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Mary Van Nimwegen

House Hess:

February 24, 1988

STEVE COWPER
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 1, 1988

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

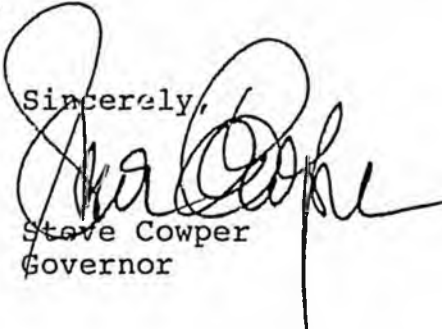
Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill reducing liability of the state, and those acting on behalf of the state, for damages relating to release and supervision of persons in custody of the state who are on conditional release from confinement.

Proposed AS 09.50.255, in sec. 1 of the bill, provides for negligence immunity of the state and its agents and contractors. However, the state and those acting on behalf of the state, would still be liable in specific instances involving gross negligence, defined in proposed AS 09.50.255(b) as "reckless disregard for the safety of individual, identifiable victims." Guidance as to the meaning of "reckless" may be derived from AS 11.81.900(a)(3), which defines "recklessly" for the purposes of the Criminal Code.

Immunity is extended to state contractors because liability insurance is generally unavailable or prohibitively expensive for contractors. If a particular contractor is able to obtain insurance, it is expected that eliminating the necessity for that insurance would result in that cost saving being passed on to the state.

Sincerely,



Steve Cowper
Governor

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Dept. of Corrections
 Title: "An Act limiting liability relating to release and supervision." BRU: _____
 Sponsor: Rules Committee Components: _____
 Requestor: Governor

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | 0 | 0 | 0 | 0 | 0 | 0 |
| CAPITAL | 0 | 0 | 0 | 0 | 0 | 0 |
| REVENUE | 0 | 0 | 0 | 0 | 0 | 0 |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---------------|---|---|---|---|---|---|
| GENERAL FUND | | | | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | 0 | 0 | 0 | 0 | 0 | 0 |

POSITIONS:

| | | | | | | |
|-----------|---|---|---|---|---|---|
| FULL-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

ANALYSIS : (Attach a separate page if necessary)

This legislation will have no fiscal impact on the Department of Corrections. The monies needed to pay liability judgments are provided through supplemental requests by the Department of Law.

Prepared by: Susan Knighton, Director of Admin. Services Phone: 465-3376
 Division: Administrative Services Date: 1-18-88
 Approved by Commissioner: Susan Humphrey-Barnett Date: 1-18-88
 Agency: Department of Corrections

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

FISCAL NOTE

REQUEST: _____

Revision Date: _____ Agency Affected: Department of Law
 Title: "An Act limiting liability...release BRU: Legal Services
...supervision...persons...state custody..."
 Sponsor: Rules/by Request of the Governor Components: Operations
 Requestor: House HESS

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | -0- | -0- | -0- | -0- | -0- | -0- |

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| CAPITAL | | | | | | |
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| REVENUE | | | | | | |
|---------|--|--|--|--|--|--|

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---------------|-----|-----|-----|-----|-----|-----|
| GENERAL FUND | -0- | -0- | -0- | -0- | -0- | -0- |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | | | | | | |

POSITIONS:

| | | | | | | |
|-----------|-----|-----|-----|-----|-----|-----|
| FULL-TIME | -0- | -0- | -0- | -0- | -0- | -0- |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
 Division: Administrative Services

Phone: 465-3672
 Date: February 24, 1988

Approved by Commissioner: Grace Berg Schabole, Atty. Gen.
 Agency: Department of Law

Date: February 24, 1988

Distribution (by preparer) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 417

This bill amends AS 09.50 by adding a new section that limits the state's liability for the acts of persons under state control, but who have been conditionally released from state institutional custody, to gross negligence. The Governor has proposed raising the legal standard under which the state can be found liable as a result of a 1986 decision on the part of the Alaska Supreme Court in a lawsuit entitled Division of Corrections v. Neakok. Essentially, the Court, in its three to two decision, imposed a broad duty on the state to prevent probationers and parolees from harming others, thus establishing a low standard of negligence by which the state would be held liable in these matters. Although the Department of Law often represents the state in defending negligence suits, the payment of successful claims is handled by the Division of Risk Management. That division has been requested to provide an analysis of the savings that will accrue to the state if this bill is enacted. There will not be a fiscal impact on the Department of Law.

DIVISION OF CORRECTIONS, DEPARTMENT OF HEALTH & SOCIAL SERVICES; Alaska Board of Parole; and State of Alaska, Petitioners,

v.

Warren NEAKOK, and Dorcus Neakok, as representative survivors, guardians of any minors and/or Personal Representatives of the Estate of Warren Hardy Neakok, Jr., and the Estate of Warren Hardy Neakok, Jr.; Amy Nukapi-gak, as representative survivor, guardian of any minor survivors, and/or Personal Representative of the Estate of Julia Tukrook, and the Estate of Julia Tukrook; Walter Toorak, as representative survivor, guardian of any minor survivors, and/or Personal Representative of the Estate of Virginia Toorak, and the Estate of Virginia Toorak, Respondents.

No. 7230.

Supreme Court of Alaska.

June 20, 1986.

Rehearing Denied Aug. 16, 1986.

Relatives of murder victims of parolee brought action for damages against state, Division of Corrections, Department of Health and Social Services, and state parole board, claiming negligence in failing to impose special conditions of release, in failing to supervise parolee adequately while he was on parole, and in allowing him to return to small, isolated community without police officers or alcohol counseling, and in failing to warn his victim of his dangerous propensities. The Superior Court, Second Judicial District, Kotzebue, Paul B. Jones, J., denied state's motion to dismiss or for summary judgment, and state petitioned for review. The Supreme Court, Compton, J., held that: (1) parole board was in no way at fault and could not be liable for murders; (2) state had duty to control parolee or warn potential victims of danger of parolee, though unable to predict specific victims; (3) state was not immune from liability for breach of duty under "discre-

tionary function" exception to liability; and (4) whether state's breach of duty was proximate cause of murders presented question for jury.

Affirmed in part, reversed in part, and remanded.

Matthews, J., filed dissenting opinion in which Rabinowitz, C.J., joined.

1. Pardon and Parole ⇐56

State parole board could not be liable for murders by parolee, where it was undisputed that prison officials did not forward material concerning parolee to board prior to his release, board did not become aware of parolee's release until some time after fact, board was never informed that parolee was violating any term of his general conditions of release so that it might direct his arrest, and board was never requested to act by anyone. AS 09.50.250.

2. Negligence ⇐10

Most important single criterion for imposing a duty of care is foreseeability.

3. Negligence ⇐2

Party standing in special relationship to either dangerous person or potential victim is required to control dangerous person or warn or otherwise protect victim, as exception to general rule that party is not required to prevent foreseeable harm when, to do so, he or she must control conduct of another person or warn of such conduct.

4. States ⇐112.2(2)

State had duty of due care with respect to parolee, as result of its increased ability to foresee dangers parolee posed and because of its substantial ability to control parolee.

5. States ⇐112.2(2)

State could be held liable for its failure to act reasonably and carefully with respect to parolee only if it could have foreseen that its failure to do so might cause harm to victims killed by parolee.

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6. Pardon and Parole ¶68

State is required to consider public safety in its administration of parole system, and to supervise parolees in such a way that danger to public is minimized. Const. Art. 1, § 12.

7. Negligence ¶2

Inability to predict specific victim of dangerous person does not absolve custodian from duty to use due care to protect others who might foreseeably be in danger by that person; refusing to follow *Thomas v. County of Alameda*, 27 Cal.3d 741, 167 Cal.Rptr. 70, 614 P.2d 728.

8. States ¶112.2(2)

Murders or victims were not, as matter of law, sufficiently unforeseeable to relieve state of liability for consequences of its negligence in failing to use due care in supervising parolee, given foreseeability of parolee's acting violently toward those around him if not supervised or counseled, and if given access to alcohol and firearms. Const. Art. 1, § 12.

9. Pardon and Parole ¶68

States ¶112.2(2)

State corrections personnel have duty to use due care in supervising parolees and in protecting foreseeable victims of parolees they know, or reasonably should know, to be dangerous; recognition of duty does not make state liable for all harm caused by parolees, but rather makes it liable only when its negligent supervision and administration of their parole causes injury in question. Const. Art. 1, § 12.

10. Pardon and Parole ¶68

Murder victims of parolee were not sufficiently unidentifiable that state's duty of care in connection with parolee could not require it to inform them of conditions of parole and of any information leading it to believe parolee could be dangerous, where parolee was released in small and isolated community without either police or parole officers.

11. Pardon and Parole ¶56

Whether state breached its duty of care with respect to parolee by failing to

supervise parolee more closely, to impose special conditions of parole, to warn residents of small, isolated community of his dangerous propensities, or to take other protective measures presented question of fact for jury.

12. States ¶112.2(2)

State's treatment of parolee before his release was too remote from parolee's murders to give rise to duty to victims; any duty state might have had to offer rehabilitative programs in prison did not render it liable for murders.

13. States ¶112.2(1)

While discretionary function exception immunizes formulation of policy, state may be held liable if that policy is negligently implemented. AS 09.50.250.

14. States ¶112.2(2)

Actions of prison counselor and parole officer in formulating parole plan, selecting special condition for parole, supervising parolee, and failing to inform appropriate people of parolee's status and of his dangerous propensities could not be characterized as basic policy decision and, therefore, state did not have immunity with respect to such actions as result of parolee's murdering three people. AS 09.50.250.

15. Pardon and Parole ¶56

Whether state's duty to supervise parolee adequately and to impose special conditions of parole on him was proximate cause of parolee's murdering three people presented question for jury.

16. States ¶112.2(2)

Parolee's acts of murdering three people were not superseding cause of injury relieving state from liability for its own alleged negligence in failing to supervise parolee adequately or to impose special conditions of parole on him.

Robert L. Eastaugh, Delaney, Wiles, Hayes, Reitman & Brubaker, Anchorage, for petitioners.

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Robert H. Wagstaff, Anchorage, for respondents.

Before RABINOWITZ, C.J., BURKE, MATTHEWS and COMPTON, JJ., and SHORTELL, J.*

OPINION

COMPTON, Justice.

On August 18, 1980, while highly intoxicated, Clifford Nukapigak shot and killed his teenaged stepdaughter and her boyfriend, and raped, beat and strangled to death another woman. *Nukapigak v. State*, 663 P.2d 943 (Alaska 1983). The murders took place in Point Lay, an isolated community of less than 100 residents and no resident law enforcement officers. Nukapigak had been mandatorily released from prison six months before the murders, having served a six-year sentence, less statutory good time, for an assault and rape committed in 1975. At the time of the murders he had the status of a supervised parolee,¹ and was reporting by mail to a parole officer.

This case involves a claim for damages against the State of Alaska, the Division of Corrections, Department of Health and Social Services, and the Alaska Parole Board, by relatives of the three persons whom Nukapigak murdered. The plaintiffs claim negligence in failing to impose special conditions of release at the time of Nukapigak's release, to supervise Nukapigak adequately while he was on parole, in allowing him to return to a small, isolated community without police officers or alcohol counseling and in failing to warn his victims of his dangerous propensities. This petition followed the trial court's denial of the

state's motion to dismiss or for summary judgment.² We affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Clifford Nukapigak had a history of violence while intoxicated which had led to a series of convictions beginning in 1973. In 1973 and 1974, he was convicted twice for beating his wife. Both incidents occurred while he was so drunk that he did not remember them afterwards. He was convicted in 1975 for raping a woman and stabbing and cutting her vagina. Again, he had been drinking heavily and claimed to have no recollection of his actions. In imposing a six-year sentence for the rape, the trial court considered comments made to a probation officer by Point Lay residents indicating that he had raped other women, beat his wife, and tried to rape his stepdaughter while drunk. *Nukapigak v. State*, 562 P.2d 697 (Alaska 1977). A psychiatric evaluation completed at the time expressed concern that Nukapigak's repressed sadistic impulses made him especially dangerous.

While incarcerated, Nukapigak received four months of individual transactional therapy, and participated in an alcohol treatment program and in Alcoholics Anonymous for some time. His therapist recommended that he receive additional alcohol treatment before he was released. In April and May of 1979, he wrote to Superior Court Judge Gerald J. Van Hoomissen, requesting an order to participate in a comprehensive alcohol program outside of the prison in Fairbanks. Despite Judge Van Hoomissen's approval, he was not allowed to enroll in the program, apparently be-

more than 180 days to serve under the sentence, a prisoner, upon release, shall be considered as if released on parole until the expiration of the maximum term or terms for which the prisoner was sentenced less 180 days.

Nukapigak had accrued 707 days of good time.

2. Since this petition is from a denial of the state's summary judgment motion, we must make all factual inferences in favor of Neakok.

* Shortell, Superior Court Judge, sitting by assignment made pursuant to Article IV, section 16, of the Constitution of Alaska.

1. The mandatory release statute, AS 33.20.040(a), provides:

A prisoner serving the term or terms for which the prisoner was sentenced less good time deductions shall be released unconditionally if there remains less than 180 days to serve under the sentence. If there remains

cause he had told prison personnel "that he pretty much had the situation whipped." His prison counselor testified that he saw the request as a ruse "just to get out of the confines of the institution for some periods of time."

Despite Nukapigak's claims to have conquered his alcohol problems, at least one prison counselor predicted that he would have trouble with drinking after his release. That counselor was concerned that Nukapigak would be a particular danger to his stepdaughters, whom he had apparently previously assaulted while drunk. She expressed her fears to both the Parole Board and other staff members.

Nukapigak applied for parole and for executive clemency while in prison. Both requests were denied. A 1977 progress report prepared for his parole hearing reported that he had been a good worker, had gotten along well with staff and inmates, and had become very religious. It noted that "there is a serious risk to society if he resumes his drinking" and concluded that his success on parole depended entirely on whether he could refrain from using alcohol.

Nukapigak was released in February 1980 under general parole conditions which required that he obtain employment, obey the law, report to his parole office monthly by mail, and not handle or possess firearms or other weapons. Policy required that Nukapigak's prison counselor formulate a plan for his parole. Nukapigak's parole officer was required by that same policy to review and approve the plan. However, no such plan was developed. The parole officer did not read Nukapigak's prison file until after his release. Parole Board policy to the contrary, prison officials did not forward information regarding Nukapigak to the Parole Board for its use in considering imposition of special conditions of parole. Although both Nukapigak's prison counselor and his parole officer also were authorized to impose special conditions of parole, neither was aware of this authority. Neither imposed such conditions. Consequently, no special conditions of parole

were established for Nukapigak, and he was not prohibited from drinking alcohol.

Nukapigak returned to Point Lay, where he had lived for two years prior to his arrest, and where his wife, child and five stepchildren were living. He obtained a job with the North Slope Borough, and apparently performed well (his parole officer received a letter from his employer in June saying he was doing an outstanding job). He made reports by mail to his parole officer in which he claimed to be readjusting. His parole officer, Louis Gazay, met him only twice: once before his release from prison and once when both men happened to be in Barrow at the same time in July 1980. There was no parole officer assigned to Point Lay and no village resident was appointed as a parole liaison advisor. The Point Lay Village Council and residents of the village were not aware that Nukapigak was under supervision or subject to any conditions of parole.

Apparently Nukapigak did not drink alcohol from the time of his release until August 1980. At that time, in the face of a breakdown in his marriage and other personal problems, he began drinking heavily. On August 16 he traveled to Kotzebue with a friend, and apparently drank continuously during and after this trip. He spent most of August 17 drinking in the homes of various villagers. Late that night he committed the three murders.

The plaintiffs in this case (hereafter collectively referred to as Neakok) are the survivors and personal representatives of the estates of Nukapigak's three victims. They allege seventeen counts of negligence against the State of Alaska, the Division of Corrections of the Department of Health and Social Services (collectively referred to as the state), and the Alaska Board of Parole. These counts fall into four general categories: (1) Failure to supervise Nukapigak adequately or to provide him with treatment and counseling while he was on parole; (2) Failure to consider or impose appropriate special conditions of parole; (3) Failure to warn the residents of Point Lay or Nukapigak's family of his dangerous

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propensity to violence; and (4) Failure to provide effective counseling and treatment before he was released.³

The defendants moved to dismiss or for summary judgment, claiming that (1) they were immune from Neakok's suit, (2) they owed Neakok no duty to protect him from Nukapigak's acts, (3) they did not proximately cause Nukapigak's acts, and (4) they could not legally have intervened with Nukapigak to the extent proposed by Neakok. The motion was denied, and this petition followed.

[1] As the parties have recognized, the central questions in this case are (1) whether the defendants owed a duty to Nukapigak's victims, and (2) whether, even if such a duty was owed, the defendants are immune from liability for any breach of that duty.⁴ We conclude that the state did owe a duty to protect Nukapigak's foreseeable victims. We further conclude that the actions (and inactions) of the state's employees which form the basis for Neakok's claims were, in large part, ministerial acts for which the state may be held liable.

II. DUTY

While the parties have treated the issue of the defendants' immunity as a threshold question, we agree with the California Supreme Court that "[c]onceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity."

3. Neakok does not allege that the state was negligent in releasing Nukapigak. His release was mandated by AS 33.20.040.
4. Plaintiffs have sued defendants collectively, not segregating theories of liability between them. Defendant Alaska Parole Board has been sued as an entity, individual Board members have not been sued, and no theory of liability specifically addressed to the Board has been asserted. At the time of this incident, the Parole Board was a creature of AS 33.15.010, existing within the Department of Health and Social Services. The Administrative Procedures Act did not apply to the chapter. AS 33.15.250. Prison counselors and parole officers were employees of the Department.

Davidson v. City of Westminster, 32 Cal.3d 197, 185 Cal.Rptr. 252, 649 P.2d 894, 896 (1982). We therefore begin our analysis with an examination of the duty the state owed to Neakok.

