. 2997, 3006-07, 41 L.Ed.2d 789 (1974)* quoted in Comment c, plus the holdings in *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974);* and *Greenbelt Co-op. Pub. Ass'n, Inc. v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970)* are regarded as having the effect of a holding that the Constitution does not permit the recovery in defamation for publication of a "pure" opinion.

On this and the position that a mere opinion cannot be false, see: *Hotchner v. Castillo-Puche, 551 F.2d 910 (2 Cir. 1977),* certiorari denied, *434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95; Buckley v. Littell, 539 F.2d 882 (2 Cir. 1976),* certiorari denied, *429 U.S. 1062, 97 S.Ct. 785, 50 L.Ed.2d 777* and *429 U.S. 1062, 97 S.Ct. 786, 50 L.Ed.2d 777;* Cianci v. New Times Pub. Co., F.2d (2 Cir. 1980); *Orr v. Argus-Press Co., 586 F.2d 1108 (6 Cir. 1978),* certiorari denied, *440 U.S. 960, 99 S.Ct. 1502, 59 L.Ed.2d 773; Pierce v. Capital Cities Communications, Inc., 427 F.Supp. 180 (E.D.Pa. 1976),* affirmed, *576 F.2d 495* (3 Cir.), certiorari denied, *439 U.S. 861, 99 S.Ct. 181, 58 L.Ed.2d 170; Good Government Group of Seal Beach, Inc. v. Superior Court, 22 Cal.3d 672, 150 Cal.Rptr. 258, 586 P.2d 572 (1978),* certiorari denied, *441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066; Gregory v. McDonnell Douglas Corp., 17 Cal.3d 596, 552 P.2d 425, 131 Cal.Rptr. 641 (1976); Mashburn v. Collin, 355 So.2d 879 (La.1977); Kapiloff v. Dunn, 27 Md.App. 514, 343 A.2d 251 (1975),* certiorari denied, *426 U.S. 907, 96 S.Ct. 2228, 48 L.Ed.2d 832; Hillman v. Metromedia, Inc., 452 F.Supp. 727 (D.Md.1978); National Ass'n of Government Employees, Inc. v. Central Broadcasting Corp., Mass. , 396 N.E.2d 996 (1979); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299 (1977),* certiorari denied, *434 U.S. 969, 98 S.Ct. 514, 54 L.Ed.2d 456.*

Most of these cases expressly recognize the distinction in Comment b between pure and mixed statements of opinion.

See particularly, *Hoover v. Peerless Pubs., Inc., 461 F.Supp. 1206 (E.D.Pa.1978); Good Government Group of Seal Beach, Inc. v. Superior Court, 22 Cal.3d 672, 150 Cal.Rptr. 258, 586 P.2d 572 (1978),* certiorari denied, *441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066.* They indicate that the form of the statement is not controlling on whether it is of fact or opinion.

The determination depends upon the context and circumstances surrounding the publication and indicating whether the term is intended literally or not and upon the precision or imprecision of the meaning for the expression. On factors for making the determination, see *Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9 Cir. 1980).*

There is disagreement on whether there remains any independent significance for the common law "privilege" of fair comment.

Illustration 1 is taken from *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).*

Illustration 2 is taken from *Greenbelt Coop. Pub. Ass'n, Inc. v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970).*

Comment d: On ridicule, see *Burton v. Crowell Pub. Co., 82 F.2d 154 (2 Cir. 1936); Powers v. Durgin-Snow Pub. Co., 154 Me. 108, 144 A.2d 294 (1958); Brown v. Harrington, 208 Mass. 600, 95 N.E. 655 (1911); Colbert v. Journal Pub. Co., 19 N.M. 156, 142 P. 146 (1914); Triggs v. Sun Printing & Pub. Ass'n, 179 N.Y. 144, 71 N.E. 739 (1904); Zbyszko v. New York American, 228 App.Div. 277, 239 N.Y.S. 411 (1930); Salomone v. Macmillan Pub. Co., 97 Misc.2d 346, 411 N.Y.S.2d 105 (1978); Farnsworth v. Hyde, 266 Or. 236, 512 P.2d 1003 (1973); Buckstaff v. Viall, 84 Wis. 129, 54 N.W. 111 (1893).*

If the publication is reasonably understood only as a good-natured jest, there is no defamation. *Berry v. City of New York Ins. Co., 210 Ala. 369, 98 So. 290 (1923); Blake v. Hearst Publications, Inc., 75 Cal.App.2d 6, 170 P.2d 100 (1946); Hanson v. Feuling, 160 Wis. 511, 152 N.W. 287 (1915);* cf. *Arno v. Stewart, 245 Cal.App.2d 955, 54 Cal.Rptr. 392 (1966); Cheatham v. Westchester County Publishers, Inc., 20 Misc.2d 770, 73 N.Y.S.2d 173 (1947); Lamberti v. Sun Printing & Pub. Ass'n, 111 App.Div. 437, 97 N.Y.S. 694 (1906).*

Comment e: See, holding that mere vituperation or verbal abuse is not actionable as defamation: *Curtis Pub. Co. v. Birdsong, 360 F.2d 344 (5 Cir. 1966)* (libel); *Vinson v. O'Malley, 25 Ariz. 552, 220 P. 393 (1923)* ("God damn ignorant old son of a bitch"); *Durr v. Smith, 90 So.2d 147 (La.App.1956)* ("invective epithet which deleteriously reflected upon the validity of his parentage"); *Dalton v. Woodward, 134 Neb. 915, 280 N.W. 215 (1938); Notarmuzzi v. Shevack, 108 N.Y.S.2d 172 (Sup.Ct.1951)* ("You are a bleached blond bastard, a God damn son of a bitch and a bum and a tramp; get the hell out of here"); *Cowan v. Time, Inc., 41 Misc.2d 198, 245 N.Y.S.2d 723 (1963)* ("idiot"); *Ringgold v. Land, 212 N.C. 369, 193 S.E. 267 (1937); Williams v. Rutherford Freight Lines, Inc., 10 N.C.App. 384, 179 S.E.2d 319 (1971); Halliday v. Cienkowski, 333 Pa. 123, 3 A.2d 372 (1939); Tokmakian v. Fritz, 75 R.I. 496, 67 A.2d 834 (1949)* ("drunken driver"); *Morrissette v. Beatte, 66 R.I. 73, 17 A.2d 464 (1941)* (sodomy); *Smith v. Phoenix Furniture Co., 339 F.Supp. 969 (D.S.C.1972)* ("bastard, son of a bitch"); *McCardell v. Peterson, 493 S.W.2d 288 (Tex.Civ.App.1973)* ("S-O-B").

See, however, *White v. Valenta, 234 Cal.App.2d 243, 44 Cal.Rptr. 241 (1965),* where, under the circumstances, "son of a bitch" was held to impute lack of fair business dealing; cf. *Capps v. Watts, 271 S.C. 276, 246 S.E.2d 606 (1978).*

See Titus, Statement of Fact Versus Statement of Opinion -- A Spurious Dispute in Fair Comment, 15 Vand.L.Rev. 1203 (1962); Christie, Defamatory Opinions and The Restatement (Second) of Torts, 75 Mich.L.Rev. 1621 (1977); Keeton, Defamation and Freedom of the Press, 54 Texas L.Rev. 1221 (1976); Hill, Defamation and Privacy Under the First Amendment, 76 Colum.L.Rev. 1205 (1976).

Cross Reference

ALR Annotations:

Privileged nature of statements or utterances by member of school board in course of official proceedings. *85 A.L.R.3d 1137.*

Libel and slander: who is "public figure" in the light of *Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).* *75 A.L.R.3d 616.*

Libel and slander: privileged nature of communication to other employees or employees' union of reason for plaintiff's discharge. *60 A.L.R.3d 1080.*

Libel and slander: privileged nature of communications made in course of grievance or arbitration procedure provided for by collective bargaining agreement. *60 A.L.R.3d 1041.*

Libel and slander: employer's privilege as to communications to news media concerning employees. *52 A.L.R.3d 739.*

Libel and slander: actionability of defamatory statements as to business conduct, relating to a single transaction or occurrence. *51 A.L.R.3d 1300.*

Defamation by radio or television. *50 A.L.R.3d 1311.*

Libel and slander: charges of slumlordism or the like as actionable. *49 A.L.R.3d 1074.*

Imputation of insolvency as defamatory. *49 A.L.R.3d 163.*

Libel and slander: actionability of statements imputing inefficiency or lack of qualification to public school teacher. *40 A.L.R.3d 490.*

Relevancy of matter contained in pleading as affecting privilege within law of libel. *38 A.L.R.3d 272.*

Libel and slander: actionability of imputing to private person mental disorder or incapacity, or impairment of mental faculties. *23 A.L.R.3d 652.*

Libel by will. 21 A.L.R.3d 54.

Libel and slander: what constitutes actual malice, within federal constitutional rule requiring public officials and public figures to show actual malice. *20 A.L.R.3d 988.*

Libel and slander: who is a public official or otherwise within the federal constitutional rule requiring public officials to show actual malice. *19 A.L.R.3d 1361.*

Libel and slander: statements as to plaintiff's charging excessive or exorbitant prices or fees. *11 A.L.R.3d 884.*

Libel: Imputing credit unworthiness to nontrader. *99 A.L.R.2d 700.*

Reliance on facts not stated or referred to in publication, as support for defense of fair comment in defamation case. *90 A.L.R.2d 1279.*

Defamatory nature of statements reflecting on plaintiff's religious beliefs, standing, or activities. *87 A.L.R.2d 453.*

Necessity and sufficiency of plaintiff's allegations as to falsity in defamation action. *85 A.L.R.2d 460.*

Sufficiency of plaintiff's allegations in defamation action as to defendant's malice. *76 A.L.R.2d 696.*

Libel and slander: privilege of statements by physician, surgeon, or nurse concerning patient. *73 A.L.R.2d 325.*

Right of individual member of class or group referred to in a defamatory publication to maintain action for libel and slander. *70 A.L.R.2d 1382.*

Libel and slander: criticism of literary or artistic works. *64 A.L.R.2d 245.*

Liability for statement or publication representing plaintiff as cruel to or killer of animals. *39 A.L.R.2d 1388.*

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§ 578 Liability of Republisher

Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.

COMMENTS & ILLUSTRATIONS

Comment:

a. On the liability of those who only deliver or transmit defamation published by a third person, see § 581.

b. Republication of libel. Each time that libelous matter is communicated by a new person, a new publication has occurred, which is a separate basis of tort liability. Thus one who reprints and sells a libel already published by another becomes himself a publisher and is subject to liability to the same extent as if he had originally published it. Subject to the limitation stated in § 581, the same is true of one who merely circulates, distributes or hands on a libel already so published.

It is no defense that the second publisher names the author or original publisher of the libel. Thus a newspaper is subject to liability if it republishes a defamatory statement, although it names the author and another newspaper in which the statement first appeared. The republication of a libel, being a separate publication, may make the second publisher liable although the original publisher is protected by a privilege. On the other hand, the republication of a libel may be privileged although the original publication was not. On the circumstances that create a privilege, see §§ 583 to 612. On the requirement of fault on the part of the defamer regarding falsity and defamatory character of the communication, see § 580A (action by public official or public figure) and § 580A (action by private person).

Illustrations:

1. A newspaper feature syndicate supplies a defamatory article to each of its subscribing newspapers. Each paper that prints the article has published a libel for which it is separately subject to liability.

2. The A newspaper copies a libelous article from the B newspaper, accompanied by a statement that it was so copied. The A newspaper is subject to liability to the person defamed regardless of whether the B newspaper was privileged to publish the article.

c. Repetition of slander. Subject to the exception stated in § 581, one who repeats a slanderous statement originally published by a third person is subject to liability to the person defamed as though he had himself originated the statement. This is true although the speaker accompanies the slander with a statement that it is a rumor only, or designates the name of the author or the original publisher. The rule stated is applicable although the person to whom the slander is repeated has already heard similar statements from other sources, although that fact is to be taken into account in determining the damages recoverable for the harm to the reputation of the person defamed.

Illustrations:

3. A states to B that he has heard that C is a felon. A is subject to liability to C.

4. A states to B that C has just told him that D, an unmarried woman, has given birth to a baby. A is subject to liability to C.

d. Written or printed repetition of oral defamation. The rule stated in this Section is applicable to make subject to liability for the publication of a libel one who republishes in written or printed form matter originally published by word of mouth. In this case, the republisher may be liable even though the originator of the defamatory matter is not liable because the publication in slanderous form was not of such a character as to be actionable per se. The liability of the republisher is determined by the application to the republication of the rules governing defamation. The fact that the defamer has republished matter originated by a third person is immaterial. Consequently, the liability or immunity of the originator is also immaterial.

e. Disbelief. The rule stated in this Section is applicable to make the republisher of either a libel or a slander subject to liability even though he expressly states that he does not believe the statement that he repeats to be true. The fact that he expresses belief or disbelief may, however, be taken into account in determining the damages for the harm to the reputation of the person defamed for which the repeater will be liable.

f. Privilege. There may be circumstances under which there will be a privilege to repeat a defamatory statement, even though the repeater knows it to be false. (See § 602).

REPORTER'S NOTES

Comment b: See, in general support: *Dixson v. Newsweek, Inc., 562 F.2d 626 (10 Cir. 1977);* Cianci v. New Times Pub. Co., F.2d (2 Cir. 1980); *Cobbs v. Chicago Defender, 308 Ill.App. 55, 31 N.E.2d 323 (1941); Morse v. Times-Republican Printing Co., 124 Iowa 707, 100 N.W. 867 (1904); Lundin v. Post Pub. Co., 217 Mass. 213, 104 N.E. 480 (1914); Lancour v. Herald & Globe Ass'n, 111 Vt. 371, 17 A.2d 253 (1941);* cf. *Harris v. Minvielle, 48 La.Ann. 908, 19 So. 925 (1896)* ("talebearers are as bad as talemakers").

Illustration 1 is based on *Nance v. Flaugh, 221 Ark. 352, 253 S.W.2d 207 (1952); Lubore v. Pittsburgh Courier Pub. Co., 101 F.Supp. 234 (D.D.C.1951)* affirmed, *200 F.2d 355* (D.C.Cir.); *Ott v. Murphy, 160 Iowa 730, 141 N.W. 463 (1913); Hotchkiss v. Oliphant, 2 Hill (N.Y.) 510 (1842); Underwood v. Smith, 93 Tenn. 687, 27 S.W. 1008 (1894); Sans v. Joerris, 14 Wis. 722 (1861).*

Illustration 2 is based on McPherson v. Daniels, 10 B. & C. 263, 109 Eng.Rep. 448 (1829); *Times Pub. Co. v. Carlisle, 94 F. 762 (8th Cir. 1899); Haines v. Campbell, 74 Md. 158, 21 A. 702 (1891); Fowler v. Chichester, 26 Ohio St. 9 (1874).*

Comment c: Illustrations 3 and 4 are based on *Wheeler v. Shields, 3 Ill. (2 Scam.) 348 (1840); Nicholson v. Rust, 21 Ky.L.Rep. 645, 52 S.W. 933 (1899); Vanover v. Wells, 264 Ky. 461, 94 S.W.2d 999 (1936); Harris v. Minvielle, 48 La.Ann. 908, 19 So. 925 (1895); Hampton v. Wilson, 15 N.C. (4 Dev.) 468 (1834); Stepp v. Croft, 18 Pa.Super. 101 (1901); Hoover v. Peerless Publications, Inc., 461 F.Supp. 1206 (E.D.Pa.1978).*

Comment e: This is supported by *Cobbs v. Chicago Defender, 308 Ill.App. 55, 31 N.E.2d 323 (1941); Branstetter v. Dorrough, 81 Ind. 527 (1882); Morse v. Times-Republican Printing Co., 124 Iowa 707, 100 N.W. 867 (1904).*

Including the plaintiff's denial of the charge in the publication does not relieve the defendant of liability. *Cobbs v. Chicago Defender, 308 Ill.App. 55, 31 N.E.2d 323 (1941); Bishop v. Journal Newspaper Co., 168 Mass. 327, 47 N.E. 119 (1897); Morgan v. Bulletin Co., 369 Pa. 349, 85 A.2d 869 (1952).*

See Painter, Republication Problems in the Law of Defamation, 47 Va.L.Rev. 1131 (1961); Note, Privilege to Republish Defamation, 64 Colum.L.Rev. 1102 (1964).

Cross Reference

ALR Annotations:

Liability of telegraph or telephone company for transmitting or permitting transmission of libelous or slanderous messages. *91 A.L.R.3d 1015.*

Dictation to defendant's secretary, typist, or stenographer as publication. *62 A.L.R.3d 1207.*

Liability of publisher of defamatory statement for its repetition or republication by others. *96 A.L.R.2d 373.*

Liability for permitting walls or other portions of place of public resort to be occupied with matter defamatory of plaintiff. *28 A.L.R.2d 1454.*

Joint liability for slander. *26 A.L.R.2d 1031.*

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§ 871 Intentional Harm to a Property Interest

One who intentionally deprives another of his legally protected property interest or causes injury to the interest is subject to liability to the other if his conduct is generally culpable and not justifiable under the circumstances.

COMMENTS & ILLUSTRATIONS

Comment:

a. Nature of Section. This Section is a particularized application of the general principle for intentional torts set out in § 870. Reference should be made to that Section and its Comments. This Section treats the various means by which harmful invasion of property interests are intentionally achieved and states a generalization for intentional torts to property interests. It covers not only established torts that have been specifically dealt with in earlier Sections but also other situations that are within the general principles of tort liability. Within this generalization lie many situations in which the relief is ordinarily or solely equitable in nature but in which the liability is based upon tortious conduct. Thus within it are included situations in which there has been an improper retention or disposition of land and in which the injured person is ordinarily given equitable relief, although the liability is based upon the same kind of tortious conduct as that for which relief at law is given when there has been an intermeddling with chattels, a matter that has been dealt with in §§ 216-278. So also the rule stated in this Section is applicable to duress in a great variety of situations not involving assault, battery and entry upon land, to which alone the statements in §§ 58 and 172 are specifically applicable. In addition, the rule stated in this Section applies to the improper exercise of a power (see Comment *b* and § 871A), a matter that has not previously been stated.

Comments *e* to *g* are a catalogue of methods by which intended torts against property interests may be committed, and indicate the diverse subject matters and the remedies for the various types of interference.

The rule stated in this Section applies when the defendant has done a culpable and unjustifiable act that causes injury to any one or more of another's legally protected interests in property or deprives the other of them. Thus it applies when one has interfered with the possessory interests of another in land or chattels, either by causing harm to the subject matter or by depriving the other of possession and also when there has been harm to or the deprivation of a nonpossessory interest, such as the wrongful destruction or diminution of a claim or the deprivation of a future interest in land or chattels. The rule applies to situations in which the only remedy is by an action at law, which is the usual method of redressing a tort, and also when the only remedy is equitable in nature. Thus the rule applies when title to land has been obtained by fraud or duress and has been transferred to one other than a bona fide purchaser, in which case, until its sale by the transferee, the original owner's sole redress against the transferee is by an action seeking its recovery.

Within the generalization are included rules with reference to the improper dealing with land and to the improper exercise of legal powers, matters not elsewhere stated in this Restatement, and the rules on duress elsewhere dealt with only as an avoidance of the effect of consent to the use of force or to an entry on land. (See §§ 58, 172 and 892B).

b. Justification. The intentional infliction of injury to the person or things of another is tortious in the absence of a justification, usually in the form of a privilege. However, the protection of one's own interests or those of third persons frequently creates a privilege intentionally to harm the otherwise legally protected interests of others. (See § 890).

The rule stated in this Section does not apply when the plaintiff is not entitled to keep the subject matter from the defendant. Thus one who takes his own things from the possession of a tortfeasor is not liable to the latter under the rule stated in this Section. This is true whether or not he is privileged to use the means by which he recaptures his things. Thus one who uses unlawful force to regain the possession of a chattel is not liable in an action for its value (see § 272), although he is subject to liability in an action for battery. (See § 100). Nor is he liable for trespass to or for harm done to the chattel either before or after acquiring possession. The same is true when the possession of land is regained by the unlawful use of force. On the other hand, if each of two persons is privileged to acquire an interest, the use of unlawful means by one of them to exclude the other creates liability for the value of the interest that the other is thus prevented from acquiring.

c. Interference with possession. The rule stated in this Section applies to any interference with the rightful possession of another either by entry upon or the seizure of land or the taking of chattels and to any harm intentionally inflicted upon things in the possession of another. The rule applies whether the harm was done or the possession taken by means of the use of force directed against the plaintiff, or without the use of force.

If the subject matter is land, the remedy may be by an action of tort for the amount of harm done to the land; or if the land is seized and remains in the possession of another, by an action of ejectment, or, if the land has been regained, by an action for the value of the use of the land during the period of the detention. The normal remedy of the injured person when harm is done to chattels, or when they have been taken, is by an action at law for damages. When they have been taken, he is entitled also to an action at law for their specific recovery or, if they are of peculiar value to him and the remedy at law is inadequate, to equitable relief for their specific restitution. A chose in action integrated in a document is a chattel within the rule thus stated. (See § 242). Except for the taking or detention of land, the plaintiff is also entitled in any of these cases to a restitutionary action if the defendant obtained possession of the subject matter or otherwise received a benefit. (See *Restatement of Restitution, §§ 128* and 129).

d. Refusal to return. A person who has anything that is the subject of property to which another is entitled and who knows that the other is entitled to it is subject to liability to the other if he refuses to return it upon demand or if he otherwise adversely deals with it. If the subject matter is land, the injured person is entitled to an action of ejectment or in some cases to a summary remedy provided by statute. If the subject matter is a chattel, local procedure determines whether the one entitled to possession has the same remedies as if the chattel had been taken from his possession. (See Comment *c*). The rule applies when an agent, bailee or other fiduciary who has been entrusted with land or chattels fails to return them upon demand. The rule also applies to other situations in which one has obtained property nontortiously but later a duty to return it arises. Thus the rule applies to a person to whom something has been transferred by mistake and who upon notice of the mistake fails to return the subject matter. It also applies to an innocent donee from a trustee or from one who has obtained

property by fraud; upon discovery of the facts, the donee is under a duty to restore the subject matter to the defrauded person or beneficiary and is subject to liability under the rule stated in this Section for failure to do so.

Illustrations:

1. A conveys the title to Blackacre to B, being induced to do so by B's fraud. By way of gift, B transfers Blackacre to C, who takes possession of it. Upon learning the facts, A demands that C transfer the title to him which C refuses to do. A is entitled to the land and C is subject to tort liability.

2. A mistakenly delivers groceries to B. Shortly thereafter, B discovers the mistake and although he easily could return them, he consumes them. B is subject to liability to A.

3. By mutual mistake as to the subject matter, A conveys Blackacre to B. Upon discovery of the mistake B conveys Blackacre to C, a bona fide purchaser. B is subject to liability to A.

e. Fraud. The actor's conduct is fraudulent if he intentionally causes another to act or refrain from acting by means of intentionally false or misleading conduct or by his intentional concealment of facts or by his intentional failure to disclose a fact that he has a duty to reveal to the other. For a statement of what constitutes fraudulent misrepresentation and nondisclosure in business transactions, see §§ 526-530 and 550-551.

The fraud may result in physical harm to a tangible thing, as when one knowingly misrepresents to another that a building has a sound roof, thus inducing the other to store his goods in the building where they are damaged by rain. The fraud may cause the loss of possession alone or it may result in a transfer of a title or other interest, as when one misrepresents to another the financial ability of himself or of a third person, as a result of which the other transfers property. The tort lies in causing loss; in exchange transactions it is complete when what the plaintiff transfers is worth more than what he receives.

Transactions in which possession or title has been obtained by fraud are voidable at the option of the defrauded party. If the subject matter is land, the plaintiff upon the rescission of the transaction is entitled to equitable relief for its recovery, and normally this is the only remedy aside from an action of deceit. If the subject matter is a chattel, the plaintiff is entitled upon rescission to bring, for the value of the chattel, either an action for its conversion or a restitutionary action, or to bring an action at law to regain possession of the chattel, or if the chattel is of peculiar value to him, to seek equitable relief.

The rule stated in this Section applies to one who assists another to commit a fraud. A third person who has not participated in the fraud but who acquires property with knowledge of the fraud is subject to liability to pay its value to the owner or to return it, since he became a tortfeasor by the acquisition of the subject matter with knowledge of the fraud. If one acquires property for value without notice of the fraud, or if, before notice of the fraud, he has so far changed his position that it would be unfair to require him to return or account for it, he is not liable to the person deprived of it. If he paid no value and did not change his position before learning the facts, he is liable for a refusal to return it to the person entitled to the property, as indicated in Comment *d* above.

f. Duress. The rule stated in this Section applies when a person uses duress; the liabilities and remedies are the same as those when his conduct is fraudulent. If the defendant's conduct constitutes an assault, battery or imprisonment, it is in itself a tort; otherwise, as in the case of fraud, there is a tort under this Section when the duress results in an invasion of a possessory or proprietary interest.

Duress means a threat of unlawful conduct that is intended to prevent and does prevent another from exercising free will and judgment in his conduct. It is commonly committed by an oral or written

threat but may be accomplished by acts. It may be by threats of physical harm directed against the other or a member of his immediate family (see § 58), but it may also be by threats of any unlawful conduct directed against the other or third persons that in fact, as the actor intends, deprives the other of a freedom of choice. (See Illustrations 4 and 5). The test of what act or threat produces the required degree of fear is not entirely objective. The threat need not be one that would put a brave person or even a person of ordinary firmness in fear. Age, sex, mental capacity, the relation of the parties and antecedent circumstances must all be considered. It is therefore not essential that a threat be made under such circumstances that a reasonable person would believe that it will be executed, provided the threatened person believes the other has the means and intends to carry it out. However, in determining whether the fear that is essential for duress did in fact exist in a particular case, the trier of fact can properly consider whether a reasonable person would be put in fear under the circumstances.

Courts of law originally restricted duress to imprisonment or threats sufficient to put a brave man in fear of loss of life, of mayhem or of imprisonment of himself or a member of his immediate family. The common law boundaries have been gradually enlarged, however, and it is now tortious to obtain a transfer of any form of property by means of conduct as described in this Section.

Acts or threats cannot constitute duress unless they are wrongful, even though they exert pressure precluding the exercise of free judgment.

With reference to the wrongdoer, duress has the same consequences as fraud. (See Illustration 6).

The subject of duress is also treated in the Restatement, Second, Contracts §§ 316-318 (Tent.Draft) and the *Restatement of Restitution § 70*. Both of these other Restatements are concerned primarily with equitable relief, in the form of cancellation or rescission of a contract entered into or restitution of that of which the plaintiff has been deprived. When equitable relief is sought, a broad concept of duress has been developed, in accord with that stated here. Although the theory of the remedy is that the actor's conduct is tortious, the primary concern of the courts has been the prevention of unjust enrichment and a refusal to permit the inequitable transaction to stand.

If the plaintiff seeks damages in a tort action, the cases do not yet show a similar expansion of the concept of duress. When the question is one of invalidation of the consent for the purpose of permitting a tort action upon the basis that the consent is no consent, the remedy has thus far been granted only in cases involving use or threat of force against the person consenting or the members of his immediate family or his valuable property. On this, see § 892B, and Comment *j*, where it is suggested that the cases do not necessarily mean a limitation.

Illustrations:

4. A wrongfully seizes possession of B's chattel needed by B in his business and refuses to return it unless B transfers the title of certain land to C. In response to this coercion B transfers the land to C, who later sells the property to a bona fide purchaser. A is subject to liability to B for the value of the property so transferred.

5. A, who in fact has no claim against B, in bad faith threatens B, who is about to present a dramatic performance, that he will obtain an injunction against the performance unless B pays A $ 1,000. B makes the payment, since the performance has been advertised and a considerable sum has been spent on its preparation. A is subject to liability to B for the amount so paid him.

6. A, who has discovered facts that are discreditable to B's wife, threatens to reveal the facts unless B permits A to use B's land as a depot for contraband goods. While A's servants are using B's barn for

this purpose, without negligence or other fault, they set fire to the barn. Assuming that B is not barred by illegality, A is subject to liability to B for the destruction of his barn.

g. Interest in property destroyed by the wrongful exercise of a power. One who intentionally destroys or diminishes a property interest of another by the wrongful exercise of a legal power, is subject to liability to the other. This is true when one has a power but not a privilege to transfer a title or other interest, legal or equitable, in land, chattels or choses in action in which another has an interest and of which he is deprived by an unlawful exercise of the power. Thus the rule applies to cases in which the holder of a record title or other ostensible owner knowingly terminates the interest of the owner of the beneficial interest by its sale to a bona fide purchaser; in which an agent or other fiduciary misuses his power over the property of the principal or beneficiary; in which the assignor or second assignee of a chose in action receives payment of a debt from the obligor in violation of his duty to the assignee or to the prior assignee, respectively, thereby extinguishing the chose in action; or in which one who has acquired the property of another by fraud or duress transfers it to a third person.

The damages recoverable for the destruction of an interest are determined in accordance with the rules stated in §§ 901-932. On the restitutionary rights, see *Restatement of Restitution, § 131*.

REPORTER'S NOTES

Half of this Section (covering creation of liability) has been taken out and placed in a new Section 871A. The blackletter has been rewritten to correspond to the changes in § 870.

Comment f: That duress gives rise to a tort action, see *Neibuhr v. Gage, 99 Minn. 149, 108 N.W. 884 (1906),* aff'd, *99 Minn. 149, 109 N.W. 1 (1906); Housing Authority of City of Dallas v. Hubbell, 325 S.W.2d 880 (Tex.Civ.App.1959)* refused n. r. e.; cf. *Silsbee v. Webber, 171 Mass. 378, 50 N.E. 555 (1898);* Note, Duress as a Tort, 39 Harv.L.Rev. 108 (1925).

Comment g: On improper exercise of a power, see *Jones v. Garden Park Homes Corp., 393 S.W.2d 501 (Mo.1965).*

Cross Reference

ALR Annotations:

Statutes of limitation concerning actions of trespass as applicable to actions for injury to property not constituting a common-law trespass. *15 A.L.R.3d 1228.*

Measure of damages for conversion or loss of commercial paper. *85 A.L.R.2d 1349.*

Remedy of tenant against stranger wrongfully interfering with his possession. *12 A.L.R.2d 1192.*

Digest System Key Numbers:

C.J.S. Torts §§ 43, 44, 48.

West's Key No. Digests, Torts 11.

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Restat 3d of the Law, Torts: Liability for Physical and Emotional Harm, § 40

Restatement of the Law, Torts 3d Liability for Physical and Emotional Harm - Official Text > Chapter 7- Affirmative Duties

§ 40 Duty Based on Special Relationship with Another

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

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

(1) a common carrier with its passengers,

(2) an innkeeper with its guests,

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

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

(a) in imminent danger; or

(b) injured or ill and thereby rendered helpless,

(5) a school with its students,

(6) a landlord with its tenants, and

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

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

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

COMMENTS & ILLUSTRATIONS

Comment:

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

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

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

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

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

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

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

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

Illustrations:

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

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

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

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

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

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

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

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

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

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

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

Illustrations:

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

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

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

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

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

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

l. Duty of schools. The affirmative duty imposed on schools in this Section is in addition to the ordinary duty of a school to exercise reasonable care in its operations for the safety of its students and the duties provided in Chapter 9 to entrants on the land. The relationship between a school and its students parallels aspects of several other special relationships--it is a custodian of students, it is a land possessor who opens the premises to a significant public population, and it acts partially in the place of parents. The Second Restatement of Torts contained no provision that specifically identified the school--student relationship as special. However, a generally ignored passage in § 320, Comment *b*, which imposed an affirmative duty on custodians to control third parties in order to prevent them from harming the one in custody, observes that the custodial relationship is also applicable to schools and their students. Despite the Second Restatement's limited treatment of affirmative duties of schools, such a duty has enjoyed substantial acceptance among courts since the Second Restatement's publication. As with the other duties imposed by this Section, it is only applicable to risks that occur while the student is at school or otherwise engaged in school activities. And because of the wide range of students to which it is applicable, what constitutes reasonable care is contextual--the extent and type of supervision required of young elementary-school pupils is substantially different from reasonable care for college students.

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

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

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

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

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

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

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

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

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

REPORTER'S NOTES

REPORTERS' NOTE

Comment a. History. This Chapter is organized differently from the first and Second Restatements of Torts. The first Restatement imposed no general affirmative duties on actors in a special relationship with another. It addressed only duties to control the conduct of third parties based on a special relationship with them or with the injured person. The Second Restatement, in § 314A, added general affirmative duties to another based on a special relationship with the other. This created a redundancy between the general duty owed to the person in the special relationship and the duty owed to the

person in the special relationship to control the conduct of third parties. This Chapter describes general duties owed to persons with whom the actor has a special relationship (this Section) without regard to whether the harm is caused by a third person and duties owed by actors to third parties (§ 41) based on a special relationship between the actor and another causing harm. It thus eliminates the redundancy in the Second Restatement.