"Duty," as the word is used in negligence law, "is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection." Prosser, *Law of Torts* (4th ed. 1971) at 325-26. In *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554, 555 (Alaska 1981), we adopted a list of "considerations" set forth by the California Supreme Court to aid in deciding when, as a matter of policy, a particular plaintiff is entitled to protection. These considerations include foreseeability of harm, the closeness of connection between the defendant's conduct and the plaintiff's injury, the moral blame attached to the defendant's conduct, the policy of preventing further harm, the extent of the burden to the defendant and consequences to the community of imposing a duty of care, and the availability, cost and prevalence of insurance for the risk involved.

A. Foreseeability.

[2, 3] The most important single criterion for imposing a duty of care is foreseeability. *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 131 Cal. Rptr. 14, 22, 551 P.2d 334, 342 (1976). The general rule of negligence law is that a defendant owes a duty of care "to all per-

The legal status of the Board is unclear. However, it is undisputed that (1) prison officials did not forward material concerning Nukapigak to the Board prior to his release; (2) the Board did not become aware of Nukapigak's release until sometime after the fact; (3) the Board was never informed that Nukapigak was violating any term of his general conditions of release so that it might direct his arrest; and (4) the Board was never requested to act by anyone. Thus we conclude that reasonable minds could not differ regarding the absence of fault on the part of the Board, and accordingly summary judgment should have been entered in favor of the Board.

sons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal.3d 382, 115 Cal.Rptr. 765, 776, 525 P.2d 669, 680 (1974). Traditionally, however, the common law has not required a defendant to prevent foreseeable harm when, to do so, he or she must control the conduct of another person or warn of such conduct. *Tarasoff*, 131 Cal.Rptr. at 22-23, 551 P.2d at 342-43. This rule has an important exception: When a defendant stands in a special relationship to either the dangerous person or the potential victim, the defendant is required to control the dangerous person or warn or otherwise protect the victim. Restatement (Second) of Torts Section 315 (1965).

[4] The state contends that its relationship with Nukapigak was not sufficiently close to give rise to a duty to control him. It argues that a duty to control a third person should be limited to situations where a dangerous person is in the defendant's actual custody or negligently released from custody, or where the hazard is created by the defendant. See, e.g., *Bradley Center v. Wessner*, 250 Ga. 199, 296 S.E.2d 693 (1982); *Grimm v. Arizona Board of Pardon and Parole*, 115 Ariz. 260, 564 P.2d 1227 (1977); *Morgan v. District of Columbia*, 449 A.2d 1102 (D.C.App.1982).

We do not believe that a duty to control or warn can be so narrowly limited. 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

5. At the time of Nukapigak's release, there was apparently some confusion among parole officers and prison counselors as to whether special conditions of parole could be imposed on mandatory releasees. This confusion stemmed from dicta in a plurality opinion in *Morton v. Hammond*, 604 P.2d 1 (Alaska 1979), which suggested that the parole of a mandatory releasee could be revoked for violation of statutory conditions of parole, but that special conditions could not be imposed. However, the Parole Board and the Division of Corrections did not change their policies in response to *Morton* and continued to

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.⁵ 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.

Moreover, the special relationship between Nukapigak and the state was not solely defined by Nukapigak's status as a parolee. Prior to his release, Nukapigak was incarcerated for over four years. During that time, close observation had led at least one prison counselor to conclude that Nukapigak presented a special danger to his stepdaughters, and had caused other corrections personnel to suggest that he would be dangerous to society if he resumed drinking. The state's enhanced ability to observe the conditions under which a prisoner might be expected to be especially dangerous increases its potential ability to limit his dangerousness as a parolee.

The state thus stands in a special relationship with a parolee, both because of its increased ability to foresee the dangers the parolee poses and because of its substantial ability to control the parolee. Given this special relationship, it is not unreasonable

treat mandatory releasees identically with other prisoners.

We agree with the concurring opinion of Rabinowitz, C.J. and Matthews, J. in *Morton*, 604 P.2d at 4, and with the more recent decision of the court of appeals (*Braham v. Beirne*, 675 P.2d 1297 (Alaska App.1984)), that mandatory releasees, who are "considered as if released on parole" (AS 33.20.040) are subject to the same conditions of parole as any other parolee. We therefore conclude that the parole of a mandatory releasee may be revoked if he or she violates special conditions of parole.

to impose a duty to protect the victims.

The courts of a nation have imposed potential victims of sons or institutions with that third mark case of *Tara University of California*, 131 Cal.Rptr. 14, 5. California Supreme special relationship between a patient imposed duty to act reasonable victims of the *District of Columbia* Cir. 1977), modified hearing *en banc*, 1978), the District Court of Appeals relationship between a parolee imposed a duty to protect the victims. In *Semler v. of Washington, D.C.* Cir.1976), cert. den. S.Ct. 83, 50 L.Ed.2d that a court probate state hospital a special patient which require protect the public from *son v. State*, 69 Cal. 240, 447 P.2d 352 (1980); *Petersen v. State*, 671 P.2d 230 (1983) between the state and the relationship. Each of these cases of a duty to control

[5] Having decided to be required to use

6. It is possible that protected Neakok control than would Neakok's claim allowed failed to use due care control it legitimate. Whether the murder for this alleged failure rather than of duty. as a matter of law, from a duty to exercise care. merely be

to impose a duty of care on the state to protect the victims of parolees.⁶

The courts of a number of other jurisdictions have imposed a duty to protect the potential victims of a third party on persons or institutions with a special relationship with that third party. In the landmark case of *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976), the California Supreme Court held that the special relationship between a psychotherapist and a patient imposes on the therapist a duty to act reasonably to protect the foreseeable victims of the patient. In *Rieser v. District of Columbia*, 563 F.2d 462 (D.C. Cir. 1977), modified on other grounds on hearing *en banc*, 580 F.2d 647 (D.C. Cir. 1978), the District of Columbia Circuit Court of Appeals held that the special relationship between a parole officer and a parolee imposed a duty on the parole officer to protect the parolee's potential victims. In *Semler v. Psychiatric Institute of Washington, D.C.*, 538 F.2d 121 (4th Cir. 1976), *cert. denied* 429 U.S. 827, 97 S.Ct. 83, 50 L.Ed.2d 90 (1976), it was held that a court probation order imposed on a state hospital a special relationship with a patient which required the hospital to protect the public from him. See also *Johnson v. State*, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968); *Lipari v. Sears, Roebuck & Co.*, 497 F.Supp. 185 (D.Neb. 1980); *Petersen v. State*, 100 Wash.2d 421, 671 P.2d 230 (1983). The relationship between the state and a parolee is comparable to the relationship found sufficient in each of these cases to justify the imposition of a duty to control a third person.

[5] Having decided that the state may be required to use due care to control the

6. It is possible that the state could not have protected Neakok without exercising greater control than would have been permissible. Neakok's claim alleges, however, that the state failed to use due care in exercising whatever control it legitimately did have over Nukapigak. Whether the murders would have occurred but for this alleged failure is a question of causation rather than of duty. We cannot conclude that, as a matter of law, the state should be excused from a duty to exercise that limited control carefully merely because it was not unlimited.

actions of a third party, we turn to the question of whether the injury to Neakok was a foreseeable hazard of its failure to use due care in supervising Nukapigak. As we noted at the outset, consideration of the foreseeability of injury is central to a determination of whether a duty of care exists. The state may be held liable for its failure to act reasonably and carefully only if it could have foreseen that its failure to do so might cause harm to Neakok.⁷

[6] Article I, section 12 of the Alaska State Constitution requires that penal administration be "based upon the principle of reformation and upon the need for protecting the public." We have held that the public is an intended beneficiary of this article. *Abraham v. State*, 585 P.2d 526, 531 (Alaska 1978). The state is thus required to consider public safety in its administration of the parole system, and to supervise parolees in such a way that danger to the public is minimized. "Due care" in supervising parolees and in planning for their parole is defined in part by the need to protect the public from dangerous parolees. In light of this constitutional framework, it is difficult to accept the argument that harm to the public is not a foreseeable consequence of the failure to exercise due care.

The state regulations, policies and procedures governing the parole and supervision of mandatory releasees provide a number of avenues through which "due care" may be defined. At the time Nukapigak was released, state policy required that a release plan be formulated for each parolee, and that his or her field officer investigate it for authenticity and to determine wheth-

7. While a specific case-by-case determination of foreseeability and causation lies within the province of a jury, the existence of a duty is a question of law. *Semler v. Psychiatric Institute of Washington, D.C.*, 538 F.2d 121, 124. In deciding whether Nukapigak's criminal acts were a "foreseeable" risk of a failure to use due care, we do not determine whether, under the specific facts of this case, state employees should have foreseen that the murders would occur.

er it was the best plan available. This investigation included verification of the parolee's proposed address and place of employment. A Parole Board directive also required that special conditions of parole be considered for all releasees who had been convicted of crimes of violence, who had physically injured their victims, or who had been sentenced to an effective sentence of more than five years. Under these special conditions, Nukapigak could have been required to refrain from drinking, participate in an alcohol rehabilitation program, or to live in a community with appropriate supervisory personnel. The evidence Neakok has submitted indicates that either Nukapigak's prison counselor or his parole officer could have imposed special conditions of parole. In addition, Parole Board regulations allowed the appointment of a local resident as a parole advisor to work with a parolee and report specific events to his parole officer.

It should not be difficult to foresee that the failure to use due care in following these procedures, and in supervising a parolee after his or her release, might result in harm to the public. In Nukapigak's case, the potential effects of a failure to use due care appear especially clear. Nukapigak had committed violent crimes against both relatives and strangers while intoxicated. He had been identified by a

number of sources as a potential danger to society if he resumed drinking. A psychological evaluation had cautioned that "because his explosive personality is so ingrained, Clifford is likely to have continuing problems maintaining [his] newly learned self-discipline and control in a non-structured environment if he continues drinking." In light of this information, it was not unforeseeable that if Nukapigak was not supervised or given counseling, and if he was allowed access to alcohol and firearms, he might act violently toward those around him.⁸

The state argues that, even if it could have foreseen that a failure to supervise Nukapigak carefully might have endangered the public at large, it owed no special duty to Neakok. It contends that it could not have identified Nukapigak's specific victims and that it therefore owed them, as members of the public, no actionable duty.⁹

[7] The question of whether a duty to control a dangerous person may be imposed when the dangerous person's victims cannot be specifically identified has divided the jurisdictions that have considered it. Although the *Tarasoff* court did not emphasize the identifiability of the victim, subsequent California cases have refused to impose a duty except to readily identifiable victims. See *Thomas v. County of Alameda*, 27 Cal.3d 741, 167 Cal.Rptr. 70,

8. We cannot accept the state's assertion that the murders were not foreseeable because Nukapigak has never killed before and because Nukapigak was convicted of intentional murder and could not therefore have acted in a drunken stupor. Neakok has submitted evidence that indicates that the state was on notice that Nukapigak was violent and uncontrollable when drunk. In light of this knowledge, it was not unforeseeable that, if he became drunk, he would commit violent crimes. The state's inability to predict the exact nature of these violent crimes or the exact degree of his intoxication while committing them does not absolve it of a duty to act reasonably to prevent them.

9. To the extent that the state argues that it cannot be held liable to an individual for breach of a duty owed to the public at large, its argument must be rejected. We expressly disavowed the "duty to all, duty to no one" doctrine—providing that the state may owe a duty

only to persons with whom it has a special relationship—in *Adams v. State*, 555 P.2d 235, 241-42 (Alaska 1976):

[W]e consider that the "duty to all, duty to no one" doctrine is in reality a form of sovereign immunity, which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine. An application of the public duty doctrine here would result in finding no duty owed the plaintiffs or their decedents by the state, because, although they were foreseeable victims and a private defendant would have owed such a duty, no "special relationship" between the parties existed. Why should the establishment of duty become more difficult when the state is the defendant? Where there is no immunity, the state is to be treated like a private litigant. To allow the public duty doctrine to disturb this equality would create immunity where the legislature has not.

(Footnote omitted).

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614 P.2d 728 (1980). Other courts have held that a duty of care may be owed to anyone within a "class of persons" foreseeably put at risk.¹⁰ Thus, in *Lipari v. Sears, Roebuck & Co.*, 497 F.Supp. 185, 195 (D.Neb.1980), it was held that a psychiatric hospital owed a duty to protect anyone foreseeably endangered by a patient and could therefore be held liable for the deaths caused when the patient shot into a crowd in a nightclub. In *Petersen v. State*, 100 Wash.2d 421, 671 P.2d 230, 237 (1983), the Washington Supreme Court held that a state psychiatric hospital could be held liable to a persons injured in a car crash by a patient it had negligently treated. In both cases the specific identify of the victim was wholly unforeseeable, even if the harm caused was not.

We agree with those courts which have held that the inability to predict the special victim of a dangerous person does not absolve a custodian from a duty to use due care to protect others who might foreseeably be endangered by that person. Where the state, through its negligence, allows a parolee to cause foreseeable harm to a third person, we see no reason to predicate liability wholly on the state's ability to predict the victim's name. A victim may be "foreseeable" without being specifically identifiable.

The victims in this case, moreover, were foreseeable as more than simply members of the general public. All three were residents of an isolated community of fewer than 100 residents¹¹ into which Nukapigak was released. One of them was one of Nukapigak's stepdaughters; the others

were her boyfriend and her aunt. Nukapigak's stepdaughter, had been identified by at least one prison employee as particularly at risk. If they were foreseeably endangered, their close friends and relatives may also have been within a zone of especially foreseeable victims.¹²

[8] We conclude that both Nukapigak's victims and his actions were within the zone of foreseeable hazards of the state's failure to use due care in supervising Nukapigak. A trier of fact may decide that, under the circumstances, state employees' use of care in supervising Nukapigak or in planning and administering his parole could not have prevented the murders, or that the state did, in fact, act reasonably. We cannot conclude as a matter of law, however, that the murders or the victims were sufficiently unforeseeable to relieve the state of liability for the consequences of its negligence.

B. Other Criteria.

The remaining *D.S.W.* criteria, on balance, also militate in favor of imposing a duty of due care on the state. There is no question that the plaintiffs suffered injury; the asserted failure to supervise Nukapigak adequately—if proved at trial—can be viewed as closely connected to that injury. The state's abrogation of its own responsibility for adequately supervising this particularly dangerous parolee—if proved at trial—cannot be characterized as anything but morally blameworthy. A rule imposing liability for such derelictions would, in all probability, aid in deterring such conduct in the future.

10. We note that the California cases that have limited a duty of care to identifiable victims have focused on the duty to warn. The special considerations surrounding imposition of a duty to warn may justify limiting its scope. See *infra* at 1130.

11. Point Lay had a total population in 1980 of from thirty to sixty-eight residents. Alaska, Description of Resources in the Cities and Villages [Criminal Justice Planning Agency, October 1981] sets the figure at thirty. Alaska's 1980 Population, a Preliminary Look, [Alaska Dept. of Labor, January 1, 1981] estimates the village's population at sixty-eight.

12. Cf. *Hedlund v. Superior Court*, 34 Cal.3d 695, 194 Cal.Rptr. 805, 669 P.2d 41 (1983). In that case, the California Supreme Court held that a psychotherapist was under a duty to protect the young son of a woman who had been identified as a potential victim of a mental patient. The court noted that it was not "unreasonable to recognize the existence of a duty to persons in close relationship to the object of a patient's threat, for the therapist must consider the existence of such persons both in evaluating the seriousness of the danger posed by the patient and in determining the appropriate steps to be taken to protect the named victim."

The state argues that the burdens and consequences of imposing financial liability for failure to supervise adequately would be severe and unwarranted. It claims that the imposition of such a duty would cause "intolerable judicial interference with judicial corrections' decisions" and impose an economic burden, "reordering state priorities in allocating manpower and funds" and causing other socially desirable programs to suffer. We are not convinced by the generalized arguments the state has presented on this issue. By imposing a duty of due care on corrections personnel we are not requiring that the state spend limitless sums of money taking every conceivable precaution to prevent any possible violent action on the part of any parolee. We merely conclude that state officials have the duty, within the confines of existing policies and budgetary constraints, to exercise due care in supervising parolees. We do not believe that a rule imposing such a duty will significantly expand the responsibility of the state to the public and to its parolees; it might, however, convince state officials of a need to consider more carefully the decisions they make that might have potentially disastrous consequences.

[9] We therefore hold that state corrections personnel have the duty to use due care in supervising parolees and in protecting the foreseeable victims of parolees they know, or reasonably should know, to be dangerous.¹³ This duty requires that such officials take whatever precautions that a reasonable person with their knowledge and authority would take. We emphasize that the recognition of the duty does not make the state liable for all harm caused

13. We recognize the difficulties inherent in a requirement that prison authorities accurately predict the potential dangerousness of released prisoners. Cf. *Tarasoff*, 131 Cal.Rptr. at 24-25, 551 P.2d at 344-45. See also Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U.Penn.L.Rev. 439, 451 (1974). We do not intend to impose such a requirement. We do believe, however, that prison officials may be required to take into account the known characteristics of those they supervise when formulating plans for parole and in carrying out the

by parolees, but rather makes it liable only when its negligent supervision and administration of their parole causes the injury in question. See *Lipari v. Sears, Roebuck & Co.*, 497 F.Supp. 185, 192 (D.Neb.1980).

Neakok has alleged that the state was negligent, not solely in failing to supervise Nukapigak adequately, but also in failing to warn his victims and the residents of Point Lay that he was dangerous. The state contends that it had no duty to warn Nukapigak's potential victims, both because it could not predict who they were, and for policy reasons.

Ordinarily, the duty to use reasonable care to protect the foreseeable victims of a dangerous person may require a third party to take one or more of various steps, depending on the nature of the case. "Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." *Tarasoff*, 131 Cal.Rptr. at 20, 551 P.2d at 340. The cases that have held that warnings may be appropriate, however, have generally involved specifically identifiable victims. See, e.g., *Tarasoff; Jablonski by Pahls v. United States*, 712 F.2d 391 (9th Cir.1983). These cases have concluded that the policy reasons against issuing warnings are overshadowed when they can be limited to, and substantially protect an identified potential victim.

[10] We recognize that a requirement of warnings, unlike a requirement of careful supervision, carries with it the danger that a parolee will be stigmatized and rehabilitation thus seriously impaired. We have no interest in requiring, as a matter

actual supervision of parolees. In a similar context, the California Supreme Court noted that

Within the broad range of reasonable practice and treatment in which professional opinion and judgment may differ, the therapist is free to exercise his or her own best judgment without liability; proof, aided by hindsight, that he or she judged wrongly is insufficient to establish negligence.

Tarasoff, 131 Cal.Rptr. at 25, 551 P.2d at 345.

of law, that potentially dangerous parolees be emblazoned with scarlet letters¹⁴ proclaiming their status and criminal history before they are released from prison. Therefore, if Nukapigak's victims were foreseeable only as members of a limitless class of unidentifiable victims of foreseeably dangerous behavior, we would not impose a duty to warn.

Nukapigak's victims were not unidentifiable, however. As we have already noted, their status as residents of this small, isolated community, and as the stepdaughter and the close friends and relatives of the stepdaughter of Nukapigak, make them significantly more "identifiable" than members of the general public would be.¹⁵ Moreover, as residents of a community without police or parole officers, they may have had a much greater need for warnings than would a resident of a city with better access to traditional mechanisms of social control.

The California Supreme Court set forth its reasons for refusing to impose a duty to warn where a specific victim was not identifiable in *Thompson v. County of Alameda*, 27 Cal.3d 741, 167 Cal.Rptr. 70, 614 P.2d 728 (1980). The state argues that the circumstances of this case are substantially similar to those at issue in *Thompson*, and urges us to find guidance in that case. In *Thompson*, the court held that the authorities responsible for releasing a juvenile offender who had threatened to murder an unidentified child in his mother's neighborhood had no duty to warn the parents of neighborhood children. It based its holding in part on a belief that requiring warnings in that case would be "unwieldy and of little practical value," producing "a cacaphony of warnings that by reason of their sheer volume would add little to the effective protection of the public." *Id.* 167 Cal. Rptr. at 77, 614 P.2d at 735. The court

14. See N. Hawthorne, *The Scarlet Letter* (1850), in which the protagonist, Hester Prynne, was forced to wear a scarlet "A" on her clothing as punishment for having committed adultery.

15. Several courts have ruled that a duty to warn may be found where a third party has informa-

added that "the generalized warnings sought to be required here would do little to increase the precautions of any particular members of the public who may already have become conditioned to locking their doors, avoiding dark and deserted streets, instructing their children to beware of strangers and taking other precautions." *Id.* 167 Cal.Rptr. at 78, 614 P.2d at 736.

In contrast to the circumstances at work in *Thompson*, warnings in this case would not necessarily have been either unwieldy or ineffectual. The difficulties inherent in deciding which of the residents of a densely populated urban area to warn, and the dangers of a "cacaphony of warnings" disappear when the community at issue has 68 residents. It is not unreasonable to imagine that the residents of a small, isolated community have not become conditioned to protecting themselves from random violence, and that they might be much more profoundly affected by warnings. Moreover, the possibility of issuing discrete warnings to persons in a position to use them effectively is much more realistic in a village like Point Lay than in a relatively anonymous urban neighborhood. Under these circumstances, we cannot conclude that, as a matter of law, a requirement of warnings would be unduly burdensome, futile, or counterproductive.

Other factors present here, and absent in *Thompson*, militate against precluding a finding that the state, had it exercised due care, would have warned Nukapigak's foreseeable victims. When the state releases a potentially dangerous parolee into an isolated community without either police or parole officers, it may reasonably be expected to take some action to protect the residents. The state contends that, because of budgetary constraints, this protective action cannot include the assignment of a parole officer to the community or the

tion which should have put it on notice that an identifiable potential victim was in danger. See *Jablonski by Pahls v. United States*, 712 F.2d at 398; *Lipari v. Sears, Roebuck & Co.*, 497 F.Supp. at 189, n. 3.

requirement that an officer visit the parolee there periodically. We are unwilling to hold that, under these circumstances, the state's duty of care could not require it to inform the residents of the conditions of a releasee's parole and of any information which leads it to believe he or she might be dangerous.¹⁶

Although the California court refused to impose a duty to warn under the facts of *Thompson*, it did note that "[i]n those instances in which the released offender poses a predictable threat of harm to a named or readily identifiable victim or group of victims who can be effectively warned of the danger, a releasing agent may well be liable for failure to warn such person." *Thompson*, 167 Cal.Rptr. at 80, 614 P.2d at 738 (emphasis added). We conclude that the residents of a small remote village may constitute a "group of victims" who are sufficiently identifiable to justify imposing a duty to warn. We therefore hold that, if Neakok can prove that the state knew or reasonably should have known that the residents of Point Lay, or Nukapigak's ultimate victims, were seriously endangered when Nukapigak was released into Point Lay, the state's duty of due care may have included a duty to warn them of the danger.¹⁷

[11, 12] In conclusion, the state had a legally imposed duty to supervise Nukapigak, and a concomitant authority to impose conditions on his parole and to reincarcerate him if these conditions were not met. It thus exercised substantial control over

16. The Chairman of the Parole Board testified to the Board's approach when an unrehabilitated prisoner is paroled as a mandatory releasee:

[I]f it's in a remote situation, we throw up our hands, and if its in Anchorage, we tell the P.O. that we want him to notify the police and everybody concerned that this person is out, is on mandatory release and that they need to do whatever they can do to try to make sure that they don't get involved in something too serious before we pick them back up.

17. Our holding does not necessarily impose a duty to warn on the state. Instead, we merely hold that the trier of fact is not precluded from finding that the state, had it acted reasonably,

him. We hold that, in exercising this control, the state was obligated to use reasonable care to prevent Nukapigak from causing foreseeable injury to other people. Whether the state breached its duty of care by failing to supervise Nukapigak more closely, to impose special conditions of parole, to warn the residents of Point Lay of his dangerous propensities, or to take other protective measures is a question of fact which a jury must decide.¹⁸

III. IMMUNITY

Even if the state owed a duty of due care to Nukapigak's foreseeable victims, it cannot be held liable for the breach of that duty if it is immune under the "discretionary function" exception set forth in AS 09.50.250. AS 09.50.250 provides in part:

A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in the superior court.... However, no action may be brought under this section if the claim

(1) ... is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused; ...

The state contends that all of the decisions made in connection with Nukapigak's supervision and conditions of parole were dis-

would have issued warnings to the victims or to the residents of Point Lay.

18. Neakok's complaint alleges that the state was negligent in failing to provide Nukapigak with effective treatment for alcoholism and violence while he was in prison. Neither party mentions this count in its brief. We conclude that the state's treatment of Nukapigak before his release is too remote from Neakok's injuries to give rise to a duty to Neakok. While the state may well have owed Nukapigak a duty to offer rehabilitative programs in prison, we are unwilling to hold the state liable to Neakok for its failure to rehabilitate Nukapigak.

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cretionary, and that it is therefore immune from any liability.¹⁹

In interpreting AS 09.50.250, we have consistently held that "liability is the rule, immunity the exception." *Johnson v. State*, 636 P.2d 47, 64 (Alaska 1981); *Japan Air Lines Co. v. State*, 628 P.2d 934, 937 (Alaska 1981); *Adams v. State*, 555 P.2d 235, 244 (Alaska 1976). We have recognized that the purpose of the exception is "to preserve the separation of powers inherent to our form of government by recognizing that it is the function of the state, and not the courts of private citizens, to govern." *Japan Air Lines Co.*, 628 P.2d at 936. This purpose is served when the planning and policy decisions of other branches of government are insulated from liability. See, e.g., *Wainscott v. State*, 642 P.2d 1355 (Alaska 1982). On the other hand, however, "not all decisions or acts of state employees fall within the exception;" rather, immunity attaches "only [w]here there is room for policy judgment and decision." *Japan Airlines Co.*, 628 P.2d at 936 (emphasis in original), quoting *Dalehite v. United States*, 346 U.S. 15, 36, 73 S.Ct. 956, 968, 97 L.Ed. 1427, 1441 (1953).

In distinguishing between protected and unprotected levels of government decision making, we have followed a number of jurisdictions in holding the government liable for its "operational" decisions, but not for decisions made at a "planning" level. Under this planning-operational test, only decisions that rise to the level of basic planning or policy formulation will be considered discretionary; decisions that implement policy decisions and are ministerial or operational in nature will not be immune. *Johnson v. State*, 636 P.2d at 64; *State v. I'Anson*, 529 P.2d 188, 193 (Alaska 1974).

In adopting the planning-operational test, we followed the California Supreme Court in rejecting "simple semantic inquiry into the meaning of the word 'discretionary,'"

19. The Parole Board argues that the decisions of the Board are policy decisions and must be immunized. Parole Board members, as distinguished from parole officers, have frequently been afforded quasi-judicial immunity from liability for their decisions. See *Pope v. Chew*, 521 F.2d 400 (4th Cir.1975); *Pate v. Alabama Board*

since "almost any act, even driving a nail involves some 'discretion.'" *State v. Abbott*, 498 P.2d 712, 720 (Alaska 1972), quoting *Johnson v. State*, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968). We concluded that the planning-operational test "has the analytic virtue of focusing on the reasons for granting immunity to the governmental entity," and is therefore "a well-reasoned approach to the problem." *State v. Abbott*, 498 P.2d at 721. The test's focus allows it "to give legislative and executive policymakers sufficient breathing space in which to perform their vital policy making functions," *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 131 Cal.Rptr. 14, 30, 551 P.2d 334, 350 (1976), while avoiding the immunization of every minor exercise of discretion. Since adopting the planning-operational test we have refused to immunize even acts that involve substantial exercise of discretion, but that did not rise to the level of policy decisions. See, e.g., *Moloso v. State*, 644 P.2d 205, 219 (Alaska 1982).

In view of these guidelines for applying the discretionary function exception, we cannot accept the state's argument that all decisions that concern parole are discretionary and must be immunized. The state argues that parole decisions necessarily require sensitive balancing of competing interests of rehabilitation and public safety and are, by their nature, policy decisions. However, Neakok's claims against the state are based primarily on day-to-day acts of corrections personnel. These employees were not involved in basic policy making; they were instead assigned to implement the policies passed down to them by the Parole Board and by their superiors or required of them by the basic tenets of negligence law. In describing their decisions as involving policy making, the state has, in our view, substituted the words

of Paroles, 409 F.Supp. 478 (M.D.La.1976). In this case either the parole officer or prison counselor also could have imposed special conditions of parole. In view of our disposition of the claim against the Parole Board, we need not address the issue of immunity.

"policy making" for the word "discretionary," and proceeded with the essentially semantic inquiry rejected in *Abbott and Johnson*. While the employees assigned to supervise Nukapigak made decisions involving some discretion, they cannot be said to have made policy. As we have already noted, we have not interpreted AS 09.50.250 as immunizing all decisions requiring the exercise of some degree of discretion.

[13,14] The policies of the Parole Board required Nukapigak's prison counselor to formulate a parole plan for him before he was released. They also authorized both the counselor and Nukapigak's parole officer to impose special conditions of parole. Possible special conditions included requirements that Nukapigak refrain from drinking alcohol, that he participate in an alcohol rehabilitation program or marital counseling, or that his residency be set in a place (e.g., Barrow) where there were law enforcement officers and treatment programs to supervise him. Formulation of the parole plan, and selection of special conditions were not basic planning or policy making activities that would be immunized under AS 09.50.250. Instead, they implemented a policy already devised by the Parole Board. While the discretionary function exception immunizes the formulation of policy, the state may be held liable if that policy is negligently implemented. *State v. I'Anson*, 529 P.2d at 194.

Similarly, the actions of Nukapigak's parole officer in supervising him, and in deciding not to appoint a parole liaison advisor, not to inform appropriate people in the small community of Point Lay of his parole status, and not to warn his stepdaughter and other potential victims of his dangerous propensities cannot be characterized as basic policy decisions. Employees of the Division of Corrections were charged with supervising Nukapigak while he was on

20. The *White* court noted that:

While the policy embodied in the Veteran's Administration Regulations that patients should be allowed the maximum of freedom warranted by their condition is a discretionary decision, the application of that policy to

parole. Their actions in carrying out that duty took place "at the lowest, ministerial rung of official action," *Tarasoff*, 131 Cal. Rptr. at 30, 551 P.2d at 350, quoting *Johnson v. State*, 73 Cal.Rptr. at 250, 447 P.2d at 362, and cannot be immunized.

We find support for a holding rejecting immunity in several well reasoned decisions of other courts. Under circumstances comparable to those at issue here, a number of jurisdictions have refused to shield operational decisions of parole officers, probation officers, and government employed custodial officers. Thus, for example, in *Johnson v. State*, 69 Cal.2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968), the California Supreme Court refused to immunize a parole officer's failure to warn a juvenile parolee's foster parents of his dangerous propensities. The court acknowledged that the parole officer exercised discretion in selecting "those elements of the youth's character and background which would be most helpful to the foster parents and yet would not endanger the parole effort," *id.* 73 Cal.Rptr. at 245, 447 P.2d at 357, but concluded that such "discretion did not rise to the level of policy formation." In *Rieser v. District of Columbia*, 563 F.2d 462, the court held that the District of Columbia was not immune from suit for a parole officer's failure to warn a parolee's employer of his criminal record and to supervise him adequately. The court specifically noted that the parole officer "was not involved in the formulation of policy, but in the execution of policy as it affected an individual parolee." *Id.* at 475. See also *White v. United States*, 317 F.2d 13 (4th Cir.1963) (Veteran's Administration Hospital administrators' decision to allow mental patient privileged status not immune);²⁰ *Tarasoff*, 131 Cal.Rptr. at 22, 551 P.2d 334, (state-employed psychiatrists' decision not to warn their patient's identifiable victim not im-

an individual case is not within the category of policy decisions exempted by the [Tort Claims] statute. The application of that policy to the individual case is an administrative decision at the operational level.... 317 F.2d at 17.

mune); *Bell* (Fla.App.198 tors' decision immune).

The policies and the Alaska Constitutional duties of the Division and roles adequate to create independent appointing authority. Many of the decisions of some decisions.

Accordingly, the Division and their duty to supervise parolees and scrutinize negligence under the choice of the Supreme Court literal interpretation merely imply... alternatives to the resolution of negligence of the ty.

The need to consider the parolee's supervision and the protection of employees in fact decisions were fully, the staff, in retrospect, might have a not conclude,

mune); *Bellavance v. State*, 390 So.2d 422 (Fla.App.1980) (State hospital administrators' decision to release mental patient not immune).

The policies of the Division of Corrections and the Parole Board as well as the Alaska Constitution impose a body of operational duties on the Division and its personnel. These laws and policies require the Division and its personnel to supervise parolees adequately, and give them authority to create individualized plans of parole, to appoint parole advisors and otherwise to dictate terms and conditions of parole. Many of these activities require the exercise of some judgment, but none are policy decisions.

Accordingly, actions taken by personnel of the Division of Corrections to fulfill their duty to follow the policies of the Division and the Parole Board, and to supervise parolees adequately, should be scrutinized under established principles of negligence law. This analysis does not render the choices facing a parole officer irrelevant. In *Johnson v. State*, 73 Cal.Rptr. at 358, 447 P.2d at 358, the California Supreme Court noted that its rejection of a literal interpretation of "discretionary"

merely implies that the existence of some ... alternatives facing the employee does not perforce lead to a holding that the governmental unit thereby attains the status of non-liability under [the discretionary function exception]. These alternatives may well play a major part in the resolution of the substantial question of negligence; they do not, however, dispose of the threshold question of immunity.

The need to make decisions about Nukapigak's supervision in the light of competing considerations about his successful parole and the protection of the public must be considered in deciding whether state employees in fact acted negligently. If these decisions were made reasonably and carefully, the state will not be held liable even if, in retrospect, an alternative decision might have averted the murders. We cannot conclude, however, that the availability

of these choices should immunize the state entirely for its failure to use due care in supervising Nukapigak.

IV. CAUSATION

[15] The state argues that, even if it breached a duty to Neakok and is not immune from liability for that breach, its actions were not a proximate cause of the murders. It contends both that the connections between its acts and the murders were too attenuated to support a finding of proximate cause and that Nukapigak's acts were an independent intervening cause which relieved the state from liability. The question of proximate cause becomes one of the law only "where the evidence is such that reasonable minds cannot differ." *Sharp v. Fairbanks North Star Borough*, 569 P.2d 178, 183-84 (Alaska 1977). The evidence in this case does not preclude a finding of causation by a reasonable jury, and we therefore cannot hold that, as a matter of law, the state's alleged negligence did not cause the murders.

A party's negligence is a proximate cause of an injury only when the negligent act "was more likely than not a substantial factor in bringing about [the] injury." *Sharp*, 569 P.2d at 181. Normally, the substantial factor test may be satisfied only by a showing "both that the accident would not have happened 'but for' the defendant's negligence and that the negligent act was so important in bringing about the injury that reasonable men would regard it as a cause and attach responsibility to it." *Id.*, quoting *State v. Abbott*, 498 P.2d at 726-27.

The state contends that the murders would have occurred even if it had exercised due care, and that its alleged negligence is therefore not a "but for" cause of harm. We cannot say, as a matter of law, that reasonable jurors could not believe that if Nukapigak's wife had been warned that if Nukapigak's wife had been warned of the danger she would not have protected her daughter, that if the villagers had been warned they would not have helped him to obtain alcohol, that if Nukapigak had been prohibited under his conditions of parole

from drinking, he would not have become drunk, or that, if a local parole advisor had been appointed, Nukapigak's possession of firearms would have been prevented or reported. Reasonable jurors could certainly find that, without alcohol or firearms, the murders would not have happened.