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

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

Even the Second Restatement recognized that there might be circumstances in which an actor would have a duty to do more than provide first aid and obtain appropriate medical attention. Restatement Second, Torts § 314A, Comment *f* (the actor "will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician"). Judge Becker, in a lengthy opinion, surveyed a number of cases from a variety of states to assist in determining how the New Jersey Supreme Court would rule in a case that raised the issue of the duty of a business to a patron who suffered a heart attack. Judge Becker concluded that the duty went beyond merely rendering first aid and summoning medical care, and included an obligation not only to summon medical assistance but also "to take other reasonable steps under the circumstances to save its invitees from emergencies beyond the invitee's or his or her companions' capacity to ward off." Lundy v. Adamar, Inc., 34 F.3d 1173, 1200-1202 (3d Cir. 1994) (Becker, J., concurring and dissenting) (applying New Jersey law); see also Pacello v. Wyndam Int'l, Inc., 2006 WL 1102737 (Conn. Super. Ct. 2006) (reviewing cases and concluding that only a relatively modest effort to obtain medical care and provide first aid to a heart-attack victim is required under § 314A); L.A. Fitness Int'l, LLC v. Mayer, 980 So. 2d 550 (Fla. Dist. Ct. App. 2008) (health club had no duty to administer advanced treatment such as CPR to member suffering cardiac arrest); Lee v. GNLV Corp., 22 P.3d 209 (Nev. 2001) (characterizing the duty owed by a restaurant to a patron who was choking on food as one of reasonable care under the circumstances, but holding that restaurant was not negligent as a matter of law for not employing Heimlich maneuver); Applebaum v. Nemon, 678 S.W.2d 533 (Tex. App. 1984) (reiterating language in § 314A, Comment *f*); Hovermale v. Berkeley Springs Moose Lodge, 271 S.E.2d 335 (W. Va. 1980) (fraternal organization operating a bar owed duty of reasonable care to patron). But see Drew v. LeJay's Sportmen's Café, Inc., 806 P.2d 301 (Wyo. 1991) (dram shop had no duty to provide first aid to patron who was choking on two-inch piece of meat; dram shop satisfied its duty of care by summoning appropriate medical care). In an especially confusing passage, particularly in light of its no-duty ruling, the *Drew* court stated: "While we agree with Restatement (Second) of Torts § 314A to the extent that we acknowledge reasonable care must be exercised in this

circumstance, we are satisfied that duty is met when medical assistance is summoned within a reasonable time, and decline to adopt § 314A." *Id. at 306.*

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

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

For certain relationships, especially when the duty concerns protection from third-party misconduct, some courts have fashioned rules about when there is sufficient evidence of the foreseeability of harm to permit the factfinder to find breach of a duty of reasonable care. See, e.g., *L.A.C. v. Ward Parkway Shopping Ctr. Co., 75 S.W.3d 247 (Mo. 2002)* (explaining the variety of rules employed to determine

when a claim that a business owner failed to provide reasonable security may be submitted to the factfinder); *Krier v. Safeway Stores 46, Inc., 943 P.2d 405 (Wyo. 1997).*

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

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

> A landlord also has a duty to take reasonable security precautions to protect tenants and their guests from foreseeable criminal acts. See *Trentacost v. Brussel, 82 N.J. 214, 231-232, 412 A.2d 436 (1980)* (imposing liability on landlord for failure to "take reasonable security measures for tenant protection on the premises"); see also *Clohesy v. Food Circus Supermarkets, Inc., 149 N.J. 496, 500, 516-517, 694 A.2d 1017 (1997)* (holding landowner liable for supermarket customer's murder after her abduction from parking lot because criminal acts were foreseeable even though prior crimes on property were "lesser in degree"); *Butler v. Acme Mkts., Inc., 89 N.J. 270, 274, 280, 445 A.2d 1141 (1982)* (holding that supermarket could be liable to customer who was mugged in supermarket's parking lot because of its knowledge of other muggings on premises during preceding year); *Braitman v. Overlook Terrace Corp., 68 N.J. 368, 371-372, 382-383, 346 A.2d 76 (1975)* (holding landlord could be liable for burglary of tenant's apartment because landlord had breached duty of care by failing to provide functioning deadbolt lock). When a landlord knows or should know of a pattern of criminal activity on his premises that poses a foreseeable risk of harm to his tenants and their guests and does not take reasonable steps to meet the danger, he cannot escape liability merely because the criminal act was committed by a third party who was not within his control.
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> *Gonzalez v. Safe & Sound Sec. Corp., 881 A.2d 719, 730-731 (N.J. 2005).*

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

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

(Mich. Ct. App. 1985) (restaurant owed no duty to patron once the patron departed); *Krieg v. Massey, 781 P.2d 277 (Mont. 1989); Kimberly S.M. v. Bradford Cent. Sch., 649 N.Y.S.2d 588 (App. Div. 1996).*

Cases in which courts have addressed the scope of the duty imposed by this Section and Comment include *Fabend v. Rosewood Hotels & Resorts, LLC, 381 F.3d 152 (3d Cir. 2004)* (campground operating within national park pursuant to agreement with National Park Service had no duty with regard to risks at swimming area outside the area of its control); *Sperka v. Little Sabine Bay, Inc., 642 So. 2d 654 (Fla. Dist. Ct. App. 1994)* (innkeeper did not owe duty to guest with respect to changes in sandbars in ocean off premises); *Kimberly S.M. v. Bradford Cent. Sch., 649 N.Y.S.2d 588 (App. Div. 1996)* (no common-law duty owed by school aware of sexual abuse of student by relative during the summer and outside school premises); *Young v. Salt Lake City Sch. Dist., 52 P.3d 1230 (Utah 2002)* (school owed no duty to elementary-school student riding his bicycle to school conference when hit by car in crosswalk adjacent to school).

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

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

Comment i. Duty of common carriers. There is very little decisional law about the affirmative duties of transporters other than common carriers. Often the question involving other transporters is whether they are subject to the higher standard of care that was often imposed on common carriers. See *Commerce Ins. Co. v. Ultimate Livery Serv., Inc., 897 N.E.2d 50, 60 (Mass. 2008)* ("A private carrier, engaged in the business of transporting persons consuming alcohol, is in a primary position to use care to avoid leaving an intoxicated passenger at a location where it is likely the passenger will drive."); *Hawkins Cnty. v. Davis, 391 S.W.2d 658 (Tenn. 1965); Nichols v. TransCor Am., Inc., 2002 WL 1364059 (Tenn. Ct. App. 2002)* (private company transporting prison inmate was not a common carrier that owed prisoner heightened duty of care); *Speed Boat Leasing, Inc. v. Elmer, 124 S.W.3d 210 (Tex. 2003)* (speed boat providing thrill rides not common carrier subject to higher standard of care). The clearest case imposing an affirmative duty on a non-common-carrier transporter is *Howell v. City Towing Assocs., Inc., 717 S.W.2d 729 (Tex. App. 1986).* A tow truck transported the owner of the car that was being towed. The owner had a heart attack while riding in the tow truck, and the court

held that the tow company owed the owner a duty of reasonable care. Cf. *Anderson v. Shaughnessy, 526 N.W.2d 625 (Minn. 1995)* (implying that school bus owed affirmative duty to student while riding on bus, but holding that no duty was owed after student alighted from bus).

Comment j. Duty of business or other possessor of land who holds its premises open to the public. For courts imposing a duty on business operators with regard to third-party criminal activities that pose a risk to those on the property, see *Novak v. Capital Mgmt. & Dev. Corp., 452 F.3d 902 (D.C. Cir. 2006); Morgan v. Bucks Assocs., 428 F. Supp. 546 (E.D. Pa. 1977)* (relying on § 344); *Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653 (Cal. 1985); Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193 (Cal. 1984); Stevens v. Jefferson, 436 So. 2d 33 (Fla. 1983); Lau's Corp. v. Haskins, 405 S.E.2d 474 (Ga. 1991); Marshall v. Burger King Corp., 856 N.E.2d 1048 (Ill. 2006)* (fast-food restaurant owed affirmative duty of reasonable care to patron with regard to both criminal and negligent acts of third party); *Summy v. City of Des Moines, 708 N.W.2d 333 (Iowa 2006); Galloway v. Bankers Trust Co., 420 N.W.2d 437 (Iowa 1988); Harris v. Pizza Hut, Inc., 455 So. 2d 1364 (La. 1984); Erickson v. Curtis Inv. Co., 447 N.W.2d 165 (Minn. 1989); L.A.C. v. Ward Parkway Shopping Ctr. Co., 75 S.W.3d 247, 257 (Mo. 2002)* (imposing a duty to protect customers when "an individual is present who has conducted himself so as to indicate danger and sufficient time exists to prevent injury"); *Doud v. Las Vegas Hilton Corp., 864 P.2d 796 (Nev. 1993); Butler v. Acme Mkts., Inc., 445 A.2d 1141 (N.J. 1982)* (imposing general duty of reasonable care on business with regard to security of patrons against criminal attacks); *Moran v. Valley Forge Drive-In Theatre, Inc., 246 A.2d 875 (Pa. 1968)* (relying on § 344); see also Chapter 9. But see *MacDonald v. PKT, Inc., 628 N.W.2d 33 (Mich. 2001)* (limiting duty of merchant to involving law-enforcement officials when criminal behavior threatens imminent harm to those on the premises); *Wright v. Webb, 362 S.E.2d 919 (Va. 1987)* (holding that business owes no duty to take precautions to protect patrons from future criminal attack; duty is limited to currently existing or imminent attacks).

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

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

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

For an explanation of developments since the Second Restatement of Torts in the duty imposed on possessors of land to those on the land for conditions or activities on the land, see *Nelson v. Freeland, 507 S.E.2d 882 (N.C. 1998)* (reporting that 25 jurisdictions have modified the common-law trichotomy of categories for those who enter land, along with different duties corresponding to the

status of the person on the land); see also *Alexander v. Med. Assocs. Clinic, 646 N.W.2d 74 (Iowa 2002)* (reviewing courts' treatment of duty of land possessor to trespassers).

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

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

Even intentional torts, when the risks of such torts are increased by the circumstances of employment, may be covered by the exclusive-remedy provision of workers' compensation and thus excepted from tort treatment. See *Wood v. Safeway, Inc., 121 P.3d 1026 (Nev. 2005),* in which a mentally handicapped employee was sexually assaulted while working at defendant's grocery store by an employee of a janitorial service that cleaned the store. Because the risk of such an assault was increased by the plaintiff's presence at work, workers' compensation constituted her exclusive remedy. See also *Tanks v. Lockheed Martin Corp., 417 F.3d 456 (5th Cir. 2005)* (applying Mississippi law).

The *Wood* court did not address the matter of whether plaintiff's injuries were the result of "accident," another requirement of the workers'-compensation statute, but other courts have done so. See *Giracelli v. Franklin Cleaners & Dyers, Inc., 42 A.2d 3 (N.J. 1945); Doe v. S.C. State Hosp., 328 S.E.2d 652, 654 (S.C. Ct. App. 1985)* ("An intentional assault upon an employee by a third person is an 'accident' because it is unexpected when viewed from the employee's perspective.").

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

Although the Second Restatement of Torts did not identify the school-student relationship explicitly as one that imposed an affirmative duty, § 320, Comment *b*, stated that students are deprived of the protection of their parents while in school. In addition, an Illustration employed a kindergarten student who becomes seriously ill at school. The Illustration concluded that the school is subject to liability for its negligence in failing to obtain appropriate medical assistance for the student. *Restatement Second, Torts § 314A*, Illustration 7. For courts that affirm the duty of a school to its students, see *Chavez v. Tolleson Elementary Sch. Dist., 595 P.2d 1017 (Ariz. Ct. App. 1979); Dailey v. L.A. Unified Sch. Dist., 470 P.2d 360 (Cal. 1970); Todd M. v. Richard L., 696 A.2d 1063 (Conn. Super. Ct. 1995); District of Columbia v. Royal, 465 A.2d 367, 369 (D.C. 1983); Rupp v. Bryant, 417 So. 2d 658 (Fla. 1982); Doe Parents No. 1 v. State Dep't of Educ., 58 P.3d 545 (Haw. 2002); Beshears v. Unified Sch. Dist. No. 305, 930 P.2d 1376, 1382 (Kan. 1997); Doe v. DeSoto Parish Sch. Bd., 907 So. 2d 275 (La. Ct. App. 2005); Doe v. City of New Orleans, 577 So. 2d 1024 (La. Ct. App. 1991); Prier v. Horace Mann Ins. Co., 351 So. 2d 265 (La. Ct. App. 1977); Eisel v. Bd. of Educ. of Montgomery Cnty., 597 A.2d 447 (Md. 1991)* (school counselors had duty to student who threatened suicide); *Henderson v. Simpson Cnty. Pub. Sch. Dist., 847 So. 2d 856 (Miss. 2003); Graham v. Mont. State Univ., 767 P.2d 301 (Mont. 1988); Marquay v. Eno, 662 A.2d 272 (N.H. 1995)* (students who were sexually abused by school employees); *Mirand v. City of New York, 637 N.E.2d 263, 266 (N.Y. 1994)* ("Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision."); *Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326 (Or. 1987); Shin v. Sunriver Preparatory Sch., Inc., 111 P.3d 762 (Or. Ct. App. 2005)* (finding that private boarding school had special relationship with student); *Christensen v. Royal Sch. Dist. No. 160, 124 P.3d 283 (Wash. 2005).*

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

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

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

For courts imposing a duty of reasonable care to protect students on the college's property, including on the basis that the college has a duty in its role as land occupier to student-entrants on the land, see *Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D. Va. 2002)* (concluding that, on specific facts alleged by plaintiff, college owed affirmative duty to student who committed suicide); *Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193 (Cal. 1984)* (duty owed to student raped in college parking lot); *Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991)* (finding university had special relationship with student who was a fraternity pledge but also relying on its undertaking to regulate hazing and on its status as possessor of land and student's status of invitee); *Nova Se. Univ., Inc. v. Gross, 758 So. 2d 86 (Fla. 2000)* (duty owed to graduate student placed by university in mandatory internship); *Niles v. Bd. of Regents of Univ. Sys. of Ga., 473 S.E.2d 173, 175 (Ga. Ct. App. 1996)* (stating in dicta that a "university student is an invitee to whom the university owes a duty of reasonable care"); *Stanton v. Univ. of Me. Sys., 773 A.2d 1045 (Me. 2001)* (university owed duty to student-athlete as business invitee who was residing in dormitory to provide information about appropriate precautions for personal safety); *Univ. of Md. E. Shore v. Rhaney, 858 A.2d 497 (Md. Ct. Spec. App. 2004)* (holding that a college, as landlord, owed duty of reasonable care to student residing in dormitory), aff'd on other grounds, *880 A.2d 357 (Md. 2005); Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983); Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757 (Neb. 1999)* (victim of fraternity hazing episode owed duty by university based on its role as landowner with student as its invitee); cf. *Mintz v. State, 362 N.Y.S.2d 619 (App. Div. 1975)* (impliedly assuming that duty existed in deciding that university had not acted unreasonably as a matter of law in supervising overnight canoe outing by students); *Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 (N.C. Ct. App. 2001)* (holding that university has special relationship with cheerleader based on mutual benefit to each from the activity and control exerted by the university over the activity, but denying, in dicta, that university has special

relationship generally with students). But see *Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979)* (applying Pennsylvania law) (college owed no duty to student injured while being transported by another underage student who had become drunk at off-campus class picnic); *Booker v. Lehigh Univ., 800 F. Supp. 234 (E.D. Pa. 1992)* (university owed no duty to student who was injured after becoming inebriated at on-campus fraternity party), aff'd, *995 F.2d 215* (Table) (3d Cir. 1993); *Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Ct. App. 1981)* (university owed no duty to student by virtue of dormitory license where risks created by excessive drinking and drag racing were not foreseeable to university); *Univ. of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987)* (concluding that university owed no duty to student injured while on trampoline at fraternity; to impose duty could result in imposing regulations on student activity that would be counterproductive to appropriate environment for student development); *Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300, 311-312 (Idaho 1999)* (college does not have special relationship with student that imposes a duty to protect student from risks involved in voluntary intoxication); *Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552 (Ill. App. Ct. 1987)* (university owed no duty to student based on its landlord-tenant relationship with her for harm that resulted from prank by intoxicated fraternity member); *Nero v. Kan. State Univ., 861 P.2d 768 (Kan. 1993)* (declining to impose duty on university solely because of its role as school but concluding university had duty of care as landlord for student living in dormitory); *Boyd v. Tex. Christian Univ., Inc., 8 S.W.3d 758 (Tex. App. 1999)* (university had no duty to student injured while at off-campus bar); *Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986)* (university had no duty to protect student from consequences of voluntary intoxication while on university-sponsored field trip). See generally Peter F. Lake, *The Rise of Duty and the Fall of* In Loco Parentis *and Other Protective Tort Doctrines in Higher Education Law*, *64 MO. L. REV. 1 (1999)* (identifying a trend in tort law toward holding institutions of higher education to a tort duty with respect to the safety of students); Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485 (2003) (advocating recognition of a special relationship between colleges and their students).

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

A number of courts recognizing the landlord-tenant relationship as sufficient to impose an affirmative duty on landlords identify the innkeeper-guest relationship as an analogy. See *Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970); Tenney v. Atl. Assoc., 594 N.W.2d 11 (Iowa 1999); Miller v. Tabor W. Inv. Co., LLC, 196 P.3d 1049, 1054 (Or. Ct. App. 2008); Giggers v. Memphis Housing Auth'y, 277 S.W.3d 359 (Tenn. 2009); Tedder v. Raskin, 728 S.W.2d 343 (Tenn. Ct. App. 1987).* But see *Cooke v. Allstate Mgmt. Corp., 741 F. Supp. 1205 (D.S.C. 1990)* (distinguishing

rented premises to which only tenants and their guests have access and businesses, such as hotels, that are open to the public). The *Cooke* court's distinction fails to recognize that in both cases there is some risk that dangerous third parties may gain access to the premises. While the risk must be evaluated based on the particular facts of the case, the risk in an apartment in a dangerous neighborhood may be greater than in a secluded hotel.