[16] The state also contends that Nukapigak's acts themselves were a superseding cause of Neakok's injury and that the state should therefore be relieved from liability for its own alleged negligence. The Restatement (Second) of Torts Section 440 (1965) suggests several factors which may be considered in establishing the existence of a superseding cause of an injury which will relieve a negligent actor from liability. These standards include: (1) the fact that the intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence; (2) the fact that the result appears highly extraordinary after the event; (3) the fact that the intervening force operates independently of the actor's negligence; (4) the fact that the operation of the force is due to a third party's acts, especially if that act is wrongful; and (5) the degree of culpability of the third person's acts. These standards do not support a conclusion that Nukapigak's acts were a superseding cause of Neakok's injury. The state's duty to supervise Nukapigak adequately and to impose special conditions of parole on him was intended, in part, to protect the public and to prevent Nukapigak from committing new crimes. Indeed, if the state owed any duty to Neakok, it was to use reasonable care to prevent Nu-

kapigak from committing new crimes. Nukapigak's actions, although highly culpable, were not unforeseeable or independent of the state's negligence.²¹ Under these circumstances Nukapigak's acts cannot be viewed as a superseding cause of Neakok's injury. Cf. *Morris v. Farley Enterprises, Inc.*, 661 P.2d 167 (Alaska 1983).²²

V. CONCLUSION

In bringing this action, the survivors of Nukapigak's victims have claimed that the state's negligent supervision and treatment of a dangerous parolee allowed that parolee to commit three foreseeable and avoidable murders. By its motion for summary judgment, the state contends that, even if it was negligent, it cannot be held liable for its negligence because it had no duty to protect the parolee's eventual victims, because its negligent actions were discretionary, or because its negligence could not have caused the murders. We reach no conclusions as to the reasonableness in fact of the state's treatment or supervision of Nukapigak. We hold, however, that the state had a duty to supervise him carefully, that this duty extended to anyone foreseeably endangered by him, and that the sovereign immunity statute will not shield the state from the consequences of its breach of that duty. We conclude that Neakok has submitted enough evidence of the state's negligence, and of the foreseeability and preventability of Nukapigak's actions to merit denial of the state's summary judgment motion. Accordingly, except insofar as it subjects the state to liability for its negligence in treating Nukapigak in

21. Neither the intentional character of Nukapigak's acts nor their culpability can relieve the state of liability where, as here, the state owed a duty of due care to prevent Nukapigak's intentional, culpable acts. See *Decker v. Gibson Products Co. of Albany*, 679 F.2d 212 (11th Cir. 1982).

22. In *Morris*, we held that a liquor store that sold alcohol to a minor could be held liable for deaths caused by an ensuing automobile accident, despite the wrongfulness of the minor's conduct in purchasing the liquor and sharing it with the driver of a car.

The state also argues that its actions were not "so important in bringing about the injury that reasonable men would regard [them] as a cause." It contends that Nukapigak's actions were so much more important as causes of the injury that the state's alleged negligence must be seen as, at most, an attenuated cause of the murders. Again, if the state was negligent at all, it was negligent in failing to use due care to prevent circumstances which would make Nukapigak likely to be violent. Nukapigak's violent acts cannot therefore be viewed as a cause of the injuries independent of the state's negligence.

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prison, and subjects the Alaska Parole Board to liability, we affirm the judgment of the superior court.

AFFIRMED in part, REVERSED in part, and REMANDED.

MOORE, J., not participating.

MATTHEWS, Justice, joined by RABINOWITZ, Chief Justice, dissenting.

In my view, the state is not subject to liability in tort for failing to impose conditions of parole, either at the parole board or the parole officer level. Such decisions are akin to decisions which a sentencing judge must make in deciding on the terms of a sentence of probation and are plainly discretionary.¹ The fact that such decisions may be made by parole officers does not make them different in the degree or type of discretion involved from those made by the parole board.²

With respect to the question of whether a parole officer, and the state, may be liable for negligently supervising a parolee, I believe that there may be liability should a parole officer fail to respond appropriately upon receiving notice of a parole violation having potentially serious implications.³ I would not take the next step and hold that there can be liability for an alleged failure to seek out parole violations. Such a ruling would interfere with decisions which are necessarily discretionary, involving a balancing of the sometimes competing goals of obtaining the maximum degree of rehabilitation while avoiding unnecessary interference with the parolee, protecting the public, and maximizing the effective allocation of available resources.

Concerning the failure to warn claim, in my view the state was entitled to summary

judgment that as a matter of law there was no duty to warn. The only events from which one might conclude that Nukapigak was dangerous occurred before he was imprisoned. His wife, his step-daughter, and the inhabitants of Point Lay in general knew of these acts. Nukapigak did not develop any mental illness in jail nor did he make any threats while he was there. The state knew nothing significant about Nukapigak that was not generally appreciated in Point Lay.

Imposing a duty to warn is appropriate only where there is superior knowledge. Thus the California Supreme Court in the leading case of *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 131 Cal.Rptr. 14, 27, 551 P.2d 334, 347 (1976) stressed the danger that might result from "a concealed knowledge of the therapist that his patient was lethal." The requirement of superior knowledge is consistent with the duty to warn as it exists generally in the law of torts. A manufacturer need only warn of substantial hazards inherent in his product which are not readily recognized by the ordinary consumer, *Prince v. Parachutes, Inc.*, 685 P.2d 83 (Alaska 1984) and the owner of land need not warn of obvious dangers, W. Prosser, *Handbook of the Law of Torts* § 61 at 394 (4th ed. 1971). Since the state did not have superior knowledge of Nukapigak's dangerous propensities no duty to warn arose.

With respect to the claim that the state should be liable for failing to provide Nukapigak effective therapy in jail, I agree with the majority's conclusion that reversal is warranted. In plaintiffs' statement of genuine issues submitted in opposition to the state's motion for summary judgment, no

1. Cf. *State v. Chaney*, 477 P.2d 441, 443-44 (Alaska 1970) (sentencing is a discretionary judicial function which involves the judicious balancing of the many and oftentimes competing factors encompassed within the constitutional touchstones of reformation and protection of the public).

2. "[I]t is the nature of the conduct, rather than the status of the actor that governs whether the discretionary function exception applies in a given case." *United States v. Varig Airlines*, 467

U.S. 797, 813, 104 S.Ct. 2755, 2765, 81 L.Ed.2d 660, 674 (1984). See also *Earthmovers of Fairbanks, Inc. v. State*, 691 P.2d 281 (Alaska 1984) (police officer's decision to reduce speed limit is discretionary).

3. See *City of Kotzebue v. McLean*, 702 P.2d 1309 (Alaska 1985) (police officer has duty to respond upon receiving notice of a life-threatening situation).

such contention was raised. Thus, the state was entitled to summary judgment on the counts relating to this claim.

For these reasons I would reverse the decision of the superior court and remand this case with directions to enter judgment for the state.



John RATLIFF, Appellant,

v.

ALASKA WORKERS' COMPENSATION BOARD, Wright Schuchart Harbor/ASAG (Employer), and Wausau Insurance Companies (Insurer), Appellees.

No. 1126.

Supreme Court of Alaska.

July 3, 1986.

Claimant appealed from decision of the Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., affirming decision of the Workers' Compensation Board holding that claimant was entitled only to permanent partial benefits for a scheduled injury. The Supreme Court, Rabinowitz, C.J., held that claimant suffered only a single injury, and so was not entitled to concurrent award of both scheduled and unscheduled benefits.

Affirmed.

1. Workers' Compensation §876

Finding by the Workers' Compensation Board that effect of claimant's knee injury did not extend to other parts of his body constituted finding that claimant did not suffer unscheduled injury and that statutory schedule applied exclusively, so that claimant was limited in his recovery to benefits provided for in schedule even were he

to suffer economic disability, despite allegation by claimant that the Board's finding merely constituted a finding that claim was not governed by statute providing for scheduled award for loss of use of body part not otherwise provided for in schedule. AS 23.30.190(a)(19)(B), (a)(20).

2. Workers' Compensation §876

Despite workers' compensation claimant's allegation that fact that knee injury disabled him from working constituted a separate "injury" from knee injury, claimant suffered only a single injury, and so was not entitled to concurrent award of both scheduled and unscheduled benefits. AS 23.30.190(a)(20).

3. Workers' Compensation §877

Under statute providing that workers' compensation shall be paid "as follows" and that unscheduled benefits apply in all other cases, scheduled permanent partial disability benefits for claimant's knee injury were the exclusive benefits that claimant could recover. AS 23.30.190, 23.30.190(a)(2, 20).

4. Workers' Compensation §876

Scheduled workers' compensation benefits are not exclusive as to a claimant who is found to be permanently totally disabled. AS 23.30.180, 23.30.190(a)(21).

5. Workers' Compensation §1846

Claimant did not raise issue of whether he was fully disabled before the Workers' Compensation Board and expressly disavowed total disability as an issue, and thus, argument that claimant was permanently totally disabled would not be considered for first time on appeal.

Arthur Lyle Robson, Fairbanks, for appellant.

Ralph R. Beistline, Ann E. Stoloff, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for appellees.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

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543 US, at 734-735.

[444 US 277]

GEORGE MARTINEZ et al., Appellants,

v

STATE OF CALIFORNIA et al.

444 US 277, 62 L Ed 2d 481, 100 S Ct 553, reh den 445 US 920, 63 L Ed 2d
606, 100 S Ct 1285

[No. 78-1268]

Argued November 5, 1979. Decided January 15, 1980.

Decision: State statute immunizing parole officials from injuries resulting from parole decisions, held not violative of due process; suit against officials under 42 USCS § 1983 by survivors of parolee's murder victim, held not actionable.

SUMMARY

The survivors of a 15-year-old girl who had been murdered by a parolee five months after his parole brought an action for damages under state law and 42 USCS § 1983 in the Superior Court of San Diego County, California, against those state officials who were responsible for the parole release decision. It was alleged that the state officials' conduct in releasing the parolee (a mentally disturbed, convicted sex offender, who had been imprisoned without recommendation for parole) had deprived the victim of her life without due process of law. It was further argued that a California statute which granted the officials absolute immunity from liability for any injury resulting from a parole release decision violated the due process clause of the Fourteenth Amendment to the Federal Constitution. The trial court sustained a demurrer to the complaint, and the Court of Appeal of California, Fourth Appellate District, affirmed, ruling that the California immunity statute provided the state officials with a complete defense to the state law claims, and that the officials were immune from suit under § 1983 because they were performing a quasi-judicial function in making parole determinations (85 Cal App 3d 430, 149 Cal Rptr 519).

On appeal, the United States Supreme Court affirmed. In an opinion by STEVENS, J., expressing the unanimous view of the court, it was held that (1) the California immunity statute was not unconstitutional under the Fourteenth Amendment when applied to defeat the tort claim arising under

Briefs of Counsel, p 849, *infra*.

state law, such statute not having deprived the murder victim of due process of law by condoning a parole decision leading indirectly to the individual's death, and not having brought about an invalid deprivation of property, even assuming the immunity defense could be construed as depriving the victim's survivors of their "property" interest in a cause of action for wrongful death, and (2) the survivors of the murder victim had not alleged a claim for relief under 42 USCS § 1983 against the state officials by claiming that the officials subjected the victim to a deprivation of her life without due process of law since (a) the action of the parolee was not state action for purposes of the Fourteenth Amendment, (b) the officials did not "deprive" the victim of life within the meaning of the Fourteenth Amendment regardless of whether, as a matter of state tort law, the parole board had a "duty" to avoid harm to the victim, or proximately caused the death, and (c) the death was too remote a consequence of the officials' action to hold them responsible under § 1983.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 782 — parole officials — state immunity statute — due process of law — wrongful death

1a, 1b. A state law granting public officials immunity from liability for any injury resulting from a parole release determination is not violative of the due process clause of the Fourteenth Amend-

ment as applied to defeat a tort claim arising under state law for the wrongful death of a girl who had been murdered by a parolee after he had been released from prison by state officials despite his history as a mentally disturbed sex offender; such law, which merely provides a defense to potential state tort law liability, has not deprived the decedent

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

15 Am Jur 2d, Civil Rights §§ 16-20; 16A Am Jur 2d, Constitutional Law § 816; 63 Am Jur 2d, Public Officers and Employees § 304

42 USCS § 1983; Constitution, 14th Amendment

US L Ed Digest, Civil Rights § 12.5; Constitutional Law §§ 520, 782, 848

L Ed Index to Annos, Civil Rights; Due Process of Law; States
ALR Quick Index, Discrimination; Due Process of Law; Privileges and Immunities

Federal Quick Index, Civil Rights; Due Process of Law; Privileges and Immunities

ANNOTATION REFERENCE

Supreme Court's construction of Civil Rights Act of 1971 (42 USCS § 1983) providing private right of action for violation of federal right. 43 L Ed 2d 933.

MARTINEZ v CALIFORNIA

444 US 277, 52 L Ed 2d 481, 100 S Ct 553

of her life without due process of law because it condoned a parole decision that led indirectly to her death, since the law does not authorize nor immunize the deliberate killing of any human being and is not the equivalent of a death penalty statute which expressly authorizes state agents to take a person's life after prescribed procedures have been observed, and neither can the law be characterized as an invalid deprivation of property violative of the due process clause—even assuming the immunity defense could be construed as depriving the victim's survivors of a "property" interest in a cause of action for wrongful death—since a rational relationship exists between the state's purpose in enacting the statute and the statute itself.

Civil Rights § 12.5; Constitutional Law §§ 520, 848 — murder by parolee — parole officials' liability — due process

2a, 2b. The survivors of an individual murdered by a parolee who had been released from prison despite his history as a mentally disturbed sex offender do not allege a claim for relief under 42 USCS § 1983 in a state court action against state officials responsible for parole release determinations by claiming that the officials subjected the victim to a deprivation of life without due process of law, since (1) although the decision to release the parolee from prison constitutes action by the state, the action of the parolee in committing the murder does not amount to state action for purposes of the Fourteenth Amendment, (2) the officials did not "deprive" the victim of life within the meaning of the Fourteenth Amendment regardless of whether, as a matter of state tort law, they had a "duty" to avoid harm to the victim, or proximately caused the death, and (3) the death is too remote a consequence of the parole officials' actions to hold them responsible under § 1983, given the facts that the murder occurred 5 months after the parolee's release and that the officials were not aware that the decedent, as distinguished from the public at large, faced any danger.

Appeal and Error §§ 1088, 1123 — state immunity statute — equal protection challenge — Supreme Court consideration

3a, 3b. The United States Supreme Court will not consider a challenge under the equal protection clause of the Federal Constitution to a state law granting public officials immunity from liability for any injury resulting from a parole release determination where the challenge is presented only in the jurisdictional statement, but is not briefed in the Supreme Court and is neither raised nor treated by the lower courts.

Constitutional Law § 520 — due process — legislative decision — state action

4. A legislative decision that has an incremental impact on the probability that death will result in any given situation, such as setting the speed limit at 55 miles-per-hour instead of 45 miles-per-hour, cannot be characterized as state action depriving a person of life in violation of the due process clause of the Fourteenth Amendment just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander.

States § 33.5 — rules of tort law — relation to federal interests

5. A state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.

Courts § 103.5 — state statute — due process challenge — wisdom of legislature

6. In assessing the validity under the due process clause of the Fourteenth Amendment of a state statute providing absolute immunity to parole officials as to their parole decisions, federal courts have no authority to pass judgment on the wisdom of a legislative policy determination made by reasonable lawmakers which underlies the enactment of the statute.

Courts § 781 — federal law — state court enforcement

7a, 7b. Where an Act of Congress gives a penalty to an aggrieved party without specifying a remedy for its enforcement, the Act may be enforced by a proper action in a state court provided no Act of Congress provides otherwise; furthermore, where the same type of claim would be enforced in the state court if arising under state law, the state courts are generally not free to refuse enforcement of the federal claim.

Civil Rights § 12.5 — state immunity statute — liability of state officials

8a, 8b. A state statute which grants public officials immunity from liability for any injury resulting from a parole release determination does not control a claim asserted in a state court under 42 USC § 1983 against state officials by the survivors of an individual who was murdered by a parolee, such claim alleging that the officials, by their actions in releasing the parolee, had subjected the decedent to a deprivation of life without

due process of law; conduct by persons acting under color of state law which is wrongful under 42 USCS § 1983 or 42 USCS § 1985(3) cannot be immunized by state law.

Civil Rights § 12.5 — action — initial inquiry

9. In a suit under 42 USCS § 1983 the first inquiry is whether the plaintiff has been deprived, within the meaning of § 1983, of a right secured by the Constitution and laws of the United States.

Constitutional Law §§ 513, 529 — due process rights — erroneous state decision

10a, 10b. An individual's right to due process guaranteed by the Federal Constitution is not necessarily violated by a state's decision depriving that individual of life or property, even if that decision is erroneous.

Civil Rights § 12.5 — action — injury involving state officials

11. Not every injury in which a state official has played some part is actionable under 42 USCS § 1983.

SYLLABUS BY REPORTER OF DECISIONS

Appellants' decedent, a 15-year-old girl, was murdered by a parolee five months after he was released from prison despite his history as a sex offender. Appellants brought an action in a California court under state law and 42 USC § 1983 [42 USCS § 1983], claiming that appellee state officials, by their action in releasing the parolee, subjected the decedent to a deprivation of her life without due process of law and were therefore liable in damages for the harm caused by the parolee. The trial court sustained a demurrer to the complaint. The California Court of Appeal affirmed, holding that a California statute granting public employees absolute immunity from liability for any injury resulting from parole-release determinations provided appellees with a complete defense to appellants' state-law claims, and that appellees enjoyed quasi-judicial immu-

nity from liability under the 42 USC § 1983 [42 USCS § 1983].

Held:

1. The California immunity statute is not unconstitutional when applied to defeat a tort claim arising under state law.

(a) The statute, which merely provides a defense to potential state tort-law liability, did not deprive appellants' decedent of her life without due process of law because it condoned a parole decision that led indirectly to her death. A legislative decision that has an incremental impact on the probability that death will result in any given situation cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander.

(b) Even if the statute can be characterized as a deprivation of property, the State's interest in fashioning its own

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rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from wholly arbitrary or irrational state action. The statute is not irrational because the California Legislature could reasonably conclude that judicial review of parole decisions "would inevitably inhibit the exercise of discretion" and that this inhibiting effect could impair the State's ability to implement a parole program designed to promote rehabilitation of inmates as well as security within prisons by holding out a promise of potential rewards.

2. Appellants did not allege a claim for relief under federal law. (a) The Fourteenth Amendment protected appellants' decedent only from deprivation by the State of life without due process of law, and although the decision to release the parolee from prison was action by the State, the parolee's action five months

later cannot be fairly characterized as state action.

(b) Regardless of whether, as a matter of state tort law, the parole board either had a "duty" to avoid harm to the parolee's victim or proximately caused her death, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.

(c) Under the particular circumstances where the parolee was in no sense an agent of the parole board, and the board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger, appellants' decedent's death was too remote a consequence of appellees' action to hold them responsible under § 1983.

85 Cal App 3d 430, 149 Cal Rptr 519, affirmed.

Stevens, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

Donald McGrath, II, argued the cause for appellants.

Jeffrey T. Miller argued the cause for appellees.

Briefs of Counsel, p 849, *infra*.

OPINION OF THE COURT

[444 US 279]

Mr. Justice Stevens delivered the opinion of the Court.

[1a, 2a] The two federal questions that appellants ask us to decide are (1) whether the Fourteenth Amendment invalidates a California statute granting absolute immunity to public employees who make parole-release determinations, and (2) whether such officials are absolutely immune from liability in an action brought under the federal Civil Rights Act of 1871, 42 USC § 1983 [42 USCS § 1983].¹ We agree with the California Court of Appeal that

the state statute is valid when applied to claims arising under state law, and we conclude that appellants have not alleged a claim for relief under federal law.

The case arises out of the murder of a 15-year-old girl by a parolee. Her survivors brought this action in a California court claiming that the state officials responsible for the parole-release decision are liable in damages for the harm caused by the parolee.

The complaint alleged that the

1. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

parolee, one Thomas, was convicted of attempted rape in December 1969. He was first committed to a state mental hospital as a "Mentally Disordered Sex Offender not amenable to treatment" and thereafter sentenced to a term of imprisonment of 1 to 20 years, with a recommendation that he not be paroled. Nevertheless, five years later, appellees decided to parole Thomas to the care of his mother. They were fully informed about his history, his propensities, and the likelihood that he would commit another violent crime. Moreover, in making their release determination they failed to observe certain "requisite formalities." Five months after his release Thomas tortured

[444 US 280]

and killed appellants' decedent. We assume, as the complaint alleges, that appellees knew, or should have known, that the release of Thomas created a clear and present danger that such an incident would occur. Their action is characterized not only as negligent, but also as reckless, willful, wanton and malicious.² Appellants prayed for actual and punitive damages of \$2 million.

The trial judge sustained a demurrer to the complaint and his order was upheld on appeal. 85 Cal App 3d 430, 149 Cal Rptr 519 (1978). After

the California Supreme Court denied appellants' petition for a hearing, we noted probable jurisdiction. 441 US 960, 60 L Ed 2d 1064, 99 S Ct 2403.

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Section 845.8(a) of the Cal Gov't Code Ann (West Supp 1979) provides:

"Neither a public entity nor a public employee is liable for:

"(a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release."

[3a] The California courts held that this statute provided appellees with a complete defense to appellants' state-law claims.³ They considered and rejected the contention that the immunity

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statute as so construed violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.⁴

[1b, 4] Like the California courts, we cannot accept the contention that this statute deprived Thomas' victim of her life without due process of law because it condoned a parole decision that led indirectly to her death. The statute neither authorized nor

2. Although the complaint refers to the failure to supervise Thomas after his release, a failure to warn females in the area of potential danger, and a failure to revoke the original parole decision, the litigation has focused entirely on the original decision. The individual appellees are not alleged to have responsibility for postrelease supervision of Thomas.

3. The dismissal of appellants' cause of action charging negligent failure to warn females in the area of danger was predicated on appellants' concession that there was no "continuing relationship between the state and the victim." 85 Cal App 3d 430, 435, 149 Cal Rptr 519, 523 (1978), a requirement of state

law.

4. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. Am. 14, § 1.

[3b] Although the question presented in the jurisdictional statement posits an Equal Protection Clause challenge to the statute, that point was not actually briefed in this Court. It was also neither raised in nor treated by the courts below. We therefore make no further reference to that challenge.

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immunized the deliberate killing of any human being. It is not the equivalent of a death penalty statute which expressly authorizes state agents to take a person's life after prescribed procedures have been observed. This statute merely provides a defense to potential state tort-law liability. At most, the availability of such a defense may have encouraged members of the parole board to take somewhat greater risks of recidivism in exercising their authority to release prisoners than they otherwise might. But the basic risk that repeat offenses may occur is always present in any parole system. A legislative decision that has an incremental impact on the probability that death will result in any given situation—such as setting the speed limit at 55-miles-per-hour instead of 45—cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander.

[5] Nor can the statute be characterized as an invalid deprivation of

8. It is arguable, however, that the immunity defense, like an element of the tort claim itself, is merely one aspect of the State's definition of that property interest. Recently, in considering a lawyer's claim of immunity from a state malpractice action, we noted that when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *Ferri v Ackerman*, 499 U.S. 103, 62 L Ed 2d 355, 100 S Ct 402.

9. *Martinez* says the statute is unconstitutional because it permits the deprivation of life, a fundamental right, without due process. He suggests the statute, if it confers absolute immunity, encouraged the actions resulting in Mary Ellen's death and, thus, requires a compelling state interest. However, the Legislature has broad powers to control governmental tort liability limited only by the rule it not act arbitrarily (*Reed v City & County of San*

property. Arguably, the cause of action for wrongful death that the State has created is a species of "property"

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protected by the Due Process Clause. On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials.⁵ But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.

[6] We have no difficulty in accepting California's conclusion that there "is a rational relationship between the state's purposes and the statute."⁶ In fashioning state policy in a "practical

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and troublesome area" like this, see *McGrinnis v Royster*, 410 US 263, 270, 35 L Ed 2d

Francisco, 237 Cal App 2d 23, 24 (1966). The California Tort Claims Act as a whole (Gov Code § 81C et seq.) has been found constitutional (*Datil v City of Los Angeles*, 263 Cal App 2d 655, 660-661 (1968)). The stated purpose of section 845.8, subdivision (a), is to allow correctional personnel to make determinations of release or parole unfettered by any fear of tort liability (Law Revision Commission). To impose tort liability would have a chilling effect on the decision-making process, impede implementation of trial release programs and prolong incarceration unjustifiably for many prisoners. There is a rational relationship between the state's purposes and the statute." 85 Cal App 3d, at 437, 149 Cal Rptr, at 524.

The opinion of the California Court of Appeal does not expressly mention the Federal Constitution. But it is clear from appellants' response to the demurrer that they were relying on "a federally protected right to life under the Constitution of the United States." Record 59.

282, 93 S Ct 1055, the California Legislature could reasonably conclude that judicial review of a parole officer's decisions "would inevitably inhibit the exercise of discretion," *United States ex rel. Miller v Twomey*, 479 F2d 701, 721 (CA7 1973), cert denied, 414 US 1146, 39 L Ed 2d 102, 94 S Ct 900. That inhibiting effect could impair the State's ability to implement a parole program designed to promote rehabilitation of inmates as well as security within prison walls by holding out a promise of potential rewards. Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable law-makers may favor. As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination. We therefore find no merit in the contention that the State's immunity statute is unconstitutional when applied to de-

feat a tort claim arising under state law.

II

[2b, 7a, 8a, 9, 10a] We turn then to appellants' § 1983 claim that appellees, by their action in releasing Thomas, subjected appellants' decedent to a deprivation of her life without due process of law.⁷
[444 US 284]

It is clear that the California immunity statute does not control this claim even though the federal cause of action is being asserted in the state courts.⁸ We also conclude that it is not necessary for us to decide any question concerning the immunity of state parole officials as a matter of federal law because, as we recently held in *Baker v McCollan*, 443 US 137, 61 L Ed 2d 433, 99 S Ct 2689, "[t]he first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws'" of the United States.⁹ The answer to that

7. [7b] We note that the California courts accepted jurisdiction of this federal claim. That exercise of jurisdiction appears to be consistent with the general rule that where "an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court." *Testa v Katt*, 330 US 386, 391, 91 L Ed 967, 67 S Ct 810, 172 ALR 225, quoting *Claffin v Houseman*, 93 US 130, 137, 23 L Ed 833.

See also *Aldinger v Howard*, 427 US 1, 36, n 17, 49 L Ed 2d 276, 96 S Ct 2413 (Brennan, J., dissenting); *Grubb v Public Utilities Comm'n*, 281 US 470, 476, 74 L Ed 972, 50 S Ct 374. We have never considered, however, the question whether a State *must* entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim. *Testa v Katt*, *supra*, 394, 91 L Ed 967, 67 S Ct 810, 172 ALR 225. But see *Chamberlain v Brown*,

223 Tenn 25, 442 SW2d 248 (1969).

8. [8b] "Conduct by persons acting under color of state law which is wrongful under 42 USC § 1983 or § 1985(3) [42 USCS § 1983 or § 1985(3)], cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See *McLaughlin v Tilendis*, 398 F2d 287, 290 (7th Cir 1968). The immunity claim raises a question of federal law." *Hampton v Chicago*, 484 F2d 602, 607 (CA7 1973), cert denied, 415 US 917, 39 L Ed 2d 471, 94 S Ct 1413, 94 S Ct 1414.

9. [10b] *Baker v McCollan*, 443 US, at 140, 61 L Ed 2d 433, 99 S Ct 2689. Although there was a dissent in that case, the issue that divided the Court was assuming the plaintiff had been deprived of constitutionally protected liberty, what process was due. There was no disagreement with the majority's methodology of isolating the particular consti-

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inquiry disposes of this case.

Appellants contend that the decedent's right to life is protected by the Fourteenth Amendment to the Constitution. But the Fourteenth Amendment protected her only from deprivation by the "State . . . of life . . . without due process of law." Although the decision to release Thomas from prison

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was action by the State, the action of Thomas five months later cannot be fairly characterized as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to his victim or to have proximately caused her death, see *Grimm v Arizona Bd. of Pardons and Paroles*, 115 Ariz 260, 564 P2d 1227 (1977); *Palsgraf v Long Island R. Co.*, 248 NY 339, 162 NE 99 (1928), we hold that, taking these particular allegations as true, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.

[11] Her life was taken by the

constitutional infringement complained of. Since we decide here that the State did not "deprive" appellants' decedent of a constitutionally protected right, we need not reach the question whether a lack of "due process" was adequately alleged by the reference to a failure to observe "requisite formalities." It must be remembered that even if a state decision does deprive an individual of life or property, and even if that decision is erroneous, it does not

parolee five months after his release.¹⁰ He was in no sense an agent of the parole board. Cf. *Scheuer v Rhodes*, 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474. Further, the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger. We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole." But we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law. Although a § 1983 claim has been described as "a species of tort liability," *Imbler v Pachtman*, 424 US 409, 417, 47 L Ed 2d 128, 96 S Ct 984, it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute.

The judgment is affirmed.

So ordered.

necessarily follow that the decision violated that individual's right to due process.

10. Compare the facts in *Screws v United States*, 325 US 91, 89 L Ed 1495, 65 S Ct 1031, 162 ALR 1330, where local law enforcement officials themselves beat a citizen to death.

11. We reserve the question of what immunity, if any, a state parole officer has in a § 1983 action where a constitutional violation is made out by the allegations.

167 Cal.Rptr. 70

Clifford K. THOMPSON, Jr. et al.,
Plaintiffs and Appellants,

v.

COUNTY OF ALAMEDA, Defendant
and Respondent.

S.F. 24006.

Supreme Court of California,
In Bank.

July 14, 1980.

Rehearing Denied Aug. 21, 1980.

Parents sued county for wrongful death of their five-year-old son, alleging that county had acted recklessly in releasing from custody juvenile delinquent who was known to have dangerous and violent propensities toward young children and who, within 24 hours after being released to custody of his mother, sexually assaulted and murdered plaintiffs' son. The Superior Court, Alameda County, John P. Sparrow, J., sustained county's general demurrer without leave to amend and dismissed. Plaintiffs appealed. The Supreme Court, Richardson, J., held that: (1) county was afforded immunity by statute governing discretionary acts and statute governing parole or release of prisoner for its decision to release delinquent into community and for its selection of custodian as well as for its determination of appropriate degree of supervision of custodian's efforts, and (2) where plaintiffs alleged neither that direct or continuing relationship between them and county existed through which county placed plaintiffs' son in danger, nor that their son was foreseeable or readily identifiable target of delinquent's threat that he would, if released, take life of young child residing in neighborhood, blanket liability would not be imposed on county for failing to warn plaintiffs, parents of other neighborhood children, police or delinquent's mother of delinquent's threat.

Judgment of dismissal affirmed.

Tobriner, J., dissented and filed opinion in which Mosk, J., concurred.

Opinion, Cal.App., 152 Cal.Rptr. 226, vacated.

1. Appeal and Error ⇐917(1)

For purposes of plaintiffs' appeal from judgment of dismissal entered in favor of defendant after defendant's general demurrer was sustained without leave to amend, those factual allegations of complaint which were properly pleaded were deemed admitted by defendant's demurrer.

2. Counties ⇐148

County, being sued for wrongful death of parents' young son, who was murdered by juvenile delinquent, because county had allegedly acted recklessly in releasing delinquent from custody, in failing to warn parents of delinquent's violent propensities toward young children, in failing to exercise due care in maintaining control over delinquent through mother as county's agent, and in failing to exercise reasonable care in selecting mother to serve as county's agent, was not afforded immunity by certain statutes, because county's claimed omissions did not involve adoption or failure to adopt any enactment or lack of enforcement of any law, failure to provide police protection or failure to make arrest or retain arrested person in custody. West's Ann.Gov.Code, §§ 818.2, 845, 846.

3. Counties ⇐148

County, being sued for wrongful death of parents' young son, who was murdered by juvenile delinquent, because county had allegedly acted recklessly in releasing delinquent from custody, was not afforded immunity by certain statute, which was applicable only to liability for injuries caused by "prisoner," because delinquent's mother's private residence utilized for custody of delinquent could not be deemed equivalent of prison, and delinquent placed in custody of his mother was not "prisoner" for purposes of statute in question. West's Ann.Gov. Code, § 844.6(a)(1).

4. Counties ⇐222

County, being sued for wrongful death of parents' young son, who was murdered by juvenile delinquent, because county had

allegedly acted recklessly in releasing delinquent from custody, was afforded immunity by statute governing discretionary acts and statute governing parole or release of prisoner for its release of delinquent to community, where plaintiffs failed to allege that releasing agent was not empowered to make determination to release delinquent. West's Ann.Gov.Code, §§ 820.2, 845.8.

5. Counties ⇐148

County, being sued for wrongful death of parents' young son, who was murdered by juvenile delinquent, because county had allegedly acted recklessly in failing to exercise reasonable care in selecting delinquent's mother to serve as county's agent in maintaining control over delinquent, and in failing to exercise due care in maintaining control over delinquent through his mother in her capacity as county's agent, was afforded immunity by statute governing discretionary acts and statute governing parole or release of prisoner for its selection of custodian as well as for its determination of appropriate degree of supervision of custodian's efforts. West's Ann.Gov.Code, §§ 820.2, 845.8(a).

6. Counties ⇐148

Immunity under statute governing parole or release of prisoner is provided when questioned acts involved policy decisions made prior to or as integral part of decision to release. West's Ann.Gov.Code, § 845.8.

7. Negligence ⇐136(2)

The existence of "duty" is a question of law.

8. Negligence ⇐4

It is fundamental proposition of tort law that one is liable for injuries caused by failure to exercise reasonable care.

9. Counties ⇐141

Negligence ⇐2

In considering existence of "duty" in given case several factors require consideration including foreseeability of harm to plaintiff, degree of certainty that plaintiff suffered injury, closeness of connection between defendant's conduct and injury suffered, moral blame attached to defendant's

conduct, policy of preventing future harm, extent of burden to defendant and consequences to community of imposing duty to exercise care with resulting liability for breach, and availability, cost, and prevalence of insurance for risk involved; when public agencies are involved, additional elements include extent of agency's power, role imposed upon it by law and limitations imposed upon it by budget.

10. Negligence ⇐2

General rule is that one owes no duty to control conduct of another, but such duty may arise if special relation exists between actor and third person which imposes duty upon actor to control third person's conduct, or special relation exists between actor and other which gives other right to protection.

11. Counties ⇐222

Where parents, who sued county for wrongful death of their young son, who was murdered by juvenile delinquent released by county to his mother, had alleged neither that direct or continuing relationship between them and county existed through which county placed parents' son in danger, nor that their son was foreseeable or readily identifiable target of delinquent's threat that he would, if released, take life of young child residing in neighborhood, blanket liability would not be imposed on county for failing to warn plaintiffs, parents of other neighborhood children, police or delinquent's mother of delinquent's threat.

12. Negligence ⇐2

Public entities and employees have no affirmative duty to warn of release of inmate with violent history who has made nonspecific threats of harm directed at non-specified victims.

13. Negligence ⇐2

In those instances in which released offender poses predictable threat of harm to named or readily identifiable victim or group of victims who can be effectively warned of danger, releasing agent may well be liable for failure to warn such persons.

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RICHARDSON, Justice.

Plaintiffs appeal from a judgment of dismissal entered in favor of defendant County of Alameda (County) after County's general demurrer was sustained without leave to amend. We will affirm the judgment.

[1] For purposes of this appeal, those factual allegations of the complaint which are properly pleaded are deemed admitted by defendant's demurrer. (*White v. Davis* (1975) 13 Cal.3d 757, 765, 120 Cal.Rptr. 94, 533 P.2d 222.) We recite the gravamen of plaintiffs' causes of action as contained in their amended complaint. Plaintiffs, husband and wife, and their minor son lived in the City of Piedmont, a few doors from the residence of the mother of James F. (James), a juvenile offender. Prior to the incident in question, James had been in the custody and under the control of County and had been confined in a county institution under court order. County knew that James had "latent, extremely dangerous and violent propensities regarding young children and that sexual assaults upon

young children and violence connected therewith were a likely result of releasing [him] into the community." County also knew that James had "indicated that he would, if released, take the life of a young child residing in the neighborhood." (James gave no indication of which, if any, young child he intended as his victim.) County released James on temporary leave into his mother's custody at her home, and "[a]t no time did [County] advise and/or warn [James' mother], the local police and/or parents of young children within the immediate vicinity of [James' mother's] house of the known facts" Within 24 hours of his release on temporary leave, James murdered plaintiffs' son in the garage of James' mother's home.