For courts that have employed narrow no-duty rulings when the specific circumstances of the case revealed no basis for finding a failure to exercise reasonable care, or that reasonable care would have been futile in preventing the harm, see *C. S. v. Sophis, 368 N.W.2d 444 (Neb. 1985); Yuzefovsky v. St. John's Wood Apartments, 540 S.E.2d 134 (Va. 2001);* cf. *Nero v. Kan. State Univ., 861 P.2d 768 (Kan. 1993)* (combining proprietor and landlord language to conclude university owed affirmative duty to student residing in dormitory); *Smith v. Lagow Constr. & Dev. Co., 642 N.W.2d 187 (S.D. 2002)* (confusing opinion in which court denied special relationship between landlord and tenant existed, but held landlord had a duty based on exclusive control over locks and on principle that duty to protect can exist when a party's conduct increases the risk of third-party criminal conduct). For a court that relied on an absence of cause in fact as a matter of law, rather than adopting the more convenient but less accurate no-duty rationale, see *W. Invs., Inc. v. Urena, 162 S.W.3d 547 (Tex. 2005).*

Courts endorsing some affirmative duty for landlords include *Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970); Brock v. Watts Realty Co., 582 So. 2d 438 (Ala. 1991)* (basing duty on ordinance requiring landlords to maintain locks); *Frances T. v. Vill. Green Owners Ass'n, 723 P.2d 573 (Cal. 1986)* (condominium association owed duty of reasonable care to tenants in maintaining areas of condominium under control of association); Hawkins v. Wilton, *51 Cal. Rptr. 3d 1 (Cal. Ct. App. 2006)* (landlord has a duty to protect tenants in apartment from dangers posed by other tenants); *Ramsay v. Morrissette, 252 A.2d 509 (D.C. 1969); Paterson v. Deeb, 472 So. 2d 1210 (Fla. Dist. Ct. App. 1985)* (relying on statute requiring landlords to "make reasonable provision for . . . locks"); *Lidster v. Jones, 336 S.E.2d 287 (Ga. Ct. App. 1985)* (landlord had duty of care with regard to risk of attack on a child tenant by vicious dog owned by other tenant); *Warner v. Arnold, 210 S.E.2d 350, 353 (Ga. Ct. App. 1974)* (holding landlord could be found liable for failing to provide an additional functioning lock and citing *Kline* in support, but not discussing affirmative nature of the duty imposed); *Stephens v. Stearns, 678 P.2d 41, 50 (Idaho 1984)* (adopting rule that "a landlord is under a duty to exercise reasonable care in light of all the circumstances"); *McDonald v. Talbott, 447 S.W.2d 84 (Ky. Ct. App. 1969)* (landlord subject to liability for attack in common area by vicious dog kept by a frequent visitor to tenant); *Hemmings v. Pelham Wood Ltd. Liab. Ltd. P'ship, 826 A.2d 443 (Md. 2003)* (landlord has duty of reasonable care with regard to security measures in common areas over which landlord has control); *Scott v. Watson, 359 A.2d 548 (Md. 1976); Davis v. Christian Bhd. Homes of Jackson, Miss., Inc., 957 So. 2d 390 (Miss. Ct. App. 2007); Gans v. Parkview Plaza P'ship, 571 N.W.2d 261 (Neb. 1997); Braitman v. Overlook Terrace Corp., 346 A.2d 76 (N.J. 1975)* (declining to hold that the landlord-tenant relationship alone is sufficient to impose a duty but holding that landlord must take reasonable care to prevent theft of tenant's possessions); *Castillo v. Cnty. of Santa Fe, 755 P.2d 48 (N.M. 1988)* (landlord had duty of reasonable care to maintain common areas of premises); *Mason v. U.E.S.S. Leasing Corp., 756 N.E.2d 58 (N.Y. 2001)* (holding that a landlord has duty to take "minimal precautions" for safety of tenants); *Burgos v. Aqueduct Realty Corp., 706 N.E.2d 1163 (N.Y. 1998); In re World Trade Ctr. Bombing Litig., 776 N.Y.S.2d 713 (Sup. Ct. 2004)* (finding that Port Authority, as commercial landlord, had a duty of reasonable care with regard to criminal activities occurring on the premises, specifically the 1993 bombing of the parking garage);

Evers v. FSF Overlake Assocs., 77 P.3d 581 (Okla. 2003) (landlord who retains control over common areas has a duty of reasonable care to keep premises safe including from dangers posed by third-party criminal activity by other tenants); *Miller v. Tabor W. Inv. Co., 196 P.3d 1049 (Or. Ct. App. 2008)* (holding that landlords have an affirmative duty to warn their tenants of another tenant who presents a foreseeable risk of physical harm, regardless of whether the threat is present on or off the landlord's property); *Clea v. Odom, 714 S.E.2d 542 (S.C. 2011)* (landlords have an affirmative duty with regard to risks that exist in common areas of leased premises); *Tedder v. Raskin, 728 S.W.2d 343 (Tenn. Ct. App. 1987); Exxon Corp. v. Tidwell, 867 S.W.2d 19 (Tex. 1993); Griffin v. West RS, Inc., 984 P.2d 1070 (Wash. Ct. App. 1999)*, rev'd on other grounds, *18 P.3d 558 (Wash. 2001); Merrill v. Jansma, 86 P.3d 270 (Wyo. 2004)* (landlord-tenant statute basis for affirmative duty of reasonable care under the circumstances is imposed on landlords, overturning prior common-law rule); see also § 53.

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

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

The line between the ordinary duty of care and an affirmative duty may be quite thin, as *Vigil v. Payne, 725 P.2d 1155 (Colo. App. 1986),* reveals. The court held that a landlord, aware that a prospective tenant owned a vicious dog, owed a duty of care to other tenants. The court observed that by leasing the premises to such a tenant the landlord had participated in creating the risk at issue. Thus, the recognition of a duty in *Vigil* does not address whether an affirmative duty exists pursuant to this Section. See also *Strunk v. Zoltanski, 468 N.E.2d 13 (N.Y. 1984)* (same). Similarly, failing to provide adequate security devices at leased premises, although with considerably more stretching, can be conceptualized as conduct that facilitates the risk of criminal attack, as the court did in *Johnston v. Harris, 198 N.W.2d 409 (Mich. 1972).*

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

and conduct that facilitated a criminal attack, and ruled that the landlord could only be held liable on the latter ground, see *Rowe v. State Bank of Lombard, 531 N.E.2d 1358 (Ill. 1988).*

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

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

Comment n. Duty of custodians. Custodial relationships can include a day-care center with the children for whom it is caring, see *Applebaum v. Nemon, 678 S.W.2d 533 (Tex. App. 1984);* an adult who agrees to oversee a minor child who stays in the adult's home, see *Bjerke v. Johnson, 742 N.W.2d 660 (Minn. 2007)* (stable owner who agreed to have minor reside with her owed duty of reasonable care to protect minor from sexual assault by owner's live-in boyfriend); *Kellermann v. McDonough, 684 S.E.2d 786 (Va. 2009)* (parents who agreed to oversee overnight stay by adolescent friend of their daughter); a jailer with a prisoner, e.g., *Minneci v. Pollard, U.S. , 132 S. Ct. 617, 624-625 (2012); Young v. Huntsville Hosp., 595 So. 2d 1386 (Ala. 1990);* Giraldo v. Cal. Dep't of Corr. and Rehabilitation, *85 Cal. Rptr. 3d 371, 386 (Ct. App. 2008); Hall v. Knipp, 982 So. 2d 1196 (Fla. Dist. Ct. App. 2008); Ferguson v. Perry, 593 So. 2d 273 (Fla. Dist. Ct. App. 1992); Cole v. Ind. Dep't of Corr., 616 N.E.2d 44 (Ind. Ct. App. 1993); Thomas v. County Com'rs of Shawnee Cnty., 198 P.3d 182, 190 (Kan. Ct. App. 2008)* (adopting § 314A(4)), aff'd, *262 P.3d 336 (Kan. 2011); Brownelli v. McCaughtry, 514 N.W.2d 48 (Wis. 1994);* a hospital with a patient, *Dragomir v. Spring Harbor Hosp., 970 A.2d 310, 315-317 (Me. 2009); N.X. v. Cabrini Med. Ctr., 765 N.E.2d 844 (N.Y. 2002);* a nursing home with its residents, *Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73 (Tenn. 2001);* a summer camp for children with its campers, *Doe v. Goff, 716 N.E.2d 323 (Ill. App. Ct. 1999);* an employer with a student intern who is employed under a work-study agreement, *Platson v. NSM, Am., Inc., 748 N.E.2d 1278 (Ill. App. Ct. 2001);* a law-enforcement officer with an arrestee, *Jackson v. City of Kansas City, 947 P.2d 31 (Kan. 1997); Del Tufo v. Township of Old Bridge, 685 A.2d 1267 (N.J. 1996);* a boy-scout organization with a member, *L.P. v. Oubre, 547 So. 2d 1320 (La. Ct. App. 1989);* the state with

children for whom the state has, through its social-services operations, assumed custody, *Vonner v. State, 273 So. 2d 252, 255-256 (La. 1973);* cf. *DeShaney v. Winnebago Dep't of Soc. Servs., 489 U.S. 189, 201 n.9 (1989)* ("Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."); and a residential rehabilitation center for delinquent and other troubled juveniles with its residents, *Nova Univ. v. Wagner, 491 So. 2d 1116 (Fla. 1986).* Courts have not been sympathetic to efforts to extend the duty imposed on custodians to others who have a relationship with, say, a patient, but a noncustodial one. See, e.g., *Lee v. Corregedore, 925 P.2d 324 (Haw. 1996).* See also *Bicknell v. Dakota GM, Inc., 2009 WL 799613 (D. Minn. 2009)* (holding that plaintiff's suggestion to her intoxicated husband that he stop consuming alcohol was not sufficiently specific to constitute a custodial relationship).

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

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

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

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

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

The Prosser treatise has been predicting for nearly five decades that courts would recognize family members as a special relationship. See WILLIAM L. PROSSER, THE LAW OF TORTS § 54, at 338 (3d ed. 1964). Prosser's prognostication has not been borne out. The only case that squarely addresses whether a family member owes an affirmative duty to other family members held an aunt did not owe an affirmative duty to her nephew. *Chastain v. Fuqua Indus., Inc., 275 S.E.2d 679 (Ga. Ct. App. 1980).* Several cases recognize the duty of custodial parents to their children. See *Delgado v. Lohmar, 289 N.W.2d 479, 483-484 (Minn. 1979); Lundman v. McKown, 530 N.W.2d 807, 820-821 (Minn. Ct.*

App. 1995) ("we believe there also is a presumption that 'custodial' stepparents (and 'visitation' stepparents during visitation) assume special-relationship duties to stepchildren"). However, a number of these courts do not view the parent's duty to the child as an affirmative one. Thus, in *Broadbent v. Broadbent, 907 P.2d 43 (Ariz. 1995),* in the course of holding that parental immunity does not prevent a child from suing a parent for negligent supervision, the court observed that, had the plaintiff been a neighbor child, the defendant would be liable. See also *Bang v. Tran, 1997 Mass. App. Div. 122 (Dist. Ct. 1997).* But see *Holodook v. Spencer, 324 N.E.2d 338 (N.Y. 1974)* (declining to recognize tort action by child against parent for negligent supervision; parent can only be liable to child when legal obligation arises outside the family relationship). Hence, these cases are not strong support for recognition of family as a special relationship imposing an affirmative duty. As well, courts in many of these cases primarily focus on whether parental immunity should be abolished and, if so, the scope of liability that remains for parents, thereby distracting attention from whether a parent has a special relationship with a child that imposes affirmative duties that go beyond providing necessary care, supervision, and provision for an unemancipated minor. See *Foldi v. Jeffries, 461 A.2d 1145 (N.J. 1983); Cole v. Sears Roebuck & Co., 177 N.W.2d 866 (Wis. 1970).*

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

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

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

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

(1) a parent with dependent children,

(2) a custodian with those in its custody,

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

(4) a mental-health professional with patients.

COMMENTS & ILLUSTRATIONS

Comment:

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

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

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

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

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

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

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

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

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

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

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

Illustration:

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

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

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

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

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

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

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

In some cases, one or more of these options may be clearly inappropriate, and courts appropriately rule as a matter of law that there has been no negligence for failing to pursue that course of action. In addition, some deference to the judgment of a psychotherapist acting in good faith is appropriate. The psychotherapy profession has been attentive to the duty imposed on it; students are routinely taught

about their obligations to protect others from dangerous patients. Providing more certain guidelines than "reasonable care" to this attentive audience may be appropriate, especially where profit or other self-interest motivations are not significant. A standard of deference to the good-faith choices made by mental-health professionals would alleviate some tension prompted by the uncertainty of a reasonable-care standard. This deference might be effected by permitting argument on the subject, by an instruction to the jury explaining why it should give some deference to conscious and good-faith judgments of the defendant, or by crafting a good-faith rule roughly analogous to the business-judgment rule employed for corporate directors. Some legislatures have responded to this concern for greater certainty by enacting more inflexible rules limiting the scope of psychotherapists' duties.

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

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

Illustrations:

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

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

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

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

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

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

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

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

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

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

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

Many courts have been influenced by the patient's preferences regarding warnings or other precautions to benefit family members or others with whom the patient has a relationship. The case for an affirmative duty to be imposed on a physician is stronger when the patient would prefer protective measures for the third party. This is similar to the intended third-party-beneficiary rule that courts have used in other professional contexts. Courts generally have held physicians liable to nonpatient family members for failing to provide the patient with information about a communicable disease. On the other hand, some courts are concerned that any precaution a physician might take would have little or no effect in reducing the risk, especially for warnings to patients about risks of which they were already aware. These courts may lack confidence in their ability to address factual causation in these cases. They may also be concerned with the administrative costs of identifying the few cases in which causation exists. This Restatement takes no position on how these competing concerns should be resolved.

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

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

REPORTER'S NOTES

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

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

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

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

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

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

App. 2011); Cooper v. Meyer, 365 N.E.2d 201 (Ill. App. Ct. 1977); J.S. v. Harris, 227 P.3d 1089 (Okla. Civ. App. 2009) (because defendant could not reasonably foresee the threat her grandson posed as a potential child molester, defendant owed no duty to control grandson's actions).

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

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

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

outside the scope of employment similar to that provided in this Section, but grounded the duty in other bases for an affirmative duty. See *Marquay v. Eno, 662 A.2d 272 (N.H. 1995)* (duty of school district to students who were sexually abused by employees outside school hours); *Funkhouser v. Wilson, 950 P.2d 501 (Wash. Ct. App. 1998)* (church youth leader who sexually abused children of pastor).

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

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

Illustration 1 is based on *Coath v. Jones, 419 A.2d 1249 (Pa. Super. Ct. 1980).* For other cases in which an employee only had access to premises because of an existing or prior employment relationship, see *Int'l Distrib. Corp. v. Am. Dist. Tel. Co., 569 F.2d 136 (D.C. Cir. 1977)* (employees of burglar-alarm company who robbed liquor store after disabling burglar alarm provided by employer); *Ponticas v. K.M.S. Invs., 331 N.W.2d 907 (Minn. 1983)* (apartment owner and employer of resident manager liable for rape of tenant by resident manager who was provided passkey for all units in apartment house); *Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc., 474 A.2d 436 (R.I. 1984).*

Comment f. Duty of custodians. Section 319 of the first and Second Restatements of Torts has been influential and accepted by most courts. See *Buchler v. State, 853 P.2d 798, 802 (Or. 1991)* ("The majority of jurisdictions appear to apply common-law principles that are like section 319 in these types of cases. Many jurisdictions simply adopt Restatement section 319, by reference, as the law of that state."). For cases since the Second Restatement reaffirming the duty of jailers to third parties, see *Shepherd v. Washington Cnty., 962 S.W.2d 779 (Ark. 1998); Cansler v. State, 675 P.2d 57 (Kan. 1984); Wilson v. Dep't of Pub. Safety & Corr., 576 So. 2d 490 (La. 1991); Lopez v. Great Falls Pre-Release Servs., Inc., 986 P.2d 1081 (Mont. 1999); State v. Silva, 478 P.2d 591 (Nev. 1970); Christensen v. Epley, 585 P.2d 416 (Or. Ct. App. 1978),* aff'd by an equally divided court, *601 P.2d 1216 (Or. 1979); E.P. v. Riley, 604 N.W.2d 7 (S.D. 1999)* (employees of Department of Social Services who had custody of teenager owed duty to third parties based on custody and knowledge that teen posed a risk of sexually abusing other children); *Joyce v. State, Dep't of Corr., 119 P.3d 825*

(Wash. 2005) (convicted criminal offender under community supervision). For cases reaffirming the duty of hospitals that have custody of those with mental illnesses, see *Hicks v. United States, 511 F.2d 407 (D.C. Cir. 1975)* (Federal Tort Claims Act case); *Bradley Ctr., Inc. v. Wessner, 287 S.E.2d 716* (Ga. Ct. App.), aff'd, *296 S.E.2d 693 (Ga. 1982); Maroon v. State Dep't of Mental Health, 411 N.E.2d 404 (Ind. Ct. App. 1980); Rum River Lumber Co. v. State, 282 N.W.2d 882 (Minn. 1979); Petersen v. State, 671 P.2d 230 (Wash. 1983).* But see *Davenport v. Cmty. Corr. of the Pikes Peak Region, Inc., 962 P.2d 963 (Colo. 1998)* (private community corrections facility had no duty with regard to person placed in custody of facility).

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

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

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

> Although the state was required to release Nukapigak, he remained under state supervision as a parolee. It could regulate his movements within the state, require him to report to a parole officer under conditions set by that officer or a prison counselor, require him to undergo treatment for alcoholism, and impose and enforce special conditions of parole including requirements that he refrain from the use of alcohol, participate in an alcohol rehabilitation program, and that he consent to a search of his residence to see if he possessed firearms. It could revoke his parole and reincarcerate him if he violated these conditions. While the state could not completely control

Nukapigak's conduct, it was hardly in the position of a stranger who (at least according to the traditional rule) cannot be expected to interfere with the conduct of a third person.

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

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

The *Tarasoff* duty is widely taught to therapist students; texts and clinical guidelines provide guidance on how to comply, professional ethical codes take account of it, and the mental-health professional who does not know of the general concept is unusual. See GERALD COREY ET AL., ISSUES AND

ETHICS IN THE HELPING PROFESSIONS 224-232 (7th ed. 2007) ("Most counseling centers and community health agencies now have developed guidelines regarding the duty to warn and protect when the welfare of others is at stake."); GERALD COREY ET AL., PROFESSIONAL AND ETHICAL ISSUES IN COUNSELING AND PSYCHOTHERAPY 123-124 (1979) (therapists are "obliged to exercise reasonable care to protect the would-be victims"); DEAN HEPWORTH, ET AL., DIRECT SOCIAL WORK PRACTICE: THEORY & SKILLS 69 (7th ed. 2006) ("In certain instances, the client's right to confidentiality may be less compelling than the rights of other people who could be severely harmed or damaged by actions planned by the client and confided to the practitioner."); DAVID G. MARTIN & ALLAN D. MOORE, FIRST STEPS IN THE ART OF INTERVENTION 364 (1995) ("It is hard to imagine a mental-health professional who has not heard of the now infamous *Tarasoff* case . . . ."). Indeed, even in states in which there is no definitive case adopting a *Tarasoff* duty, clinicians practice as if there were. Lawson R. Wulsin et al., *Unexpected Clinical Features of the* Tarasoff *Decision: The Therapeutic Alliance and the "Duty to Warn,"* 140 AM. J. PSYCHIATRY 601 (1983) ("Massachusetts has had no specific case 'on point' for this issue, clinicians generally act as though the reasoning in *Tarasoff* applied here.").

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

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

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

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

Some courts and statutes have limited any warning obligation to those who are specifically identified by the patient. Others couch the limitation as those who are "readily identifiable." See, e.g., *Chrite v. United States, 564 F. Supp. 341 (E.D. Mich. 1983); Jenks v. Brown, 415, 557 N.W.2d 114, 117 (Mich. Ct. App. 1996)* ("reasonably identifiable" third parties); *Munstermann v. Alegent Health-Immanuel Med. Ctr., 716 N.W.2d 73, 85 (Neb. 2006); Emerich v. Phila. Ctr. for Human Dev., 720 A.2d 1032 (Pa. 1998).* Mental-health professionals should take reasonable steps to identify those who are at risk due to a dangerous patient. The greater the danger posed by the patient, the greater the efforts required to identify a potential victim, and a psychotherapist may not ignore a substantial risk to a third person merely because the individual's identity has not been supplied by the patient. The failure of the patient to name a specific victim may bear on whether there is a real risk of danger or on whether there is a specific person at risk. In that respect, lack of identification of the potential victim may be relevant to whether there is any duty and, if so, whether there is a breach. Nevertheless, the lack of identification does not, by itself, obviate any duty to warn. In any case, the threat must be one to an individual or small number of individuals. There is no duty to warn the public generally when no individual is identifiable. See *Thompson v. Cnty. of Alameda, 614 P.2d 728 (Cal. 1980).* On the other hand, reasonable care may require steps beyond a warning, such as commitment. No limitation with regard to victims, other than the ordinary scope-of-liability limits, applies to such cases. See *Currie v. United States, 644 F. Supp. 1074, 1079 (M.D.N.C. 1986)* ("The court does not believe that it is wise to limit any duty to commit according to the victim. Arguably, the patient who will kill wildly (rather than specifically identifiable victims) is the one *most* in need of confinement."), aff'd, *836 F.2d 209 (4th Cir. 1987).*

The duty imposed by Subsection (b)(4) is applicable to all mental-health professionals who act in a relationship with a mental patient. In *Tarasoff*, the court held that the affirmative duty extended to both the treating psychologist and to several other psychiatrists who were involved in the care of the patient, so long as they had a psychotherapist-patient relationship. *Tarasoff, supra, 551 P.2d at 344 n.6.* Courts since *Tarasoff* have applied this duty to psychiatrists, see, e.g., *Jablonski v. United States, 712 F.2d 391 (9th Cir. 1984); Rivera v. N.Y. City Health & Hosp. Corp., 191 F. Supp. 2d 412 (S.D.N.Y. 2002); Hamman v. Cnty. of Maricopa, 775 P.2d 1122 (Ariz. 1989); Davis v. Lhim, 335 N.W.2d 481 (Mich. Ct. App. 1983); MacIntosh v. Milano, 403 A.2d 500 (N.J. Super. Ct. Law Div. 1979); Schrempf v. State, 487 N.E.2d 883 (N.Y. 1985)* (recognizing a duty but finding no liability where psychiatrist acted reasonably in the absence of any warning signs of potentially violent behavior by patient); and to psychologists, see, e.g., *White v. United States, 780 F.2d 97 (D.C. Cir. 1986);*

Hedlund v. Superior Court, 669 P.2d 41 (Cal. 1983); *Weigold v. Patel, 2000 WL 1056643 (Conn. Super. Ct. 2000)* (finding duty existed for both a treating psychiatrist and psychologist); see also *Durflinger v. Artiles, 727 F.2d 888, 890 (10th Cir. 1984)* (stating that the duty involves "psychological rather than medical inquiry"). A number of state statutes enacted since *Tarasoff* contain broad definitions of the professionals to whom the statute is applicable. See, e.g., *COLO. REV. STAT. § 13-21-117* (imposing duty on any "physician, social worker, psychiatric nurse, psychologist, or other mental health professional . . . where the patient has communicated to the mental health care provider a serious threat of imminent physical violence against a specific person or persons"); *LA. REV. STAT. ANN. § 9:2800.2* (applying duty to "treating psychologist or psychiatrist, or board-certified social worker"); *MICH. COMP. LAWS § 330.1946(4)* (providing duty is imposed on "mental health professionals," including psychiatrists, psychologists, social workers, licensed professional counselors, marriage and family therapists, and music therapists); *NEB. REV. STAT. § 38-2137* (providing duty applicable to licensed or certified mental-health practitioners); *N.J. STAT. ANN. § 2A:62A-16* (West) (affecting any person licensed "to practice psychology, psychiatry, medicine, nursing, clinical social work or marriage counseling"); see also *Emerich v. Phila. Ctr. for Human Dev., 720 A.2d 1032 (Pa. 1998)* (imposing duty on mental-health professionals). So long as persons act in a mental-health-professional role, they are subject to the duty imposed by Subsection (b)(4). A Louisiana court declined to extend *Tarasoff* to religious counselors in *Miller v. Everett, 576 So. 2d 1162 (La. Ct. App. 1991).* The court in *Miller* relied on the lack of a special relationship between the counselor and the plaintiffs, rather than addressing the relationship between the counselor and the counseled.

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

Only four jurisdictions have decided against a *Tarasoff*-like duty, and one of those was by an intermediate appellate court. See *Boynton v. Burglass, 590 So. 2d 446 (Fla. Dist. Ct. App. 1991)* (en banc); *Tedrick v. Cmty. Res. Ctr., Inc., 920 N.E.2d 220, 228-229 (Ill. 2009);* *Thapar v. Zezulka, 994 S.W.2d 635 (Tex. 1999)* (declining to adopt a duty to warn because such a duty would have conflicted with confidentiality statute that barred disclosure; distinguishing victims of child and sexual abuse, where reporting is statutorily mandated); *Nasser v. Parker, 455 S.E.2d 502 (Va. 1995)* (no special relationship exists unless defendant has "taken charge" of other; relationship between psychiatrist and patient admitted voluntarily to hospital because of history of violence toward women whose condition had recently deteriorated entailed insufficient control for special relationship to exist); see also *Evans v. United States, 883 F. Supp. 124 (S.D. Miss. 1995)* (Federal Tort Claims Act case in which court predicted that Mississippi would not adopt *Tarasoff*); *Gregory v. Kilbride, 565 S.E.2d 685, 692 (N.C.*

Ct. App. 2002) (acknowledging a duty to control patients, but stating that "North Carolina does not recognize a psychiatrist's duty to warn third parties" without further explanation or citation (emphasis omitted)).

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

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

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

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

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

(1) In the largest survey of mental-health professionals, Givelber et al. found that their respondents generally thought that they were able to predict, with some degree of accuracy, outpatient dangerousness, with less than 10 percent expressing the view that it was impossible to predict.

Respondents also believed that there was a fair amount of reliability, i.e., agreement among others, for their judgments. See Daniel J. Givelber et al., Tarasoff, *Myth and Reality: An Empirical Study of Private Law in Action*, *1984 WIS. L. REV. 443, 462-464.* A survey conducted a decade after the Givelber study obtained similar results. Rosenhan, supra, at 1207-1208.

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

False negatives are apparently not as prevalent as false positives because of the perception that they are more costly than false positives and because of the low base rate of dangerousness. See ALAN A. STONE, MENTAL HEALTH AND THE LAW: A SYSTEM IN TRANSITION 35 (1975) (explaining forces at work in the psychotherapy profession that produce low rate of false negatives); Michael Petrunik, *The Politics of Dangerousness*, 5 INT'L J.L. & PSYCHIATRY 225, 243-246 (1982).

(2) Before *Tarasoff*, mental-health professionals believed that professional ethical obligations required them to breach confidentiality and issue warnings in certain circumstances, including when a patient posed a risk to the community. Judith Beren Leonard, *A Therapist's Duty to Potential Victims: A Nonthreatening View of* Tarasoff, 1 LAW & HUM. BEHAV. 309, 317 (1977) ("*Tarasoff* represents no greater burden than the profession would be likely to impose upon itself."); R. Little & E. Strecker, *Moot Questions in Psychiatric Ethics*, 113 AM. J. PSYCHIATRY 455 (1956) (two-thirds of responding psychotherapists stated that they would breach confidentiality and warn others if they believed a minor patient was homicidal or suicidal and parents refused to take action); Toni Wise, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of* Tarasoff, 31

STAN. L. REV. 165, 176 (1978) (70% of survey respondents reported that confidentiality could be breached under appropriate circumstances). Thus, the idea that *Tarasoff* required breach of an absolute curtain of confidentiality was false; indeed, in the *Tarasoff* case, the psychotherapist contacted law-enforcement officials and had his patient detained because of the psychotherapist's concern about the potential for violence by the patient. However, by including potential victims among those required to be warned, *Tarasoff* expanded the universe of persons to be provided confidential information. Even after *Tarasoff*, a substantial proportion of mental-health professionals believe that their ethical, rather than legal, obligations require warnings. James C. Beck, *Violent Patients and the* Tarasoff *Duty in Private Psychiatric Practice*, 13 J. PSYCHIATRY & L. 361, 365 (1985) (only 12% of respondents believed *Tarasoff* duty was due solely to legal requirements); Givelber, supra, at 474 (between 48 and 77% of respondents believed professional ethics and 75 to 85% believed personal ethics required taking some action to protect third party).

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

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

> A warning that is discussed strengthens an alliance because the therapist demonstrates to the patient the ability to retain his therapeutic concern even in the face of imminent danger . . . . By making clear to the patient that the therapist proposes to prevent violence if he or she can, the therapist dramatically demonstrates to the patient an alliance with the healthier, more socially constructive aspects of the patient's personality.
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> James C. Beck, *When the Patient Threatens Violence: An Empirical Study of Clinical Practice after* Tarasoff, 10 BULL. AM. ACAD. PSYCHIATRY & L. 189, 199 (1982); see also Judith Treadway, Tarasoff *in the Therapeutic Setting*, 41 HOSP. & CMTY. PSYCHIATRY 88, 88-89 (1990) (reporting on case in which patient was relieved that therapist brought spouse, who had been threatened by patient, into therapy session); David B. Wexler, *Patients, Therapists, and Third Parties: The Victimological Virtues of* Tarasoff, 2 INT'L J.L. & PSYCHIATRY 1 (1979).

(4) Surveys reveal little or no abandonment of potentially dangerous patients after *Tarasoff*. Givelber, supra, at 478-489; Beck, supra, at 366 (5% of private psychiatrist respondents report avoiding potentially violent patients and another 5% report referring patients who become violent for public

treatment); Rosenhan et al., supra, at 1209-1210 (18% of therapists report avoiding counseling dangerous patients, at least in part, because of *Tarasoff*). Mental-health professionals might be reluctant to self-report such behavior, lending concern about bias to this outcome. Yet, if the obligations imposed by *Tarasoff* are unpopular in the psychotherapist community, a contrary bias might result in overreporting of abandonment.

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

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

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

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

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

That a defendant is subject to a duty under Subsection (b)(4) does not preclude an affirmative duty existing due to some other provision in this Chapter. See *Estate of Long v. Broadlawns Med. Ctr., 656 N.W.2d 71 (Iowa 2002)* (duty imposed based on undertaking by defendant). For cases imposing a duty on mental-health professionals based on their custody of those who are being treated as inpatients, see *Bradley Ctr., Inc. v. Wessner, 296 S.E.2d 693 (Ga. 1982)* (mental-health hospital subject to duty of

reasonable care to identified third party with regard to voluntarily committed patient who was provided a weekend pass after he stated that, if given the opportunity, he would hurt his wife); *Leonard v. State, 491 N.W.2d 508 (Iowa 1992)* (psychotherapist has special relationship with involuntarily committed patient, but duty is limited to reasonably foreseeable victims); *Durflinger v. Artiles, 673 P.2d 86 (Kan. 1983)* (affirmative duty of reasonable care owed to third parties for dangerous patient who was involuntarily committed); *Gregory v. Kilbride, 565 S.E.2d 685 (N.C. Ct. App. 2002)* (affirmative duty exists to take care to protect third parties from risks posed by the release of a mental patient who is involuntarily committed). But see *Boulanger v. Pol, 900 P.2d 823 (Kan. 1995)* (no affirmative duty and no liability for negligent release of voluntary patient).

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

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

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

Comment h. Duty of non-mental-health physicians to third parties. For courts distinguishing between cases in which the physician's conduct in the case created a risk of harm and those involving an affirmative duty, see *Taylor v. Smith, 892 So. 2d 887, 893 (Ala. 2004)* (Physician-defendant continued to supply methadone to a clinic patient despite drug tests that showed that she was continuing to abuse other drugs. The combination of methadone and other drugs created serious risks and the patient caused an automobile crash that injured plaintiff. The court recognizes this case as one falling within the general duty of care: "[E]very person owes every other person a duty imposed by law to be careful not to hurt him."); *Cheeks v. Dorsey, 846 So. 2d 1169 (Fla. Dist. Ct. App. 2003); McKenzie v. Haw. Permanente Med. Grp., Inc., 47 P.3d 1209 (Haw. 2002); McNulty v. City of New York, 792 N.E.2d 162 (N.Y. 2003); Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993); Flynn v. Houston Emergicare, Inc., 869 S.W.2d 403 (Tex. App. 1994); Gooden v. Tips, 651 S.W.2d 364 (Tex. App. 1983).* For a case in which the plaintiff's allegations encompassed both the creation of risk and affirmative duties, see *Schmidt v. Mahoney, 659 N.W.2d 552 (Iowa 2003).*

For courts that have found an affirmative duty on the part of physicians to nonpatients, see *Myers v. Quesenberry, 193 Cal. Rptr. 733 (Ct. App. 1983); Pate v. Threlkel, 661 So. 2d 278 (Fla. 1995)* (physician owed a duty of care to child of patient to warn patient of genetic condition that could affect child); *Hoffman v. Backmon, 241 So. 2d 752 (Fla. Dist. Ct. App. 1970)* (physician has a duty to warn

family members of patient with tuberculosis); *DiMarco v. Lynch Homes-Chester Cnty., Inc., 583 A.2d 422 (Pa. 1990)* (physician had duty based on § 324A to tell patient that hepatitis could be transmitted through sexual intercourse; physician also incorrectly told patient that, if she was symptom-free six weeks after exposure to virus, she was not infected); *Troxel v. A.I. DuPont Inst., 675 A.2d 314 (Pa. Super. Ct. 1996)* (physician who diagnosed infant with contagious disease, but failed to tell family, owed duty to friend of family who was later infected with the virus); *Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993)* (physician had duty to warn family members of patient who contracted Rocky Mountain spotted fever about common sources of infection to which they might be exposed). Indeed, the California Supreme Court in *Tarasoff* relied on non-mental-health physicians' duty to third parties to justify the affirmative duty it adopted for mental-health professionals. *Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 343 & n.8 (Cal. 1976).*

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

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

In *Praesel v. Johnson, 967 S.W.2d 391 (Tex. 1998),* the court expressed concern about the efficacy of any warning by a physician in reducing the risk posed by a patient. The court proceeded to balance the benefit of any warning in risk reduction with the burden of liability being imposed on the physician. The court thus balanced the *ex ante* benefit with the *ex post* burden, determined by the cost of the accident, an inappropriate comparison for purposes of identifying appropriate incentives for safety.