The complaint further alleges that the death was caused by County's "reckless, wanton and grossly negligent" actions in releasing James into the community (first cause of action); failing to advise and/or warn James' mother, the local police, or "parents of young children within the immediate vicinity" of the residence of James' mother (second cause of action); failing to exercise due care in maintaining custody and control over James through his mother in her capacity as County's agent (third cause of action); and failing to exercise reasonable care in selecting James' mother to serve as County's agent in maintaining custody and control over James (fourth cause of action).

County demurred on the ground that the complaint failed to state a cause of action (Code Civ.Proc., § 430.10, subd. (e)), contending that Government Code sections 818.2, 820.2, 844.6, subdivision (a)(1), 845, 845.8, subdivision (a), and 846, granted County immunity.

We consider, nonsequentially, the validity of each of the alleged causes of action.

1. THE DECISION TO RELEASE

[2.3] We note preliminarily that Government Code sections 818.2, 845, and 846 afford the County no immunity. The

alleged failures of County do not invoke these statutory immunities because the claimed omissions of County do not involve the adoption or failure to adopt any enactment or lack of enforcement of any law (§ 818.2), the failure to provide police protection (§ 845), or the failure to make an arrest or retain an arrested person in custody (§ 846). Similarly inapplicable is section 844.6, subdivision (a)(1), applicable only to liability for injuries caused by a "prisoner," because a private residence utilized for the custody of delinquent children may not be deemed the equivalent of a prison (*Patricia J. v. Rio Linda Union Sch. Dist.* (1976) 61 Cal.App.3d 278, 287, 132 Cal.Rptr. 211); nor is a minor placed in the custody of his family or foster parents a "prisoner" for purposes of section 844.3.

[4] County asserts additionally, however, that sections 820.2 and 845.8 immunize County's release of James into the community. We agree.

In *Johnson v. State of California* (1968) 69 Cal.2d 782, 795, 73 Cal.Rptr. 240, 447 P.2d 352, we characterized the determination of whether or not to release an offender as a discretionary decision clothed with immunity under section 820.2 when made by the appropriate authorities. We explained, "The decision to parole thus comprises the resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial reexamination." (*Johnson*, supra, at p. 795, 73 Cal.Rptr. at p. 249, 447 P.2d at p. 361; see also *Welf. & Inst.Code*, § 1176.) In the present case, plaintiffs fail to allege that the releasing agent was not empowered to make the determination to release James. It follows that the decision to release James is immune from tort liability under section 820.2.

A further specific immunity within this context is conferred by section 845.8, which explicitly provides that "Neither a public entity nor a public employee is liable for: [c] (a) Any injury resulting from determining whether to *parole or release* a prisoner . . ." (Italics added.)

Each of these sections extends to County a statutory immunity for any liability based upon its decision to "release."

II. THE SELECTION OF A CUSTODIAN AND SUPERVISION OF HER ACTIVITIES

[5, 6] The third and fourth causes of action involve County's selection of James' mother as custodian and its alleged failure adequately to supervise her activities. Plaintiffs assert that these matters are beyond the scope of any decision to release which is immunized by section 845.8, subdivision (a), but rather constitute mere ministerial implementations of a prior discretionary decision and accordingly are not immunized by section 820.2. We disagree.

Section 820.2 recites "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." In *Johnson* we rejected a purely mechanical analysis of the term "discretionary." Rather, we both emphasized and evaluated those policy considerations which underlie grants of immunity in order to determine which acts are protected. As we subsequently declared in *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 260-261, 74 Cal.Rptr. 389, 395, 449 P.2d 453, 459, contentions such as those which are made here "have frequently required judicial determination of the category into which the particular act falls: i. e., whether it was ministerial because it amounted 'only to an obedience to orders, or the performance of a duty in which the officer is left no choice of his own,' or discretionary because it required 'personal deliberation, decision and judgment.'" (*Morgan v. County of Yuba* (1961) 230 Cal. App.2d 938, 942-943 [41 Cal.Rptr. 508] . . . [citations].)"

The discretionary nature of the selection of custodians for potentially dangerous minors and the determination of the requisite level of governmental supervision for such custodians becomes apparent when the un-

derlying policy considerations are analyzed. Choosing a proper custodian to direct the attempted rehabilitation of a minor with a prior history of antisocial behavior is a complex task. (See Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System* (1976) 64 Cal.L.Rev. 984, 1003-1015; Nejelski, *Diversion: Unleashing the Hound of Heaven?* in *Pursuing Justice for the Child* (Rosenheim edit. 1976) p. 94, at pp. 104-116.) The determination involves a careful consideration and balancing of such factors as the protection of the public, the physical and psychological needs of the minor, the relative suitability of the home environment, the availability of other resources such as halfway houses and community centers, and the need to reintegrate the minor into the community. The decision, requiring as it does, comparisons, choices, judgments, and evaluations, comprises the very essence of the exercise of "discretion" and we conclude that such decisions are immunized under section 820.2.

Moreover, as previously noted, section 845.8 immunizes County from liability for "Any injury resulting from determining . . . the terms and conditions of [a prisoner's] release. . . ." As established in *County of Santa Barbara v. Superior Court* (1971) 15 Cal.App.3d 751, 757, 93 Cal.Rptr. 406, immunity under this section is provided when the questioned acts involve policy decisions made prior to or as an integral part of the decision to release. (Accord, *Whitcombe v. County of Yolo* (1977) 73 Cal.App.3d 698, 713, 141 Cal.Rptr. 189.) The selection of James' mother as custodian and the degree of supervision to be exercised over her clearly involved such protected policy decisions.

Accordingly, we conclude that County is immune from liability for its selection of a custodian as well as for its determination of the appropriate degree of supervision of the custodian's efforts.

III. DUTY TO WARN THE LOCAL POLICE, THE NEIGHBORHOOD PARENTS, OR THE JUVENILE'S CUSTODIAN

We now examine the principal and most troublesome contentions of plaintiffs, name-

ly, that County is liable for its failure to warn the local police and the parents of neighborhood children that James was being released or, alternatively, to warn James' mother of his expressed threat. We first inquire whether there would be liability in the absence of immunity (*Smith v. Alameda County Social Services Agency* (1979) 90 Cal.App.3d 929, 935, 153 Cal.Rptr. 712) and determine initially whether in any event County had a duty to warn for the protection of plaintiffs.

As we observed in *Dillon v. Legg* (1968) 68 Cal.2d 723, 69 Cal.Rptr. 72, 441 P.2d 912, duty "is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . But it should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, *Law of Torts* [3d ed.] at pp. 332-333.)" (P. 734, 69 Cal.Rptr. p. 76, 441 P.2d p. 916.) Courts, however, have invoked the concept of duty to limit generally "the otherwise potentially infinite liability which would follow every negligent act, . . ." (*Id.* at p. 739, 69 Cal.Rptr. at p. 79, 441 P.2d at p. 919.)

[7] The existence of "duty" is a question of law. (*Richards v. Stanley* (1954) 43 Cal.2d 60, 66-67, 271 P.2d 23.) "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434, 131 Cal.Rptr. 14, 22, 551 P.2d 334, 342.)

[8, 9] It is a fundamental proposition of tort law that one is liable for injuries caused by a failure to exercise reasonable care. We have said, however, that in considering the existence of "duty" in a given case several factors require consideration including "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of

the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]” (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113, 70 Cal.Rptr. 97, 100, 443 P.2d 561, 564; compare *Richards v. Stanley*, supra, and *Hergenrether v. East* (1964) 61 Cal.2d 440, 39 Cal.Rptr. 4, 393 P.2d 164.) When public agencies are involved, additional elements include “the extent of [the agency's] powers, the role imposed upon it by law and the limitations imposed upon it by budget; . . .” (*Raymond v. Paradise Unified School Dist.* (1963) 218 Cal.App.2d 1, 8, 31 Cal.Rptr. 847, 852; see *Smith v. Alameda County Social Services Agency*, supra, 90 Cal.App.3d 929, 153 Cal.Rptr. 712.)

Bearing in mind the foregoing controlling considerations, we examine the propriety of imposing on those responsible for releasing or confining criminal offenders a duty to warn of the release of a potentially dangerous offender who, as here, has made a generalized threat to a segment of the population. Our earlier rulings in *Johnson v. State of California*, supra, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352, and *Tarasoff v. Regents of University of California*, supra, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334, furnish considerable guidance in our inquiry and plaintiffs rely heavily on both cases in support of their view that County had an affirmative duty to warn someone (the police, the offender's parent, or neighborhood parents) of the dangers arising from James' release.

In *Johnson*, the state, acting through a Youth Authority placement officer, placed a minor with “homicidal tendencies and a background of violence and cruelty” in the plaintiff's home. Following his attack on the plaintiff, she sued the state. In sustaining plaintiff's cause of action, we held “[a]t the outset, we can dispose summarily of the contention, not strenuously pressed by de-

fendant, that the judgment should be affirmed because the state owed no duty of care to plaintiff. As the party placing the youth with Mrs. Johnson, the state's relationship to plaintiff was . . . that its duty extended to warning of latent, dangerous qualities suggested by the parolee's history or character. [Citations.] These cases impose a duty upon those who create a *foreseeable peril*, not readily discoverable by endangered persons, to warn them of such potential peril. Accordingly, the state owed a duty to inform Mrs. Johnson of any matter that its agents knew or should have known that might endanger the Johnson family . . .” (*Johnson*, supra, 69 Cal.2d at pp. 785-786, 73 Cal.Rptr. at p. 243, 447 P.2d at p. 355, italics added.)

In *Johnson* we emphasized the *relationship* between the state and plaintiff-victim, and the fact that the state by its conduct placed the specific plaintiff in a position of clearly foreseeable danger. In contrast with the situation in *Johnson*, in which the risk of danger focused precisely on plaintiff, here County bore no special and continuous relationship with the specific plaintiffs nor did County knowingly place the specific plaintiffs' decedent into a foreseeably dangerous position. Thus the reasoning of our holding in *Johnson* would not sustain the complaint in this action.

[10] Likewise in *Tarasoff* we were concerned with the duty of therapists, after determining that a patient posed a serious threat of violence, to protect the “foreseeable victim of that danger.” (*Tarasoff*, supra, 17 Cal.3d at p. 439, 131 Cal.Rptr. 14, 551 P.2d 334.) In reaching the conclusion that the therapists had a duty to warn either “the endangered party or those who can reasonably be expected to notify him, . . .” (*id.*, at p. 442, 131 Cal.Rptr. at p. 27, 551 P.2d at p. 347), we relied on an exception to the general rule that one owes no duty to control the conduct of another. (*Id.*, at p. 435, 131 Cal.Rptr. 14, 551 P.2d 334; see Rest.2d Torts (1965) §§ 315-320.) As declared in section 315 of the Restatement, such a duty may arise if “(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 the other a right to protection."

We noted in *Tarasoff* that a special relationship existed between the defendant therapists and the patient which "may support affirmative duties for the benefit of third persons." (17 Cal.3d at p. 436, 131 Cal.Rptr. at p. 23, 551 P.2d at p. 343, italics added.) The *Tarasoff* decedent was the known and specifically foreseeable and identifiable victim of the patient's threats. We concluded that under such circumstances it was appropriate to impose liability on those defendants for failing to take reasonable steps to protect her.

In *Tarasoff*, in reference to the police defendants who had been requested by defendant therapists to detain the patient, we further held that the police had no duty of care to the decedent because there was no "special relationship" between them and either the victim or the patient. We also rejected any application of the principle enunciated in the Restatement to the effect that "If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect." (Rest.2d Torts, supra, § 321.) We reasoned that "The assertion of a cause of action against the police defendants under this theory would raise difficult problems of causation and of public policy," (17 Cal.3d at p. 444, fn. 18, 131 Cal.Rptr. at p. 29, fn. 18, 551 P.2d at p. 349, fn. 18.)

We recognized in *Tarasoff* that "the open and confidential character of psychotherapeutic dialogue encourages patients to express threats of violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened." (17 Cal.3d at p. 441, 131 Cal.Rptr. at p. 27, 551

P.2d at p. 347.) We further concluded that "the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger. [Citation.]" (*Ibid.*) Thus, we made clear that the therapist has no *general* duty to warn of each threat. Only if he "does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, [does he bear] a duty to exercise reasonable care to protect the *foreseeable victim* of that danger." (17 Cal.3d at p. 439, 131 Cal.Rptr. at p. 25, 551 P.2d at p. 345, italics added.) Although the intended victim as a precondition to liability need not be specifically named, he must be "readily identifiable." (*Ibid.*, fn. 11; see *Mavroudis v. Superior Court* (1980) 102 Cal.App.3d 594, 599-601, 162 Cal.Rptr. 724.)

[11] Unlike *Johnson* and *Tarasoff*, plaintiffs here have alleged neither that a direct or continuing relationship between them and County existed through which County placed plaintiffs' decedent in danger, nor that their decedent was a foreseeable or readily identifiable target of the juvenile offender's threats. Under such circumstances, while recognizing the continuing obligation of County, as with all public entities, to exercise reasonable care to protect *all* of its citizens, we decline to impose a blanket liability on County for failing to warn plaintiffs, the parents of other neighborhood children, the police or James' mother of James' threat. As will appear, our conclusion is based in part on policy considerations and in part upon an analysis of "foreseeability" within the context of this case.

By their very nature parole and probation decisions are inherently imprecise. According to a recent study by the California Probation Parole and Correction Association, during 1977 in California a total of 315,143 persons (225,331 adults and 89,912

juveniles) were supervised on probation. (The Future of Probation, A Report of the CPPCA Committee on the Future of Probation (Jul. 1979) p. 15.) During the same year, cases removed from probation because of violations totaled 13.4 percent in the superior courts, 14.8 percent in the lower courts, and 11.5 percent in the juvenile courts. (*Id.*, at pp. 27-28.) Additionally, a large number of parole violations occur. National parole violation rates reflect that 18-20 percent of parolees fail on one-year follow-up, 25 percent on two-year follow-up, and 26 percent on three-year follow-up. (*Id.*, at p. 35.) Although we fully recognize that not all violations involve new or violent offenses, a significant proportion do.

Notwithstanding the danger illustrated by the foregoing statistics, parole and probation release nonetheless comprise an integral and continuing part in our correctional system authorized by the Legislature, serving the public by rehabilitating substantial numbers of offenders and returning them to a productive position in society. The result, as we observed in *Johnson*, is that "each member of the general public who chances to come into contact with a parolee bear[s] the risk that the rehabilitative effort will fail" (69 Cal.2d at p. 799, 73 Cal.Rptr. at p. 252, 447 P.2d at p. 364.) The United States Supreme Court very recently reached a similar conclusion in *Martinez v. State of Cal.* (1980) 444 U.S. 277, 281, 100 S.Ct. 553, 557, 62 L.Ed.2d 481. In *Martinez*, the high court rejected a contention that the California governmental immunity statutes (Gov.Code, § 845.8 in particular) deprived plaintiffs' decedent of her life without due process of law because of a parole decision that led indirectly to her death. (*Martinez*, 100 S.Ct. at p. 557.) The Supreme Court observed that "the basic risk that repeat offenses may occur is always present in any parole system." (*Ibid.*)

[12] Bearing in mind the ever present danger of parole violations, we nonetheless conclude that public entities and employees have no affirmative duty to warn of the release of an inmate with a violent history who has made *nonspecific threats of harm*

directed at nonspecific victims. Obviously aware of the risk of failure of probation and parole programs the Legislature has nonetheless as a matter of public policy elected to continue those programs even though such risks must be borne by the public. (See *Beardsone v. Synanon Foundation, Inc.* (1979, 88 Cal.App.3d 342, 347, 151 Cal.Rptr. 796.)

Similar general public policy considerations were described in a recent analysis of the *Tarasoff* issue. The author reasoned: "Assume that one person out of a thousand will kill. Assume also that an exceptionally accurate test is created which differentiates with 95% effectiveness those who will kill from those who will not. If 100,000 people were tested, out of the 100 who would kill 95 would be isolated. Unfortunately, out of the 99,900 who would not kill, 4,995 people would also be isolated as potential killers. In these circumstances, it is clear that we could not justify incarcerating all 5,090 people. If, in the criminal law, it is better that ten guilty men go free than that one innocent man suffer, how can we say in the civil commitment area that it is better that fifty-four harmless people be incarcerated lest one dangerous man be free? [Citation.]" (Comment, *Tarasoff and the Psychotherapist's Duty to Warn* (1975) 12 San Diego L.Rev. 932, 942-943, fn. 75.)

Furthermore, we foresee significant practical obstacles in the imposition of a duty in the form that plaintiffs seek, concluding that it would be unwieldy and of little practical value. As previously indicated a large number of persons are released and supervised on probation and parole each year in this state. Notification to the public at large of the release of each offender who has a history of violence and who has made a generalized threat at some time during incarceration or while under supervision would, in our view, produce a cacophony of warnings that by reason of their sheer volume would add little to the effective protection of the public.

The issues herein presented are difficult and we are very sensitive to the tragic consequences herein presented, and the ne-

cessity, to the extent possible, of preventing their repetition. Plaintiffs assert that if County had made the requested warnings, a different result would have ensued. In deciding whether a duty to warn should be imposed, we inquire under our *Rowland v. Christian*, supra, formulation concerning the probable beneficial effect if such warnings were routinely and generally given.

We are skeptical of any net benefit which might flow from a duty to issue a generalized warning of the probationary release of offenders. In our view, the generalized warnings sought to be required here would do little to increase the precautions of any particular members of the public who already may have become conditioned to locking their doors, avoiding dark and deserted streets, instructing their children to beware of strangers and taking other precautions. By their very numbers the force of the multiple warnings required to accompany the release of all probationers with a potential for violence would be diluted as to each member of the public who by such release thereby becomes a potential victim. Such a warning may also negate the rehabilitative purposes of the parole and probation system by stigmatizing the released offender in the public's eye.