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

that he could not be held liable to nonpatients as he had no duty to them; his only duty was the standard of care owed to patients).

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

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

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

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

Restatement of the Law, Third, Torts: Liability for Physical and Emotional Harm
2012

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Berger v. Hanlon

United States District Court for the District of Montana, Billings Division

February 26, 1996, Decided ; February 26, 1996, Filed

Cause No. CV-95-46-BLG-JDS

Reporter
1996 U.S. Dist. LEXIS 22525 *; 1996 Media L. Rep. 1748

PAUL W. BERGER and ERMA R. BERGER, Plaintiffs, vs. RODNEY HANLON, JOEL SCRAFFORD, RICHARD C. BRANZELL, ROBERT PRIEKSAT, KRIS A. McLEAN, TURNER BROADCASTING SYSTEMS, INC., a Georgia corporation, ROBERT RAINEY, DONALD HOOPER, and UNITED STATES OF AMERICA, Defendants.

Disposition: [*1] SUMMARY JUDGMENT ENTERED IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFFS. FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT GRANTED. FEDERAL DEFENDANT'S REQUEST FOR JUDICIAL NOTICE OF CERTIFICATION OF SCOPE OF EMPLOYMENT GRANTED. FEDERAL DEFENDANTS' REQUEST FOR JUDICIAL NOTICE MOOT. MEDIA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT GRANTED. PLAINTIFFS' MOTION TO SET A PRELIMINARY PRETRIAL CONFERENCE DENIED AS MOOT.

Core Terms

media, summary judgment, defendants', cases, conversion, qualified immunity, recording, search warrant, crew, execution of a search warrant, summary judgment motion, judicial notice, observe, constitutional right, trespass, rights, cause of action, broadcast, executing, intercept, Wiretap, criminal case, communications, photographed, videotape, courts, images, ranch, intentional infliction of emotional distress, action for conversion

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Judges: Jack D. Shanstrom, United States District

Judge.

Opinion by: Jack D. Shanstrom

Opinion

MEMORANDUM AND ORDER

Pending before this Court is the federal defendants' motion to dismiss or, in the alternative, for summary judgment. The "federal defendants" as referred to in this order are United States Department of Interior's Fish and Wildlife Service (FWS) Special Agents Hanlon, Scrafford, Branzell, and Prieksat, and Assistant United States Attorney (AUSA) McLean. Incorporated in the federal defendants' motion is a request that this Court take judicial notice of the information filed May 5, 1993 in ***United States v. Paul W. Berger,*** and of excerpts from testimony given by Special Agent Joel Scrafford in the matter. Also pending is the motion for summary judgment filed by defendants Turner Broadcasting Systems, Inc. (TBS), Robert Rainey (Rainey), and Donald **[*3]** Hooper (Hooper). Rainey and Hooper were members of the Cable News Network (CNN) camera crew which filmed the execution of the search warrant. After hearing oral arguments and reviewing the briefs, this Court is prepared to rule on the motions.

BACKGROUND

The plaintiffs in this case are Garfield County ranchers Paul W. Berger (Berger) and his wife Erma R. Berger (Mrs. Berger). An investigation was initiated after former employees of Berger contacted Montana Fish and Game Service officials alleging that Berger used poisons to kill predators on his ranch, including eagles. In connection with the investigation of Berger, the FWS obtained a search warrant for the Berger ranch. This action arises from the March 24, 1993 execution of that federal search warrant by FWS agents.

Sometime prior to the execution of the warrant, CNN was given permission to accompany the government while agents executed the search warrant. The CNN crew accompanied federal and state agents during the execution of the search warrant. CNN later broadcast a news story about ranchers killing predators. The investigation and prosecution of Berger were featured in the story. On March 21, 1995, this lawsuit **[*4]** was filed. The Bergers allege that in executing the search warrant, federal defendants and defendants TBS, Rainey, and Hooper violated their *Fourth Amendment* right to be free from unreasonable searches and seizures. Additionally, the Bergers allege trespass against TBS, Rainey, Hooper and AUSA McLean; conversion against TBS, Rainey and Hooper; intentional infliction of emotional distress against TBS, Rainey, and Hooper; and a violation of the federal wiretapping statute, *18 U.S.C. § 2511*, against TBS, Rainey and Hooper.

I. *The federal defendants' Motion to Dismiss or, in the alternative, for Summary Judgment.*

Standard of Review

When deciding a motion for summary judgment, the Court generally looks to whether material issues of fact are in dispute. *Fed.R.Civ.P. 56(e)*. However, when the summary judgment motion is based on qualified immunity, a court must consider the law as it was established at the time of the incident. ***Romero v. Kitsap County,*** *931 F.2d 624, 628 (9th Cir. 1991)*.

The defense of qualified immunity applies to government officials and protects all "but the plainly incompetent or those who knowingly **[*5]** violate the law." ***Schroeder v. McDonald,*** *55 F.3d 454, 461 (1995)* (citations omitted). Even officials who violate the Constitution are to be accorded qualified immunity and, therefore, escape money damages if, in their performance of discretionary duties, their actions do not violate "clearly established constitutional or statutory rights of which a reasonable person would have known." ***Harlow v. Fitzgerald,*** *457 U.S. 800, 818, 73 L. Ed.*

2d 396, 102 S. Ct. 2727 (1982); see also Elder v. Holloway, 510 U.S. 510, 114 S. Ct. 1019, 1021, 127 L. Ed. 2d 344 (1994). Under the summary judgment standard for qualified immunity, the Court must determine if the plaintiff has alleged a violation of law that was clearly established at the time of the alleged violation. See Romero, 931 F.2d at 627-28. If the law was not clearly established, then the official is immune from suit as a matter of law, any factual disputes are rendered immaterial, and summary judgment is appropriate. See Mitchell v. Forsyth, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985); Romero, 931 F.2d at 628. **[*6]** The determination of whether an asserted federal right was clearly established at a particular time is a question of law. Elder, 114 S. Ct. at 1023.

Therefore, the qualified immunity test essentially requires the following three steps: 1) the identification of the specific right allegedly violated; 2) the determination of whether that right was so "clearly established" that a reasonable officer would have been aware of it; and 3) the determination of whether a reasonable officer could have believed that the conduct at issue was lawful. Romero, 931 F.2d at 627.

The question to be answered in this case is whether on March 24, 1993 it was clearly established that the Bergers' Fourth Amendment freedom from unreasonable searches and seizures was violated when government agents executing a valid search warrant allowed representatives of the news media to observe and document the search. The contours of the right must have been sufficiently clear in 1993 that a reasonable official would have understood that what he was doing violated that right. Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). **[*7]** In light of pre-existing law, the unlawfulness of the act must have been apparent. ***Id.*** If the law was not clearly established, then summary judgment must be granted.

Discussion

A. *Motion for Summary Judgment*

In their motion, defendants ask the Court for an order finding that federal law enforcement agents who allowed a news media camera crew to accompany them during the execution of a valid search warrant did not violate any clearly established Fourth Amendment rights and that, therefore, they are entitled to qualified immunity. See Harlow, 457 U.S. at 818 (if law was not "clearly established" at time of incident, then summary judgment is proper). The Bergers contend that it was clearly established at the time of the search that it is a violation of the Fourth Amendment to allow a media camera crew at the execution of a search warrant for reasons other than a legitimate law enforcement purpose.

The operation of the ***Harlow*** qualified immunity standard greatly depends upon the level of generality in which the relevant "legal rule" is identified. Anderson, 483 U.S. at 639; Camarillo v. McCarthy, 998 F.2d 638, 640 (9th Cir. 1993). **[*8]** A plaintiff who has a suit based upon a constitutional tort cannot circumvent the plainly established rule of qualified immunity simply by alleging violations of extremely abstract rights. Anderson, 483 U.S. at 639. The ***Anderson*** Court noted as an example of abstract rights that "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." Anderson, 483 U.S. at 639. The right referred to by the ***Harlow*** test is not a general constitutional guarantee, but rather it is the application in a particular context. See Todd v. United States, 849 F.2d 365, 370 (9th Cir. 1988).

The ***Harlow*** standard is an objective inquiry. Kirkpatrick v. Los Angeles, 803 F.2d 485, 490 (9th Cir. 1986). A plaintiff seeking damages from a government official bears the threshold burden of demonstrating that the constitutional rights at issue were clearly established at the time of the **[*9]**

officer's allegedly unlawful act. *See e.g.*, ***Shoshone-Bannock Tribes v. Fish & Game Comm'n of Idaho,*** *42 F.3d 1278, 1285 (9th Cir. 1994)*; ***Davis v. Scherer,*** *468 U.S. 183, 197, 82 L. Ed. 2d 139, 104 S. Ct. 3012 (1984)*. In deciding whether the law was clearly established at the relevant time, the court must "survey the legal landscape" as it existed at the time of the conduct in question. ***Figueroa v. United States,*** *7 F.3d 1405, 1409 (9th Cir. 1993)*, *cert. denied, 511 U.S. 1030, 114 S. Ct. 1537, 128 L. Ed. 2d 190 (1994)*; ***Wood v. Ostrander,*** *879 F.2d 583, 591 (9th Cir. 1989)*, *cert. denied 498 U.S. 938, 112 L. Ed. 2d 305, 111 S. Ct. 341 (1990)*. The survey of the legal landscape begins by examining the binding Supreme Court and Ninth Circuit decisions. ***Kirkpatrick,*** *803 F.2d at 490*. In the absence of binding Supreme Court or Ninth Circuit precedent, courts in this circuit reviewing a qualified immunity defense must look to all available decisional law, including cases from other state, circuit, and district courts. ***Figueroa,*** *7 F.3d at 1409*; **[*10]** ***Wood,*** *879 F.2d at 591*. The analysis begins by examining those cases that are "most like" the instant case. ***Figueroa,*** *7 F.3d at 1409*. Finally, because the question is whether the relevant law was so clearly established at the time of the conduct at issue that a reasonable officer could be said to "know" his conduct was unlawful, post-incident decisions may not be considered. *See* ***Harlow,*** *457 U.S. at 818-19*; ***Baker v. Racansky,*** *887 F.2d 183, 187 (9th Cir. 1989)*.

The Bergers attempt to satisfy their burden of demonstrating that the constitutional rights at issue were clearly established by relying on ***United States v. Sanusi,*** *813 F. Supp. 149, 157-59 (E.D.N.Y. 1992)*, and ***Ayeni v. CBS, Inc.,*** *848 F. Supp. 362, 368 (E.D.N.Y. 1994)*. The ***Ayeni*** case arose from the search underlying the ***Sanusi*** case. Both cases, however, can be distinguished.

The ***Sanusi*** case involved the news-gathering privileges of the media and whether the media had to turn over to the defendant a videotape taken at the execution of a search warrant. The case **[*11]** did not involve the question of qualified immunity.

The district court in ***Ayeni*** was affirmed by the Second Circuit in ***Ayeni v. Mottola,*** *35 F.3d 680 (1994)*, *cert. denied, 514 U.S. 1062, 115 S. Ct. 1689, 131 L. Ed. 2d 554 (1995)*. The ***Ayeni*** case is distinguishable because the Second Circuit Court allowed the plaintiff to defeat the rule of qualified immunity by addressing and analyzing the alleged violation of an extremely abstract right. Unlike the search in the case at bar, the ***Ayeni*** case involved the search of a home, where privacy interests are at their greatest. The ***Ayeni*** Court addressed the general *Fourth Amendment* right of privacy and held that the right had been violated when a news crew entered the house during the execution of a search warrant. ***Ayeni,*** *35 F.3d at 686*. [1] The Sixth Circuit and this Court recognize the error made by the Second Circuit. ***See*** ***Bills v. Aseltine,*** *52 F.3d 596 (6th Cir. 1995)* (criticizing the ***Ayeni*** Court for describing the violation in abstract and general terms, contrary to the Supreme Court's instructions in **[*12]** ***Anderson***).

Additionally, the ***Ayeni*** case was decided subsequent to the Berger search. Therefore, the holding in the case should not be considered in determining whether the law was clearly established at the time the events at issue occurred. *See* ***Baker,*** *887 F.2d at 187* (post-incident decisions cannot clearly establish the law at the time of the conduct in **[*13]** question).

Furthermore, citing to ***United States v. Wright,*** *667 F.2d 793 (9th Cir. 1982)*, and ***United States v. Clouston,*** *623 F.2d 485 (6th Cir. 1980)*, the Bergers assert that existing case law establishes that it is unconstitutional for officers to delegate their authority or to bring private persons along to

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[1] In analyzing the general *Fourth Amendment* right instead of the specific application of that right, the ***Ayeni*** Court stated that it has long been established that the objectives of the *Fourth Amendment* are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties. The court concluded that a special agent exceeded those well-established principles when he brought into the plaintiff's home a television news crew that was neither authorized by the warrant nor serving any legitimate law enforcement purpose. ***Ayeni,*** *35 F.3d at 686*.

execute warrants unless the private persons are necessary to provide reasonable assistance in the execution of the warrant. Both of these cases, however, involved persons who actively participated with the officers in a search for evidence. These cases demonstrate only that at the time of the Berger search the *Fourth Amendment* did not prohibit the use of a third party at a search if that party was aiding the officer in searching for items either specified in the warrant or within plain view of those items specified. *See* ***Wright,*** *667 F.2d at 797* (officer executing a warrant that authorized seizure of driver's license may utilize assistance of law enforcement officer involved in separate narcotics conspiracy investigation involving same people); ***Clouston,*** *623 F.2d at 486-87* (presence of telephone **[*14]** company employee, who was used to identify equipment reasonably believed to be found near equipment specified in warrant, did not render search unconstitutional). The cases did not involve the question of the lawfulness of allowing media representatives to observe and document the searching officers' own execution of a warrant. In fact, the media was not involved in either case.

Finally, in a supplemental filing, the plaintiffs presented the case of ***Buonocore v. Harris,*** *65 F.3d 347 (4th Cir. 1995)* in support of their position. The ***Buonocore*** decision is distinguishable because the case involved law enforcement officers inviting a private person to engage in an independent general search of the home for items never mentioned in the warrant. ***Buonocore,*** *65 F.3d at 350*. Furthermore, although the search in ***Buonocore*** took place late in 1992, the decision was rendered years after the 1993 Berger search.

The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if **[*15]** that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.

No case at the time of the search directly stated the proposition that allowing media observers to attend the execution of an otherwise valid search violated the constitutional rights of one whose property was the subject of the search. To the contrary, the case law at the time suggested that the presence of media observers did not violate constitutional rights.

The federal defendants cite to several cases to demonstrate that decisional law did not "clearly establish" the proposition that government agents executing a warrant violated constitutional rights by allowing media representatives to attend and observe. For example, in ***Avenson v. Zegart,*** *577 F. Supp. 958 (D. Minn. 1984)*, the Court found that officers did not violate the *Fourth Amendment* when they told the media what time the search would be executed and then refused to make the media leave during **[*16]** the execution of the warrant, even though the property owner asked that they be removed. The federal defendants also cite two unpublished district court cases, ***Higbee v. Times-Advocate,*** *5 Media L. Rep. 2372* (S.D. Cal. Jan. 9, 1980) and ***Moncrief v. Hanton,*** *10 Media L. Rep. 1620* (N.D. Ohio Jan. 6, 1984). In both cases, summary judgment was entered in favor of defendants who allowed media coverage at the execution of a search warrant.

Another case cited by the federal defendants, ***Prahl v. Brosamle,*** *98 Wis. 2d 130, 295 N.W.2d 768 (Wis. Ct. App. 1980)*, was dismissed when police allowed a reporter, who learned about the search on the police scanner, to observe the search. The court stated that it was unwilling to accept the proposition that an otherwise reasonable search would be made unreasonable by the filming and television broadcast of the search. *295 N.W.2d at 774*.