Unlike members of the general public, in *Tarasoff* and *Johnson* the potential victims were specifically known and designated individuals. The warnings which we therein required were directed at making those individuals aware of the danger to which they were uniquely exposed. The threatened targets were precise. In such cases, it is fair to conclude that warnings given discreetly and to a limited number of persons would have a greater effect because they would alert those particular targeted individuals of the possibility of a specific threat pointed at them. In contrast, the warnings sought by plaintiffs would of necessity have to be made to a broad segment of the population and would be only general in nature. In addition to the likelihood that such generalized warnings when frequently repeated would do little as a practical matter to stimulate increased safety measures, as we develop below, such extensive warnings would be difficult to give.

a.) *Warning the Police.* In our view, warnings to the police as urged by plaintiffs ordinarily would be of little benefit in preventing assaults upon members of the public by dangerous persons unless we were simultaneously and additionally to impose a concurrent duty on the police to act upon such warnings. As we noted in *Tarasoff*, supra, no such duty to act exists. (17 Cal.3d at p. 444, 131 Cal.Rptr. 14, 551 P.2d 334; see also Gov.Code, §§ 845, 846.)

In *Tarasoff* we required that warnings be given directly to the *identifiable* potential victim or to those who, in turn, would advise such individuals of potential danger. In contrast, the requirement that local police be warned would not, in our view, guarantee effective notice to potential victims unless the police also, upon receipt of the warning, were thereupon required to knock on individual doors in the community and give warning, or to provide a 24-hour police escort either for the offender or for all possible victims. Requiring such police action to attend every release of every person who had expressed a generalized intent to commit a violent act against society at large would necessitate the diversion of an inordinate expenditure of time and manpower.

In a somewhat parallel situation, we note that the Legislature has expressly spoken in requiring those who have been convicted of certain sex crimes to inform the police of their presence in the community. (See Pen. Code, § 290.) No similar requirement exists for other kinds of offenders or for persons temporarily released on probation or parole. Furthermore, even section 290 does not require the police to take any specific action to warn the community of the offender's presence, or to supervise the offender's movements. All that is required under the section is recordkeeping by the police which, at the discretion of the police, may be utilized when appropriate. Similar recordkeeping which would be required if regular and numerous warnings such as are requested here were given to the police would

create a mass of paper, the upkeep and review of which might well divert police personnel from more effective activities.

Thus, unlike the situation in *Tarasoff*, requiring warning to the police ordinarily would result in no benefit to any potential victims of possible violence.

b.) *Warnings to Parents of Neighborhood Children.* In similar fashion, requiring the releasing agent to warn all neighborhood parents of small children that a potentially dangerous offender had been released in the area would require an expenditure of time and limited resources that parole and probation agencies cannot spare and would be of questionable value. The magnitude of the problem may be understood in the light of statistics contained in the above cited CPPCA report. In 1978 California probation departments employed a total of 18,331 persons, including professional probation officers, group counselors, clerical staff, business management professionals, psychiatrists, psychologists, medical specialists, other treatment personnel, and 5,156 part-time or volunteer staff members. As previously noted, these personnel exercised supervision over 315,000 probationers "on the streets" during that year. (CPPCA Rep., at p. 16; see also Keldgor & Norris, *New Directions for Correction*, 36 Fed.Probation (Mar. 1972) at p. 3 [a study of California's correctional system].)

Furthermore, such notice might substantially jeopardize rehabilitative efforts both by stigmatizing released offenders and by inhibiting their release. It is also possible that, in addition, parole or probation authorities would be far less likely to authorize release given the substantial drain on their resources which such warnings might require. A stated public policy favoring innovative release programs would be thwarted. (See *Whitcombe v. County of Yolo*, supra, 73 Cal.App.3d 698, 716, 141 Cal.Rptr. 189; *Beauchene v. Synanon Foundation, Inc.*, supra, 88 Cal.App.3d 342, 347, 151 Cal.Rptr. 796.)

c.) *Warning to the Juvenile's Mother.* Finally, notification to the offender's mother of James' threat in our opinion would not

have the desired effect of warning potential victims, at least in a case such as that herein presented. In the usual instance we doubt that the mother of the juvenile offender would be likely voluntarily to inform other neighborhood parents or children that her son posed a general threat to their welfare, thereby perhaps thwarting any rehabilitative effort, and also effectively stigmatizing both the mother and son in the community. The imposition of an affirmative duty on the County to warn a parent of generalized threats without additionally requiring, in turn, some affirmative action by the parent would prove ineffective.

The dissent speculates that the mother "might" have taken special care to control her son had she been warned of James' threats, inferring thereby that she would have maintained such constant surveillance over her son as to prevent any possible harm. Such attenuated conjecture, however, cannot alone support the imposition of civil liability. This is particularly true inasmuch as the County's original decision to release James from close confinement into the obviously less restrictive custody of his mother is a decision we already hold is immunized from liability.

In *Johnson*, cited by the dissent as authority for an obligation to warn, we required notification to those placed in imminent danger by the state's action. There the county had placed a *stranger* into the home and we noted that the failure "to warn the foster parents of latent dangers facing *them* . . ." (69 Cal.2d at p. 795, 73 Cal.Rptr. at p. 250, 447 P.2d at p. 362, italics added) presented a "classic case for the imposition of tort liability" (p. 797, 73 Cal.Rptr. p. 251, 447 P.2d p. 363). In contrast, the duty sought to be imposed here is that of warning a mother, aware of her son's incarceration for the previous 18 months and not herself endangered for the remote benefit of a third party, an unidentifiable potential victim. Furthermore, it is contrary to the very purpose of such a release to speculate that a mother in whose care a nearly 18-year-old offender has been temporarily placed would thereby assume

the constant minute-to-minute supervision that would have been required to prevent the tragedy.

[13] In summary, whenever a potentially dangerous offender is released and thereafter commits a crime, the possibility of the commission of that crime is statistically foreseeable. Yet the Legislature has concluded that the benefits to society from rehabilitative release programs mandate their continuance. Within this context and for policy reasons the duty to warn depends upon and arises from the existence of a prior threat to a specific identifiable victim. (Cf. *Morgan v. County of Yuba* (1964) 230 Cal.App.2d 938, 41 Cal.Rptr. 508.) In those instances in which the released offender poses a predictable threat of harm to a named or readily identifiable victim or group of victims who can be effectively warned of the danger, a releasing agent may well be liable for failure to warn such persons. Despite the tragic events underlying the present complaint, plaintiffs' decedent was not a known, identifiable victim, but rather a member of large amorphous public group of potential targets. Under these circumstances we hold that County had no affirmative duty to warn plaintiffs, the police, the mother of the juvenile offender, or other local parents.

Because we have concluded that County was either statutorily immunized from liability or, alternatively, bore no affirmative duty that it failed to perform, we need not reach the other contentions raised by County.

The judgment of dismissal is affirmed.

BIRD, C. J., and CLARK, NEWMAN and CALDECOTT,* JJ., CONCUR.

TOBRINER, Justice, dissenting.

I dissent from the conclusion in part III of the majority opinion that plaintiffs' complaint states no cause of action arising from Alameda County's negligence in failing to warn James' mother that he might harm neighborhood children. In holding that the County is not legally responsible for its

negligence, the majority in effect amend the Government Code, creating an immunity from liability which the Legislature has not enacted.

The complaint alleges that the county released James, a juvenile in county custody, to the custody of James' mother. The County knew that James had "extremely dangerous and violent propensities regarding young children and that sexual assaults upon young children and violence . . . were a likely result of releasing [him] into the community"; it knew also that James had "indicated that he would, if released, take the life of a young child residing in the neighborhood." Nevertheless the County failed to warn either James' mother, the local police, or the parents of neighborhood children of the impending danger. Within 24 hours of James' release to the custody of his mother, he assaulted and murdered Jonathan Thompson, plaintiffs' son.

The issue before us is whether the foregoing allegations state a cause of action for wrongful death against the County. The basis for upholding the complaint is clear and straightforward. The County, having custody of James, stood in a "special relationship" to James that imports a duty to control his conduct and to warn of danger. (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 435-437, 131 Cal.Rptr. 14, 551 P.2d 334.) The County placed James in the temporary custody of his mother without informing her that James had threatened to kill a neighborhood child. Whether that failure to warn was negligent and proximately caused Jonathan's death are questions of fact which cannot be resolved on demurrer. Since under the alleged facts the County can claim no statutory immunity from liability arising from its failure to warn (see *Johnson v. State of California* (1968) 69 Cal.2d 782, 797, 73 Cal.Rptr. 240, 447 P.2d 352), the complaint states a cause of action.

The majority opinion in reaching a contrary result misreads controlling precedent. Although both *Johnson v. State of Califor-*

* Assigned by the Chairperson of the Judicial Council.

Cite as: Cal. 614 P.2d 728

nia, *supra*, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352, and *Tarasoff v. Regents of University of California*, *supra*, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334, involved a failure to warn an identifiable victim, the reasoning of those decisions cannot be confined to that narrow scope. Instead, the cases stand for the principle that a special relationship, such as that between the state and a person in its custody, establishes a duty to use reasonable care to avert danger to foreseeable victims. If the victim can be identified in advance, a warning to him may discharge that duty; if he cannot be identified, reasonable care may require other action. But the absence of an identifiable victim does not postulate the absence of a duty of reasonable care.

Our opinion in *Tarasoff* makes clear that failure to warn a victim who is identifiable does not constitute an essential element of the cause of action. We noted that the duty of care requires the defendant "to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." (17 Cal.3d at p. 431, 131 Cal.Rptr. at p. 20, 551 P.2d at p. 340.)

In upholding plaintiffs' cause of action in *Tarasoff*, we relied on a federal district court decision, *Merchants Nat. Bank & Trust Co. of Fargo v. United States* (D.N.D. 1967) 272 F.Supp. 409. In that case the Veterans Administration arranged for a patient to work on a local farm, but did not inform the farmer of the patient's threats to kill the patient's wife. The farmer, un-

aware of the danger to the wife, permitted the patient to come and go freely during nonworking hours. The patient borrowed a car, drove to his wife's residence, and killed her. The court held the Veteran's Administration liable, not because it failed to warn the wife, but because it failed to notify the farmer of the need to supervise the patient closely.

The principles underlying the *Tarasoff* decision indicate that even the existence of an identifiable victim is not essential to the cause of action. Our decision rested upon the basic tenet of tort law that a "defendant owes a duty of care to all persons who are *foreseeably* endangered by his conduct." (Pp. 434-435, quoting *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 282, 399, 115 Cal.Rptr. 765, 525 P.2d 669.) (Emphasis added.) The "avoidance of foreseeable harm," we explained, "requires a defendant to control the conduct of another person, or to warn of such conduct . . . if the defendant bears some special relationship to the dangerous person or to the potential victim." (P. 435.) The relationship between therapist and patient fulfilled this requirement in *Tarasoff*; the relationship between the County and a juvenile under its custody suffices in the present case.¹

At no point did we hold that such duty of care runs only to identifiable victims. We cited numerous examples to the contrary. (See 17 Cal.3d at p. 436, 131 Cal.Rptr. 14, 551 P.2d 334, cases cited fns. 7 & 8.) One example makes the point particularly clear: "[a] doctor must . . . warn a patient if the patient's condition or medication renders certain conduct, such as driving a car, dangerous to others." (17 Cal.3d at p. 436, 131 Cal.Rptr. at p. 23, 551 P.2d at p. 343; cf.

1. *Buford v. State of California* (1980) 104 Cal. App.3d 811, 164 Cal.Rptr. 264, also involved an assault upon an allegedly foreseeable but not identifiable victim. The Court of Appeal stated that "[t]he complaint shows that Daniels [the assailant] was confined to Atascadero State Hospital for commission of several criminal offenses and that various personnel were assigned to his rehabilitative care both during commitment and during his leave of absence. The nature of the relationship here resembles those cases [*Tarasoff v. Regents of University*

of California, supra, 17 Cal.3d 425; *Harland v. State of California* (1977) 75 Cal.App.3d 475 [142 Cal.Rptr. 201] (state and resident of veteran's home)] in which a duty was imposed as a matter of law. Although there are substantial questions about the foreseeability of potential victims and the reasonableness of making a public warning about Daniels' release, these are questions for the trier of fact and should not be resolved against plaintiffs at the complaint stage." (104 Cal.App.3d at p. 824, 164 Cal.Rptr. at p. 271.)

Harland v. State of California, supra, 75 Cal.App.3d at pp. 475, 482, 142 Cal.Rptr. 201. It would be absurd to confine that duty to motorists or pedestrians whom the doctor could identify in advance.

Thus under the reasoning of *Tarasoff* and the principles of tort law endorsed in the case, the proper inquiry turns on whether Jonathan Thompson was a foreseeable victim. The complaint alleges that James had threatened to "take the life of a young child residing in the neighborhood"; since Jonathan falls within that description his killing was clearly a foreseeable consequence of James' release and subsequent lack of supervision. Whether Jonathan was also an identifiable victim is relevant not to the existence of a duty of care, but only to whether a warning to Jonathan personally was a reasonable means of discharging that duty. If, as the majority claim, a warning to the neighborhood families was not a reasonable way to reduce the danger, the fact cannot absolve the state of the duty to employ other methods. In particular, it cannot absolve the state from its failure to warn James' mother so that she could exercise proper care in observing and supervising James and thereby preventing the harm that ensued.

Thus no precedent supports the majority's unique attempt to limit the imposition upon defendant of a duty of due care to warn only to a situation in which a person commits a tort upon a victim who can be identified in advance of the wrongful conduct. Even the reading of precedent most favorable to the majority will reveal only that most, but not all, prior cases did involve identifiable victims. Thus the majority position must stand, if it can stand at all, upon the policy considerations it advances.

2. The majority opinion implicitly recognizes the distinction drawn in the quoted language from *Johnson*. In holding plaintiffs' complaint states no cause of action for negligence in releasing James or in selecting his mother as custodian, the majority rely squarely upon statutory immunities; in finding no cause of action for failure to warn the mother they speak in terms of policy considerations which, presumably, did not persuade the Legislature to enact a corresponding immunity.

As to policy considerations, the majority first state that although parole and probation decisions are imprecise, and necessarily present an element of danger to the public, "the Legislature has nonetheless as a matter of public policy elected to continue those programs even though such risks must be borne by the public." (Majority opn. p. 77 of 167 Cal.Rptr., p. 735 of 614 P.2d.) We appreciate the majority's fear that imposition of liability might interfere with the discretion of agencies who must decide whether to grant parole or probation. The Legislature, however, has considered that subject and determined that providing immunity to the state for basic policy decisions is a sufficient safeguard, and that it is unnecessary further to shield the state from liability for implementation of those decisions. As we explained in *Johnson v. State of California, supra*, 69 Cal.2d 782, 799, 73 Cal. Rptr. 240, 252, 447 P.2d 352, 364: "once the proper authorities have made the basic policy decision—to place a youth with foster parents, for example—the role of . . . immunity ends; subsequent negligent actions, such as the failure to give reasonable warnings to the foster parents actually selected, are subject to legal redress."²

Twelve years have past since we filed the decision in *Johnson*. The Legislature has not amended the Government Code to enlarge governmental immunity beyond that described in *Johnson*. We have heard no outcry that *Johnson* imperils the state's parole and probation programs, no claim that the liability for failure to warn imposed by that case has interfered with legislative policy. We thus perceive no need for judicial creation of an expanded immunity.³

3. It is arguable that imposition of a duty to warn the *general public* whenever a prisoner who might possibly be dangerous is released on parole or probation might, through the impact of repeated warnings, arcuse the public to curtail parole and probation programs. Imposition of numerous sizable judgments for breach of that duty could have the same effect. But neither consideration has any significant bearing upon liability for failure to warn the person to whose custody the prisoner is released.

In sum, whatever policy considerations impelled the Legislature to establish parole and probation programs, the Legislature did not believe those considerations preclude liability for negligent failure to warn. The majority cannot rely on legislative policy to grant a larger immunity than the Legislature has elected to provide. In rejecting the Legislature's judgment, the majority protect the government from liability for its own negligence when the Legislature finds such protection unnecessary.

The policy considerations favoring plaintiffs' cause of action in the present setting—considerations not taken into account by the majority—are weighty and substantial. The principle of compensating victims of negligence in order to recompense their injury and to deter future negligence is fundamental in our judicial system. Thus as a general principle, a plaintiff injured as a proximate result of a defendant's negligence is entitled to compensation. (See Civ. Code, § 1714, subd. (a); *Rodriguez v. Bethlehem Steel Corp.*, supra, 12 Cal.3d 382, 399, 115 Cal.Rptr. 765, 525 P.2d 669.) Even if the government is the tortfeasor, "when there is negligence, the rule is liability, immunity is the exception." (*Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 219, 11 Cal.Rptr. 89, 94, 359 P.2d 457, 462; *Baldwin v. State of California* (1972) 6 Cal.3d 424, 435, 99 Cal.Rptr. 145, 491 P.2d 1121.) Consequently "[u]nless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail." (*Ramos v. Madera* (1971) 4 Cal.3d 685, 692, 94 Cal.Rptr. 421, 426, 484 P.2d 93, 98.) In the balance, I believe these basic precepts outweigh the majority's anxiety that the Legislature did not go far enough in immunizing implementation of parole and probation programs.

The other policy considerations advanced by the majority are of less moment. The

majority quote a student comment (*Tarasoff and the Psychotherapist's Duty to Warn* (1975) 12 San Diego L.Rev. 932, 942-943, fn. 75) to the effect that predictions of dangerousness are not sufficiently reliable to justify civil commitment of persons as dangerous to others.⁴ The present case does not involve civil commitment. Moreover, the argument that predictions of danger are so unreliable that they should not serve as a basis for a warning was expressly rejected in *Tarasoff* (17 Cal.3d at pp. 438-439, 131 Cal.Rptr. 14, 551 P.2d 334) and is contrary to legislative policy. (See Evid. Code § 1024.)

Finally, the majority note the practical problems of warning the public at large. When it comes to warning James' mother, however, the majority say only that she would be unlikely to relay that warning to others in the neighborhood. They do not consider that a mother, when warned that her son is a serious danger to young children, might take special care to watch him, to control his activities, to know his whereabouts, and to make sure he is not alone with small children. Neither do they consider that James' mother as his legal custodian would, given proper warnings, have a legal duty to so control James' behavior. Confined by their narrow concept of warning identifiable victims, the majority do not consider the obvious.