The Bergers attack these cases because two are unpublished, the other is a state court case, and none are authoritative. But, the cases cited by the

federal defendants help demonstrate that courts (and officers) were lacking clear authority on this **[*17]** issue at the time of the Berger search.

In addition to case law, the Bergers also rely on *18 U.S.C. § 3105*, which identifies who may serve search warrants. The Bergers argue that the statute provides guidance on the constitutional issue of what constitutes "reasonableness" under the *Fourth Amendment*. The statute provides:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. § 3105 (1985).

The case at bar does not involve a situation in which CNN was helping to serve or execute the warrant. CNN was simply observing the agents who were serving the warrant. The statute prevents officers who obtain a warrant from using the warrant themselves or allowing others to use the warrant as a means of expanding an otherwise valid and judicially-approved search into a general search for things not specified in the warrant. Neither *18 U.S.C. § 3105* on its face nor pre-March 1993 case **[*18]** law interpreting the statute clearly establish that the presence of a news crew, or any other third person observer not actively participating in a search or seizure, violates the *Fourth Amendment*.

The mere fact that later cases may have extended pre-existing legal principles in a way that makes the defendants' conduct unlawful does not mean that the unlawfulness of that conduct was "clearly established" at the time of the search. *See* ***Mitchell v. Forsyth,*** *472 U.S. 511, 530-35, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985)*. When "all available decisional law" at the relevant time is considered, the most that can be said of the legal landscape as it stood in March 1993 is that the law was perhaps beginning to evolve toward the view that the *Fourth Amendment* may prohibit the presence of media observers during the execution of a valid search warrant. This Court finds that the law was not clearly established in March 1993 and, therefore, the FWS agents and AUSA McLean are entitled to qualified immunity.

II. *Motions for Judicial Notice*

In addition to their brief and statement of uncontroverted facts in support of their motion, the federal defendants rely **[*19]** on the Certification of Scope of Employment as prepared by Helene M. Goldberg, Director of the Torts Branch, Civil Division, United States Department of Justice. The Bergers do not oppose the defendants' motion that this Court take judicial notice of the certification. The Court grants the defendants' request for certification.

The federal defendants also ask this Court to take judicial notice of certain materials from the proceedings in the matter of ***United States v. Paul W. Berger,*** No. CR 93-46-BLG-RWA (D. Mont.). Specifically, they ask that notice be taken of the information filed May 5, 1993, and of excerpts from testimony given August 11, 1993 by Special Agent Joel Scrafford in the same matter. The defendants hardily contest the motion. The Court did not rely on the material in determining whether the law at issue was clearly established at the time of the Berger search. However, the Court did not consider the motion for judicial notice on its merits. The motion is moot.

III. *The defendants' (TBS, Rainey, and Hooper) motion for summary judgment.*

The defendants TBS, Rainey, and Hooper are moving this Court for summary judgment. TBS is engaged in the business **[*20]** of broadcasting entertainment, news and information programs. Rainey and Hooper are agents of CNN and served on the camera crew during filming of the execution of the Berger search.

Standard of Review

First, the Court finds it instructive to review the standards applicable to motions for summary judgment. Fed.R.Civ.P. 56(c) states summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party must initially identify those portions of the record before the Court which it believes establish an absence of material fact. ***T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n.,*** *809 F.2d 626, 630 (9th Cir. 1987)*. If the moving party adequately carries its burden, the party opposing summary judgment must then "set forth specific facts showing that there is a genuine issue for trial." ***Kaiser Cement Corp. v. Fischbach & Moore, Inc.,*** *793 F.2d 1100, 1103-04* (9th Cir.), *cert. denied,* **[*21]** *479 U.S. 949, 93 L. Ed. 2d 384, 107 S. Ct. 435 (1986)*.

All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. ***Anderson v. Liberty Lobby, Inc.,*** *477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. Nevertheless, "disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." ***T.W. Elec. Serv.,*** *809 F.2d at 630* (*citing, **Liberty Lobby,** 477 U.S. at 248*). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." ***Id.***

If a rational trier of fact might resolve disputes raised during summary judgment proceedings in favor of the nonmoving party, summary judgment must be denied. ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,*** *475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. Thus, the Court's ultimate inquiry is whether the "specific facts" set forth by the nonmoving party, viewed along with **[*22]** the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence. *809 F.2d at 631*. Having so stated, the Court now turns to the merits of the pending motion.

Discussion

The defendants TBS, Rainey, and Hooper (the media defendants) move for summary judgment on four grounds. First, the media defendants claim that the Bergers' constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. Second, they argue that as a matter of law, there is no constitutional, statutory or common law liability for recording voluntary conversations with law enforcement officers or videotaping areas outside the family residence. Third, they allege that the Bergers have failed to plead or otherwise satisfy the standards required under the *First Amendment* for the requested injunction. Finally, the media defendants allege that the Bergers cannot fulfill the requirements for their common law theories.

A. *Collateral Estoppel*

The media defendants claim that the Bergers' constitutional claims were already litigated in the criminal case **[*23]** and their action is barred by collateral estoppel. The Bergers, however, argue that the action is not barred because the issues in the two cases are different. Specifically, the plaintiffs assert that the *Fourth Amendment* was not previously adjudicated, that TBS's involvement was not considered, and that Mrs. Berger was not a party.

The Bergers' arguments are not persuasive. CNN and TBS shared the same role in the search; they were essentially one in the same. Consideration of CNN's involvement in the prior suit is essentially consideration of TBS's involvement. The same argument holds true for Mrs. Berger. She is in privity with Mr. Berger. She held the same position as Mr. Berger and went through the same experience. If his rights were not violated, her

rights were not violated.

In the criminal case against Berger, the defendant sought to suppress evidence obtained in the search on the basis that his *Fourth Amendment* rights had been violated. ***United States v. Paul W. Berger,*** CR 93-46-BLG-RWA (D.Mont. 1993). Berger argued that the search was illegal. Magistrate Judge Anderson held a full hearing on these issues. Because the search conducted at the ranch did not violate **[*24]** the *Fourth Amendment*, Magistrate Judge Richard W. Anderson denied the suppression motion. In the case at bar, the plaintiffs are again arguing that their *Fourth Amendment* rights were violated by the search.

Magistrate Judge Anderson's holding in the criminal case, however, bars a ***Bivens*** action in this case. ***See*** ***Matthews v. Macanas,*** *990 F.2d 467, 468 (9th Cir. 1993)* (if a court in a criminal case holds that a search warrant is supported by probable cause and constitutional rights were not violated, a subsequent ***Bivens*** civil action is barred by collateral estoppel); ***Bagley v. CMC Real Estate Corp.,*** *923 F.2d 758, 762 (9th Cir. 1991)* (plaintiff estopped from bringing a civil action because issue determined in criminal case), *cert. denied, 502 U.S. 1091, 117 L. Ed. 2d 409, 112 S. Ct. 1161 (1992)*. A ***Bivens*** action authorizes a cause of action against persons, acting under color of federal law, for violations of constitutional rights. ***Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics,*** *403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971)*. Because the constitutionality **[*25]** of the search has already been litigated, the causes of action based on the constitutionality of the search are barred by collateral estoppel. [2]

The Bergers' *Fourth Amendment* claims against the media defendants arising from the videotaping of various places on the ranch also fail because the media defendants were not acting under color of law when they filmed the execution of the search. When a private party, such as TBS, is present during a search as a means of furthering its own interests, it is not acting under color of federal law and is not liable under ***Bivens***. *See* ***United States v. Miller,*** *688 F.2d 652, 657-58 (9th Cir. 1982)*; ***United States v. Jennings,*** *653 F.2d 107, 110 (4th Cir. 1981)*. In this case, the defendants **[*26]** were not acting under the color of federal law. [3]

B. ***Federal wiretap statutes***

The Bergers claim that the media defendants "intercepted" their communications with the federal officers in violation of the Wiretap Act. The media defendants are entitled to summary judgment on the wiretap claims because the federal agents consented to the recording.

The Wiretap Act prohibits the intentional interception of certain communications, but expressly allows persons to intercept and record communications under certain other conditions. *Section 2511(2)(d)* of the Act provides in pertinent part that:

> it shall not be unlawful. . .for a person not acting under color of law to intercept an. . .oral. . .communication **[*27]** where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (1970 & Supp. 1995).

The statute specifically provides that it is not unlawful to intercept oral communication where

[2] The videotaping of an execution of a valid search and seizure warrant does not render an otherwise reasonable search and seizure unreasonable. ***Prahl v. Brosamle,*** *98 Wis. 2d 130, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980)*.

[3] To establish a ***Bivens*** action, the Bergers must prove that the media defendants (1) acted under the color of federal law and (2) deprived them of constitutionally protected rights. Because this Court determined that one prong was not met, this Court need not analyze the second prong.

one of the parties has given prior consent. In the case at bar, law enforcement consented to TBS recording the conversations. The exception to this statute does not apply because this Court does not find that the media defendants made the recordings for the purpose of committing a crime or tortious act. Instead, the recordings were made for the purpose of producing a news story and for the defendants' commercial gain. Since the Act provides that there is no liability to a third party if one party to the conversation consents to the third party recording and since the exception does not apply, the media defendants did not violate the Wiretap Act. *See, e.g.,* ***Desnick v. American Broadcasting Co., Inc.,*** *44 F.3d 1345, 1353 (7th Cir. 1995)* **[*28]** (wiretap statutes allow one party to have conversation recorded unless his purpose is to commit a crime or tort); ***United States v. Mullins,*** *992 F.2d 1472, 1478 (9th Cir. 1993)* (no violation of *Fourth Amendment* where one party consented to the monitoring of wire communications), *cert. denied 510 U.S. 994, 114 S. Ct. 556, 126 L. Ed. 2d 457 (1993).*

C. ***Request for Injunction***

The Bergers seek an injunction preventing TBS, Rainey, and Hooper from broadcasting or selling all or part of the videotape and recordings gathered during the search. They make this request though the segment has already been broadcast several times and has not aired in more than a year.

The request is essentially a request for a prior restraint, which carries a "heavy presumption against its constitutional validity." ***CBS, Inc. v. Davis,*** *510 U.S. 1315, 114 S. Ct. 912, 914, 127 L. Ed. 2d 358 (1994)* (citations omitted). The term "prior restraint" is used to describe administrative and judicial orders issued in advance of the time that communications are to occur and forbidding that those communications occur. ***Alexander v. United States,*** *509 U.S. 544, 113 S. Ct. 2766, 2771, 125 L. Ed. 2d 441 (1993).* **[*29]** While the prohibition against prior restraints is not absolute, the gagging of publication has been considered acceptable only in "exceptional cases." ***CBS,*** *114 S. Ct. at 914*.

The plaintiffs have not shown that this case is an exceptional case that would justify the imposition of a prior restraint.

D. ***Common law Claims***

The Bergers have pled several state law claims against TBS, Rainey and Hooper, including conversion, trespass, and intentional infliction of emotional distress. [4]

1. ***Conversion***

In their conversion count, the plaintiffs allege that **[*30]** the media defendants intentionally and wrongfully entered the Berger Ranch and wrongfully seized and appropriated both statements and private images of the Bergers, their premises, and possessions. The media defendants contend that the images and voices cannot be the subject of a conversion action.

The elements necessary for a conversion action in Montana include ownership of property, a right of possession, unauthorized dominion over that property by another, and damages that result. ***Eatinger v. Johnson,*** *269 Mont. 99, 887 P.2d 231, 234 (Mont. 1995)*. The Ninth Circuit has held that three criteria must be met before the law will recognize a property right. First, there must be an interest capable of precise definition. Second, that interest must be capable of exclusive possession or control. Finally, the putative owner must have established a legitimate claim to exclusivity. ***Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.,*** *958 F.2d 896, 903 (9th Cir. 1992), cert. denied 508 U.S. 959, 113 S. Ct. 2927, 124 L. Ed. 2d 678 (1993).*

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[4] The amended complaint also pled a claim of trespass against AUSA McLean. The United States was later substituted as the sole defendant for the claim of trespass against AUSA McLean pursuant to the Federal Employees Liability Reform and Tort Compensation Act. The claim against the United States for trespass was recently dismissed without prejudice by this Court in its December 15, 1995 and December 20, 1995 Orders.

The Montana Supreme Court has never held that recorded sounds and images can be the subject **[*31]** of a conversion action. Other courts however have concluded that they cannot. *See, e.g.*, ***Ault v. Hustler Magazine, Inc.,*** *860 F.2d 877, 883 (9th Cir. 1988)* (use of one's photographic image is not proper grounds for conversion action), *cert. denied 489 U.S. 1080, 103 L. Ed. 2d 837, 109 S. Ct. 1532 (1989)*; ***Zacchini v. Scripps-Howard Broadcasting Co.,*** *47 Ohio St. 2d 224, 351 N.E.2d 454, 457 (Ohio 1976)* (one's image is not converted by being photographed), *rev'd on other grounds*, *433 U.S. 562, 53 L. Ed. 2d 965, 97 S. Ct. 2849 (1977)*; ***Ippolito v. Lennon,*** *150 A.D.2d 300, 542 N.Y.S.2d 3, 6 (N.Y. App. Div. 1989)* (any possible interest by musician in his performance contained on video and sound recording is intangible and not actionable as conversion). *See also,* ***FMC Corp. v. Capital Cities/ABC,*** *915 F.2d 300, 303 (7th Cir. 1990)* (retaining copies of documents not sufficient to constitute conversion). This Court agrees with those courts that have found that the use of photographed or videotaped images and sound recordings does not give rise to a cause of action for **[*32]** conversion.

Conversion requires the intentional exercise of dominion and control over a chattel. ***Ault v. Hustler Magazine, Inc.,*** *860 F.2d at 883*. The Bergers assert that the twenty-two tapes containing the images and statements of the Bergers are tangible chattel giving rise to the conversion action. The plaintiffs' argument was rejected by the Ninth Circuit in ***Ault***. The ***Ault*** Court held that the photographs were the property of the photographer, not of the person photographed. ***Id.*** While the tapes may be viewed as tangible chattel, it is the chattel of the defendants, not of the Bergers. Therefore, there was no conversion of Berger's chattels. ***Id.***

2. ***Trespass***

The Bergers also allege that the media defendants trespassed when they entered the Berger ranch to observe the execution of the search warrant. Consent of the owner, possessor, or another authorized to consent, however, is an absolute defense to trespass. ***See*** ***Salisbury Livestock Co. v. Credit Union,*** *793 P.2d 470, 475 (Wyo. 1990)*.

In this case, the federal government had temporary control and possession of the property while executing **[*33]** the search warrant. CNN had the permission of the federal government to be present during the execution of the search warrant. [5] The plaintiffs' amended complaint acknowledges that permission was given by the government. The letter from CNN to AUSA McLean dated March 11, 1993 was sent to confirm that permission. (Pl.'s Statement of Facts, Exhibit A).

Furthermore, the media defendants did not invade the property interests protected by the tort of trespass. *See* ***Desnick,*** *44 F.3d at 1352*. The execution of the warrant was not disrupted by the presence of the media. The media was present for the purpose of news coverage only. In this case, the recorded transcript from CNN submitted by the plaintiffs, along with their attorney's affidavit in response to this motion, does not reveal that the **[*34]** crew was asked to leave, even though Mr. Berger apparently acknowledged that his picture was being taken. (Lansing's Aff., Ex. 8 at tape 08 page 13). Furthermore, any argument that the Bergers did not know the crew was a news crew is not dispositive. "Consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent." ***Desnick,*** *44 F.3d at 1351*.

This Court finds that the media defendants are not liable under a cause of action for trespass.

3. ***Intentional Infliction of Emotional Distress***

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[5] This Court has already ruled that the government agents have qualified immunity for their actions in allowing the media to accompany them. The media's reliance on that permission was not unreasonable.

Finally, the Bergers allege a cause of action for intentional infliction of emotion distress. Montana allows a separate cause of action alleging intentional infliction of emotional distress. ***Sacco v. High Country Indep. Press, Inc.,*** *271 Mont. 209, 896 P.2d 411 (1995)*. This independent cause of action may arise if there was serious or severe emotional distress to the plaintiff which was a reasonably foreseeable consequence of the defendant's negligent or intentional act **[*35]** or omission. ***Sacco,*** *896 P.2d at 429*. It is a question of law whether a plaintiff has introduced sufficient evidence to support a prima facie case for intentional infliction of emotional distress. ***Sacco,*** *896 P.2d at 427*.

This Court has already found that the media defendants did not trespass when they accompanied the government during the execution of the search warrant. They are also not liable for recording conversations during the search or for capturing videotaped images of plaintiffs. Furthermore, the media defendants are not liable for broadcasting a truthful, newsworthy story. Since no tortious conduct took place, emotional distress was not a reasonably foreseeable consequence of their actions. The Bergers' intentional infliction of emotion distress claim fails.

E. Declaratory Judgment

The Bergers are asking for declaratory judgment declaring essentially that the federal agents and the media defendants violated the Bergers' constitutional rights. The declaratory relief sought is redundant of the claims already addressed in this opinion.

Courts generally recognize two criteria for determining whether declaratory relief is **[*36]** appropriate: "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." ***Eureka Fed. Sav. and Loan Ass'n v. American Cas. Co. of Reading, Pa.,*** *873 F.2d 229, 231 (9th Cir. 1989)* (citations omitted). In light of this opinion, the declaratory judgment requested by the Bergers is not warranted.

Accordingly,

IT IS ORDERED:

1. The federal defendants' motion for summary judgment is granted.

2. The federal defendants' request for judicial notice of the Certification of Scope of Employment is granted.

3. The federal defendants' request for judicial notice is moot.

4. The media defendants' motion for summary judgment is granted.

5. In light of these rulings, the plaintiffs' motion to set preliminary pretrial conference is denied as moot.

6. The Clerk of Court shall forthwith enter summary judgment in favor of the defendants and against the plaintiffs.

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

DONE and **DATED** this 26th **[*37]** day of February, 1996.

Jack D. Shanstrom

United States District Judge

JUDGMENT IN A CIVIL CASE

XX **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT SUMMARY JUDGMENT IS ENTERED IN FAVOR OF THE DEFENDANTS AND AGAINST THE PLAINTIFFS.

THAT FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS GRANTED.

THAT FEDERAL DEFENDANT'S REQUEST FOR JUDICIAL NOTICE OF THE CERTIFICATION OF SCOPE OF EMPLOYMENT IS GRANTED. THE FEDERAL DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IS MOOT.

THE MEDIA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS GRANTED.

THAT PLAINTIFFS' MOTION TO SET A PRELIMINARY PRETRIAL CONFERENCE IS DENIED AS MOOT.

(Copy of Memorandum & Order is attached)

FEBRUARY 26, 1996

DATE

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Brunette v. Humane Soc'y

United States Court of Appeals for the Ninth Circuit

February 6, 2002, Argued and Submitted, Pasadena, California ; June 28, 2002, Filed

No. 00-56730, D.C. No. CV-96-04557-DT

Reporter
40 Fed. Appx. 594 *; 2002 U.S. App. LEXIS 13169 **; 2002 Daily Journal DAR 7417; 30 Media L. Rep. 2181

GLENDA BRUNETTE, Plaintiff - Appellant, v. HUMANE SOCIETY OF VENTURA COUNTY, a non-profit corporation; THE OJAI PUBLISHING COMPANY, INC., d/b/a THE OJAI VALLEY NEWS, a corporation; TIM DEWAR; JOLENE HOFFMAN; ROBERT JEFFREY HOFFMAN; SHAWNA BOATMAN; TIM COZATT, Defendants - Appellees.

Notice: [1]** RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Subsequent History: Petition for rehearing and rehearing en banc Denied August 23, 2002, Reported at: *2002 U.S. App. LEXIS 17915*. As Amended August 23, 2002.

Prior History: Appeal from the United States District Court for the Central District of California. Dickran M. Tevrizian, District Judge, Presiding.

Brunette v. Humane Soc'y, 2002 U.S. App. LEXIS 12846

Disposition: Affirmed in part, reversed in part, and remanded.

Core Terms

district court, trespass, ranch, invasion of privacy, declaratory relief, emotional distress, conversion, photographed, conspiracy

Case Summary

Procedural Posture
Appellant sought review of a decision of the United States District Court for the Central District of California, which dismissed her complaint filed against appellees, newspaper and member of the media.

Overview
Appellant filed an action alleging that appellees and others were liable for trespass, invasion of privacy, conspiracy, conversion, and infliction of emotional distress. The district court dismissed all claims against appellees and the court affirmed in part and reversed in part. The court held that appellant had alleged facts sufficient to state a claim for trespass and invasion of privacy. Appellees were allegedly on the property and were taking pictures at the request of the humane society which was executing a warrant against appellant. The warrant was invalid and the humane society had no authority to enter the property. Additionally, even if the humane society's presence was valid, appellees were not performing any law enforcement related activity. Concerning the other claims, the court held that: (1) appellant did not allege any activities in furtherance of a conspiracy, (2) a photograph was not a property right protected by a conversion claim, (3) appellant could not bring a separate action for emotional distress but could recover distress damages under her trespass claim, and (4) appellant was not entitled to declaratory relief or a pre-publication injunction.

Outcome

The court reversed the district court's grant of dismissal of appellant's claims against appellees for trespass and invasion of privacy. The court affirmed the dismissal of the claims for conspiracy, conversion, infliction of emotional distress, declaratory relief, and an injunction.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN1[] **Standards of Review, De Novo Review**

The court reviews de novo the district court's dismissal of a complaint for failure to state a claim. All factual allegations in the complaint must be accepted as true, and all reasonable inferences drawn in favor of plaintiff.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Real Property Law > Torts > General Overview

Torts > ... > Trespass to Real Property > Defenses > Consent

Torts > Premises & Property Liability > Trespass to Real Property > General Overview

Torts > ... > Trespass to Real Property > Defenses > General Overview

HN2[] **Fundamental Freedoms, Freedom of Speech**

Under California law, a defendant is subject to trespass liability, irrespective of whether it caused harm, if it intentionally entered land in possession of another. The *First Amendment* is not a license to trespass. However, a peaceable entry onto land with the consent of a person in lawful possession or control of the property is not actionable.

Torts > ... > Invasion of Privacy > Intrusions > General Overview

Torts > Intentional Torts > Invasion of Privacy > General Overview

HN3[] **Invasion of Privacy, Intrusions**

Any illegal entry on a plaintiff's property would be sufficiently serious and offensive to state a claim for invasion of privacy.

Torts > Intentional Torts > Conversion > General Overview

HN4[] **Intentional Torts, Conversion**

Although a claim of conversion may exist even if the allegedly converted property is intangible, not all intangible property is the proper subject of conversion. Courts have traditionally refused to recognize conversion of intangible assets that are not merged with something tangible. A photographic image is not generally an intangible property right protected by a conversion claim.

Torts > ... > Remedies > Damages > General Overview

Torts > ... > Pain & Suffering > Emotional

Distress > General Overview

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

Torts > Premises & Property Liability > Trespass to Real Property > General Overview

HN5[] **Remedies, Damages**

As a part of plaintiff's trespass action, she may recover damages for discomfort and annoyance that would naturally ensue therefrom. She may not, however, seek duplicative recovery under the guise of an action for emotional distress.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Torts > Intentional
Torts > Defamation > General Overview

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

HN6[] **Declaratory Judgments, Federal Declaratory Judgments**

Although emotional distress may be considered as damage in a properly stated defamation action, it cannot form the basis of an independent infliction of emotion distress action on the same facts.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN7[] **Declaratory Judgments, Federal Declaratory Judgments**

Declaratory relief is appropriate when (1) the judgment will serve a useful purpose in clarifying and settling legal relations; and (2) when it will terminate and afford relief from uncertainty, insecurity, and controversy giving rise to the proceeding.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Discretionary Jurisdiction

HN8[] **Standards of Review, Abuse of Discretion**

The district court's decision to deny declaratory relief is reviewed for an abuse of discretion.

Counsel: For GLENDA BRUNETTE, Plaintiff - Appellant: Henry H. Rossbacher, Esq., Nanci E. Nishimura, Esq., ROSSBACHER & ASSOCIATES, Los Angeles, CA.

For HUMANE SOCIETY OF VENTURA COUNTY, Defendant - Appellee: Mark A. Weinstein, Esq., VEATCH, CARLOS, GROGAN & NELSON, Los Angeles, CA.

For THE OJAI PUBLISHING COMPANY, INC., TIM DEWAR, JOLENE HOFFMAN, ROBERT JEFFREY HOFFMAN, SHAWNA BOATMAN, TIM COZATT, Defendants - Appellees: Mark A. Weinstein, Esq., VEATCH, CARLOS, GROGAN & NELSON, Los Angeles, CA. Kelli L. Sager, Esq., DAVIS WRIGHT TREMAINE, Los Angeles, CA.

Judges: Before: TROTT, THOMAS and

WARDLAW, Circuit Judges.

Opinion

[*596] MEMORANDUM [*]

[2]** Glenda Brunette ("Brunette") appeals the district court's dismissal of her complaint against Tim Dewar and the Ojai Valley News ("collectively "the Media"). We have jurisdiction pursuant to *28 U.S.C. § 1291*. ***HN1***[⬆] We review de novo the district court's dismissal of a complaint for failure to state a claim. *TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999)*. All factual allegations in the complaint must be accepted as true, and all reasonable inferences drawn in favor of Brunette. *Id.*

We hold that Brunette has alleged facts sufficient to state claims for trespass and invasion of privacy, and we reverse and remand those causes of action. We affirm the district court's dismissal of Brunette's other causes of action. [1]

[3] DISCUSSION**

I Trespass

HN2[⬆] Under California law, the Media is subject to trespass liability, irrespective of whether it caused harm, if it intentionally entered land in possession of another. *Miller v. Nat'l Broad. Co., 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668, 677 (Cal. Ct. App. 1986)*. The *First Amendment* is not a license to trespass. *See* *Shulman v. Group W Prods. Inc., 18 Cal. 4th 200, 955 P.2d 469, 496, 74 Cal. Rptr. 2d 843 (Cal. 1998)*. However, a peaceable entry onto land with the consent of a person in lawful possession or control of the property is not actionable. *See* 5 Witkin, Summary of California Law § 607 (9th ed. 1988).

The Media claims the invitation and consent of the Humane Society absolved its entry onto Brunette's ranch of the taint of trespass. However, the Humane Society entered Brunette's ranch pursuant to an **[*597]** invalid search warrant and thus, never gained lawful control of the premises. It appears the Humane Society had no authority to enter the property itself, much less grant lawful entry to the Media.

Brunette alleged that the Media's presence was neither authorized by the warrant nor necessary to the Humane Society's investigation. **[**4]** Even if the Humane Society's presence was permissible, the Media performed no law enforcement related activity during the search. In fact, Brunette alleged that the Media's presence was superfluous, as the Humane Society photographed and videotaped the scene independently. If proven, Brunette's allegations may demonstrate that the Media's entry onto her ranch constituted a trespass. Consequently, we reverse and remand the district court's dismissal of this cause of action.

II Invasion of Privacy

Brunette alleged a sufficient privacy interest in her home and property as well as a reasonable expectation of privacy in those items. Nevertheless, the district court determined that the Media committed no serious or offensive invasion of privacy because it entered Brunette's ranch legally, upon receiving consent from the Humane Society. As discussed above, Brunette alleged that the Media, in fact, entered her ranch illegally. ***HN3***[⬆] Any illegal entry would be sufficiently serious and offensive to state a claim for invasion of privacy. *See* *Dietemann v. Time, Inc., 449 F.2d 245, 247-49*

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by *Ninth Circuit Rule 36-3*.

[1] In a separate, published opinion filed simultaneously with this memorandum, we recount the facts of Brunette's case in some detail. There, we affirm the district court's dismissal of Brunette's § 1983 claim against the Media for violation of her *Fourth Amendment* rights because she did not allege facts sufficient to demonstrate the Media was a state actor.

(9th Cir. 1971) (applying California law) (finding invasion of privacy where reporter **[**5]** entered and photographed the plaintiff at home without authorization). Thus, we reverse and remand the district court's dismissal of this cause of action.

III Conspiracy

Finding no underlying trespass or invasion of privacy, the district court dismissed Brunette's conspiracy claim. In the alternative, the district court dismissed this claim because Brunette failed to allege with particularity any behavior in furtherance of a conspiracy. We agree with the district court's alternative rationale. Brunette did not sufficiently allege any particular actions by the Humane Society or the Media in furtherance of a conspiracy to violate her rights. Instead the record reflects that the Humane Society unilaterally invited the Media to accompany its search of Brunette's ranch, and that the Humane Society and the Media never discussed how the search would be performed. There was no agreement to violate Brunette's rights; thus her conspiracy cause of action fails.

IV Conversion

The district court dismissed Brunette's claim that the Media converted images of her property through photography. ***HN4***[⬆] Although a claim of conversion may exist even if the allegedly converted property **[**6]** is intangible, *see* A & M Records, Inc. v. Heilman, 75 Cal. App. 3d 554, 142 Cal. Rptr. 390, 400 (Cal. Ct. App. 1977), not all intangible property is the proper subject of conversion. Courts have traditionally refused to recognize conversion of intangible assets that are not merged with something tangible. *See* Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 54 Cal. Rptr. 2d 468, 472 (Cal. Ct. App. 1996).

A photographic image is not generally an intangible property right protected by a conversion claim, *see* Ault v. Hustler Magazine, Inc., 860 F.2d 877, 883 (9th Cir. 1988), and Brunette points to no California case in which a photographic image was the subject of a conversion. The district court properly dismissed this claim.

[*598] V Infliction of Emotional Distress

Brunette alleged that she suffered emotional distress due to the Media's trespass on her ranch. ***HN5***[⬆] As a part of Brunette's trespass action, she may recover damages for "discomfort and annoyance that would naturally ensue therefrom." Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 288 P.2d 507, 511 (Cal. 1955) (internal citations and quotations **[**7]** omitted). She may not, however, seek duplicative recovery under the guise of an action for emotional distress. Billmeyer v. Plaza Bank of Commerce, 42 Cal. App. 4th 1086, 50 Cal. Rptr. 2d 119, 126 (Cal. Ct. App. 1995) (finding no authority that a trespass gives rise to an action for emotional distress). Brunette also alleged infliction of emotional distress stemming from the Media's publication of the photographs taken during the search. ***HN6***[⬆] Although emotional distress may be considered as damage in a properly stated defamation action, it cannot form the basis of an independent infliction of emotion distress action on the same facts. *See* Grimes v. Carter, 241 Cal. App. 2d 694, 50 Cal. Rptr. 808, 813 (Cal. Ct. App. 1966). Therefore, the district court properly dismissed these claims.

VI Declaratory Relief

The district court denied Brunette's request for declaratory relief. ***HN7***[⬆] Declaratory relief is appropriate when (1) the judgment will serve a useful purpose in clarifying and settling legal relations; and (2) when it will terminate and afford relief from uncertainty, insecurity, and controversy giving rise to the proceeding. Bilbrey v. Brown, 738 F.2d 1462, 1470 (9th Cir. 1984). **[**8]** ***HN8***[⬆] The district court's decision to deny declaratory relief is reviewed for an abuse of discretion. Wilton v. Seven Falls Co., 515 U.S. 277, 289, 132 L. Ed.

2d 214, 115 S. Ct. 2137 (1995). In this case, declaratory relief served no purpose beyond the remedies Brunette sought on her claims at law. Therefore, the district court properly denied Brunette's request for declaratory relief.

VII Injunction

Finally, Brunette sought an injunction restraining the Media from further publication of the images taken during the objectionable search. In essence, Brunette asked us to impose a prior restraint -- a heavily disfavored remedy. *See* *CBS, Inc. v. Davis, 510 U.S. 1315, 1317, 127 L. Ed. 2d 358, 114 S. Ct. 912 (1994)*. Because post-publication remedies will adequately compensate Brunette for any injury, *see id.*, the district court properly denied Brunette's request for injunctive relief.

VIII Statute of Limitations

The Media alleges a statute of limitation defense to Brunette's tort claims. The Media asserts that the district court erred when it concluded that because Brunette "was arrested *contemporaneously* with the alleged entry" onto her ranch, the controlling one-year statute of limitation was "tolled until her release from jail." *Cal. Civ. Proc. Code § 357*. Upon review of the record and the controlling cases, we agree with the district court's conclusion that Brunette's tort claims are not time-barred. *See* *Elliott v. City of Union City, 25 F.3d 800, 802 (9th Cir. 1994)*.

CONCLUSION

[9]** We reverse and remand Brunette's claims for trespass and invasion of privacy. The district court properly decided all other issues.

AFFIRMED in part, REVERSED in part, and REMANDED.

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CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. Rules 13(e), 16(a)(15), in the Appeals Court for the Commonwealth of Massachusetts, No. 2021-P-0350, *Tamara Lanier v. President and Fellows of Harvard College & Others*, Brief for the Plaintiff-Appellant, on behalf of the plaintiff, I, Sarah Steinfeld, certify, under the penalties of perjury, that on July 21, 2021, I served a true and accurate copy of the foregoing, upon the attorneys listed below, by e-mail at their respective e-mail addresses set forth:

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CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R.A.P. Rule 16(k), I, Sarah Steinfeld, hereby certify that the Brief for Plaintiff-Appellant complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13); Rule 16(e); Rule 18; and Rule 21. Further, I hereby certify that compliance with the applicable length limit of Rule 20 and Rule 11(b)(5) was ascertained by using Times New Roman, size 14, proportionally spaced font, consisting of 10,483 non-excluded words, including headings, footnotes, and quotations. The word-processing program used was Microsoft Office 365, Microsoft Word, Version 2106.

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