In sum, the policy considerations discussed by the majority relate to the discretionary decision whether to grant parole or probation, the wisdom of civil commitment of dangerous persons, and the practical problems of warning large classes of possible victims. It is striking how little relevance these considerations have to the present case. None bear significantly on the question whether the County should have warned James' mother.

I believe that as a matter of law and common sense the County, before it re-

4. The quoted language from the San Diego Law Review, while only of tangential relevance to the present case, has serious implications. It implies (a) that *Tarasoff* was wrongly decided, and (b) that the Lanterman-Petris-Short Act

(Welf. & Inst.Code, § 5000 et seq.) and other statutes providing for commitment of persons dangerous to others are unwise and probably unconstitutional. I doubt that the justices of the majority subscribe to either proposition.

leased James to his mother's custody, had a duty to tell her of his homicidal threats and inclinations. The complaint alleges that the County's failure to warn her was negligent, and proximately caused Jonathan's death. Thus under settled principles of tort law as explained in our prior opinion in *Tarasoff*, the complaint states a cause of action. I would therefore reverse the judgment dismissing plaintiffs' complaint and remand the cause to the superior court for further proceedings.

MOSK, J., concurs.

Rehearing denied; TOBRINER and MOSK, JJ., dissenting.



167 Cal.Rptr. 84

CITIZENS AGAINST RENT CONTROL
et al., Plaintiffs and Respondents,

v.

CITY OF BERKELEY et al., Defendants
and Appellants.

S.F. 24124.

Supreme Court of California.

Aug. 7, 1980.

A summary judgment of the Superior Court, Alameda County, John P. Sparrow, J., declared unconstitutional a section of a Berkeley ordinance providing that no person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed \$250. On appeal by the city and other defendants, the Supreme Court, Mosk, J., held that municipality could constitutionally place a limit on size of contributions to committees formed to support or oppose ballot measures under initiative and referendum as such a limit served compelling governmental interests without unduly infringing upon First Amendment rights.

Reversed.

Richardson, J., dissented with opinion in which Clark and Manuel, JJ., concurred.

Vacating, Cal.App., 160 Cal.Rptr. 448.

1. Constitutional Law ⇐91

Municipality may constitutionally place a limit on size of contributions to committees formed to support or oppose ballot measures as such serves a compelling governmental interest without unduly infringing upon First Amendment rights. U.S.C. A.Const. Amend. 1.

2. Constitutional Law ⇐91

Monetary restrictions on election campaigns requires strict scrutiny. U.S.C.A. Const. Amend. 1.

3. Constitutional Law ⇐91

Ordinance placing limit on size of contributions to committees formed to support or oppose ballot measures and challenged under First Amendment would be given stringent review. U.S.C.A. Const. Amend. 1.

4. Constitutional Law ⇐91

Municipal Corporations ⇐108

Municipal ordinance placing \$250 limit on type of contributions to committees formed to support or oppose ballot measures under initiative and referendum was not unduly restrictive because the \$250 ceiling was too low and, thus, ordinance which was necessary to accomplishment of compelling governmental interests used least restrictive means to achieve those ends and violated neither the First Amendment nor applicable Article of the California Constitution. U.S.C.A. Const. Amend. 1; West's Ann.Const. Art. 1, § 2.

Michael Lawson, City Atty., Theodore R. Lakey, Acting City Atty., and Charles O. Triebel, Jr., for defendants and appellants.

Robert M. Myers, Venice, David C. Velasquez, Los Angeles, William H. Jennings, Beverly Hills, Stephen Shane Stark, Acting

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property of the earning spouse, the parties are bound by their agreement.

The judgment is affirmed.

WRIGHT, C. J., and McCOMB, MOSK, SULLIVAN, CLARK and RICHARDSON, J.J., concur.



131 Cal.Rptr. 14
Vitaly TARASOFF et al., Plaintiffs
and Appellants,

v.

The REGENTS OF the UNIVERSITY OF
CALIFORNIA et al., Defend-
ants and Respondents.

S. F. 23042.

Supreme Court of California,
In Bank.

July 1, 1978.

Action was brought against university regents, psychotherapists employed by university hospital and campus police to recover for murder of plaintiffs' daughter by psychiatric patient. The Superior Court, Alameda County, Robert L. Bostick, J., sustained demurrers without leave to amend, and plaintiffs appealed. The Supreme Court, Tobriner, J., held that when a psychotherapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another he incurs an obligation to use reasonable care to protect the intended victim against such danger, that discharge of such duty may require the therapist to take one or more of various steps, depending on the nature of the case, that complaint could be amended to state cause of action against the therapists, to whom patient confided his intentions to kill plaintiffs' daughter, on theory of failure to warn, that therapists were entitled to statutory immunity from liability for failure to bring about patient's confine-

ment but that plaintiffs pled no special relationship between the patient and the police defendants which would impose on them any duty to warn the daughter or other appropriate individuals and that the police were also entitled to statutory immunity for failure to confine the patient.

Affirmed in part and reversed and remanded in part for further proceedings.

Mosk, J., filed concurring and dissenting opinion.

Clark, J., filed dissenting opinion in which McComb, J., joined.

Opinion, 13 Cal.3d 177, 118 Cal.Rptr. 129, 529 P.2d 553, vacated.

1. Mental Health \S 414

Physicians and Surgeons \S 7

When a psychotherapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another he incurs an obligation to use reasonable care to protect the intended victim against such danger; discharge of such duty may require the therapist to take one or more of various steps, depending on the nature of the case, including warning the intended victim or others likely to apprise the victim of the danger, notifying the police, or taking whatever steps are reasonably necessary under the circumstances. West's Ann.Civ.Code, \S 1714.

2. Mental Health \S 414

Physicians and Surgeons \S 7

Complaint alleging that psychotherapists, to whom patient confided his intention to kill another, who knew that patient was at large and dangerous, who were unsuccessful in their attempt to confine patient and who failed to warn the intended victim or persons likely to apprise her of the danger breached their duty to exercise reasonable care in protecting intended victim, would state cause of action for wrongful death of victim. West's Ann.Civ.Code, \S 1714.

3. Pleading \S 225(1)

Although complaint seeking to hold psychotherapists liable for death of plain-

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plaintiff's daughter at hands of a patient did not allege that the therapists failed to warn the victim herself or failed to warn persons who would be likely to apprise her of the danger, such omission could properly be cured by amendment; hence it was error to sustain demurrer without leave to amend. West's Ann.Civ.Code, § 1714.

4. Torts ⇨3

Legal duties are not discoverable facts of nature, but mere conclusory expressions that, in cases of a particular type, liability should be imposed for damage done.

5. Negligence ⇨10

Foreseeability is the most important factor to be considered in a departure from general rule that liability should be imposed for an injury occasioned to another by want of the actor's ordinary care or skill. West's Ann.Civ.Code, § 1714.

6. Negligence ⇨2

As a general principle, one owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous. West's Ann.Civ.Code, § 1714.

7. Negligence ⇨62(3)

Physicians and Surgeons ⇨7

When the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim; relationship between a psychotherapist and his patient satisfies such requirement. West's Ann.Civ.Code, § 1714.

8. Negligence ⇨62(3)

Although at common law, the general rule is that one person owes no duty to control the conduct of another nor to warn those endangered by such conduct, the courts have carved out an exception in cases in which defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a rela-

tionship to the foreseeable victim of that conduct. West's Ann.Civ.Code, § 1714.

9. Negligence ⇨62(3)

Common-law rule that one person owes no duty to control the conduct of another nor to warn those endangered by such conduct derives from the common law's distinction between misfeasance and nonfeasance and its reluctance to impose liability for the latter. West's Ann.Civ.Code, § 1714.

10. Mental Health ⇨414

Physicians and Surgeons ⇨7

Relationship of psychotherapist to either the patient, who confided his intention to kill another, or to the intended victim was sufficient to establish a duty of care on part of the therapist to warn the intended victim or take other appropriate action. West's Ann.Civ.Code, § 1714.

11. Mental Health ⇨414

Physicians and Surgeons ⇨7

Allegations that one psychiatrist personally examined patient and that another psychiatrist, who was assistant to the supervising psychiatrist, approved decision to arrange patient's commitment were sufficient to raise issue whether a doctor-patient or therapist-patient relationship existed between the patient and the psychiatrists, giving rise to possible duty of the therapists to exercise reasonable care to protect individual whom the patient had informed the therapists he intended to kill. West's Ann.Civ.Code, § 1714.

12. Mental Health ⇨414

Physicians and Surgeons ⇨7

Special relationship that arises between a patient and his doctor or psychotherapist may support affirmative duties for the benefit of third persons; hence, for example, a hospital must exercise reasonable care to control the behavior of a patient which may endanger other persons and a doctor must also warn a patient if the patient's condition or medication renders certain conduct, such as driving a car, dangerous to others; also, a mental hospital may be liable if it negligently permits

the escape or release of a dangerous patient. West's Ann.Civ.Code, § 1714.

13. Mental Health ⇨414

Physicians and Surgeons ⇨7

Although special relationship between a patient and his doctor or psychotherapist may support an affirmative duty for the benefit of third persons, such duty is not limited to situations in which the doctor or psychotherapist stands in a special relationship both to the victim and to the person whose conduct created the danger; single relationship of a doctor to his patient is sufficient to support duty to exercise reasonable care to protect others against dangers emanating from the patient's illness; for example, a doctor may be held liable to persons infected by his patient if he negligently fails to diagnose a contagious disease or, having diagnosed the illness, fails to warn members of patient's family. West's Ann.Civ.Code, § 1714.

14. Mental Health ⇨414

Physicians and Surgeons ⇨7

Difficulty which a psychotherapist encounters in attempting to forecast whether a patient presents a serious danger of violence is a factor in considering extent of his duty to exercise reasonable care to protect third persons from the patient's violent acts; it is not required that the therapist render a perfect performance, rather, the therapist need only exercise that reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the profession under similar circumstances; proof, aided by hindsight, that the therapist judges wrongly is insufficient to establish negligence. West's Ann.Civ.Code, § 1714.

15. Mental Health ⇨414

Physicians and Surgeons ⇨7

Once a psychotherapist in fact determines, or under applicable professional standards, reasonably should have determined that a patient poses a serious danger of violence to others he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger; while a discharge of such duty of due care will neces-

sarily vary with the facts of each case, in each instance the adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances. West's Ann.Civ.Code, § 1714.

16. Mental Health ⇨414

Physicians and Surgeons ⇨7

Although a therapist knowing, or having reason to know, that a patient poses a serious danger of violence to others has a duty to exercise reasonable care to protect the foreseeable victim, there may be cases in which it would be unreasonable to require the therapist to interrogate the patient to discover the victim's identity or to conduct an independent investigation but, on the other hand, there may be cases in which a moment's reflection will reveal the victim's identity; hence, matter is one which depends on the circumstances of each case and should not be governed by any hard and fast rule. West's Ann.Civ.Code, § 1714.

17. Mental Health ⇨414

Physicians and Surgeons ⇨7

Professional inaccuracy in predicting violent behavior by a patient cannot negate a psychotherapist's duty to protect the threatened victim; risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved. West's Ann.Civ.Code, § 1714.

18. Mental Health ⇨414

Physicians and Surgeons ⇨7

Although public interest in effective treatment of mental illness and in protecting patient's right to privacy and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication is not to be lightly disregarded, such factors are to be weighed against the public interest and safety from violent assault in determining a psychotherapist's duty to protect a potential victim from a patient whom the therapist predicts poses a serious danger of violence to others.

19. Physicians and

Although a patient poses a serious danger of violence to others, if the therapist exercises reasonable care to protect the foreseeable victim, a therapist is not routinely to reveal disclosures could patient's relationship with the person whose conduct created the danger; single relationship of a doctor to his patient is sufficient to support duty to exercise reasonable care to protect others against dangers emanating from the patient's illness; for example, a doctor may be held liable to persons infected by his patient if he negligently fails to diagnose a contagious disease or, having diagnosed the illness, fails to warn members of patient's family. West's Ann.Civ.Code, § 1714.

20. Physicians and

Psychotherapist's communication with a patient in trust or a violation of the duty to protect others where such disclosure poses a serious danger to others, the therapist's duty to protect the patient's privacy is not absolute; where such disclosure poses a serious danger to others, the therapist's duty to protect the patient's privacy must yield to the duty to protect the public. West's Ann.Civ.Code, § 1714.

21. Colleges and U

University of California, San Diego, could be held liable for its failure to protect students from a psychotherapist's breach of duty to protect the public from a serious danger posed by a psychotherapist who had been confidentially confided to the public. West's Ann.Civ.Code, § 1714.

22. Colleges and U

Provisions of the Short Act governing the disclosure of confidential information by psychotherapists, who w

19. Physicians and Surgeons ⇨7

Although a psychotherapist who knows that a patient poses a serious danger of violence to others bears a duty to exercise reasonable care to protect the foreseeable victim, a therapist is not to be encouraged routinely to reveal such threats since such disclosures could seriously disrupt the patient's relationship with the therapist and with the person threatened; to the contrary, the therapist's obligations to the patient require that he not disclose a confidence unless necessary to avert danger to others and even then that he do so discreetly and in a fashion that preserves the privacy of the patient to the fullest extent compatible with the prevention of a threatened danger. West's Ann.Evid.Code, §§ 1014, 1024.

20. Physicians and Surgeons ⇨15(23)

Psychotherapist's revelation of a patient's communications is not a breach of trust or a violation of professional ethics where such disclosure is necessary to avert danger to others; public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others since the protective privilege ends where the public peril begins. West's Ann.Civ. Code, § 1714; West's Ann.Evid.Code, §§ 1014, 1024.

21. Colleges and Universities ⇨5

University of California, as employer of treating and supervising psychotherapists, could be held liable for the therapists' breach of duty to exercise reasonable care to protect plaintiffs' decedent from danger posed by mental patient, who allegedly confided to the therapists his intentions to kill plaintiffs' daughter. West's Ann.Civ.Code, § 1714.

22. Colleges and Universities ⇨7

Provisions of the Lanterman-Petris-Short Act governing release of confidential information did not prevent psychotherapists, who were employed by universi-

ty hospital, from warning plaintiffs' daughter of mental patient's stated intentions to kill daughter; not only did treating therapist's letter to campus police to detain the patient not constitute an "application in writing," absent allegations that the therapists, the hospital or any staff member had been designated by the county to institute an involuntary commitment proceeding, there was no showing that the psychotherapy provided the patient fell under any treatment program authorized by the act. West's Ann.Welfare & Inst. Code, §§ 5000 et seq., 5150, 5328, 5328-5328.9, 6000 et seq.

23. Physicians and Surgeons ⇨15(23)

Detailed provisions of the Lanterman-Petris-Short Act regulating disclosure of confidential information do not apply to disclosure of information not governed by the Act; since the legislature did not extend the Act to control all disclosures of confidential matter by psychotherapists, it must be inferred that the legislature did not relieve the courts of their obligation to define by reference to the principles of common law the obligation of a therapist in those situations not governed by the act. West's Ann.Welfare & Inst.Code, §§ 5000 et seq., 5328, 6000 et seq.

24. Colleges and Universities ⇨7

Campus police, who on request of psychotherapist a university hospital briefly detained mental patient but released him when he appeared rational, did not have such a special relationship to either the patient, who informed therapist that he intended to kill plaintiffs' daughter, or to the daughter, whom he subsequently killed, so as to impose on the police a duty to warn of the patient's violent intentions; assertion of cause of action founded on absence of a special relationship would raise difficult problems of causation and public policy which were not properly resolvable on basis of conjectural facts not averred in the pleadings or any proposed amendment thereto.

25. Officers ⇨114

Statute affording immunity to public employees in connection with discretionary acts affords immunity only for basic policy decisions. West's Ann.Gov.Code, § 820.2.

26. Officers ⇨114

Public employees' immunity from liability for injury resulting from discretionary acts should be no greater than is required to give legislative and executive policy makers sufficient breathing space in which to perform their vital policy-making functions. West's Ann.Gov.Code, § 820.2.

27. Colleges and Universities ⇨7

Immunity of public employees from liability for injury resulting from discretionary acts did not shield psychotherapists employed by university hospital from liability for mere failure to warn either plaintiffs' daughter or those who reasonably could have been expected to notify her of apparent threats made on her life by a patient; failure to warn did not fall within zone of immunity created by the act. West's Ann.Gov.Code, § 820.2.

28. Officers ⇨116

Although statute shielding government employees from liability for results of discretionary acts does not shield publicly employed psychotherapists from liability for failure to act when a patient poses a serious danger of violence to others, the law requires of such therapist only that quantum of care which the common law requires of private therapists; imposition of liability in those rare cases in which a public employee falls short of such standards does not contravene the language or purpose of the immunity statute. West's Ann.Civ.Code, § 1714; West's Ann.Gov.Code, § 820.2.

29. Colleges and Universities ⇨7

Although psychotherapists employed by university hospital were not immune from liability for failure to warn intended victim or other appropriate persons of threats made on her life by a patient, the therapists were immune from liability for failing to confine the patient, notwith-

standing that therapists were not among the persons designated in the Lanterman-Petris-Short Act as persons authorized finally to adjudicate a patient's confinement. West's Ann.Gov.Code § 856; West's Ann. Welfare & Inst.Code, § 5150.

30. Officers ⇨114

Phrase "any applicable enactment" as used in statute affording public entities and their employees absolute protection from liability for any injury resulting from determining, in accordance with any applicable enactment, whether to confine a person for mental illness does not refer solely to persons designated under the Lanterman-Petris-Short Act as authorized finally to adjudicate a patient's confinement but, extends, to any person authorized to request or recommend confinement. West's Ann.Gov.Code § 856.

See publication Words and Phrases for other judicial constructions and definitions.

31. Officers ⇨114

Immunity of a public entity and its employees from liability from any injury resulting from determining whether to confine a person for mental illness extends not only to the final determination to confine or not to confine but to all determinations involved in the commitment process. West's Ann.Gov.Code § 856.

32. Officers ⇨114

Supervising psychiatrist's orders that no actions leading to mental patient's detention be taken reflected his determination not to seek confinement of the patient, who carried out his stated intentions to kill plaintiffs' daughter, and, hence, clearly fell within statutory immunity of governmental entities and their employees from liability for injury resulting from determining whether to confine a person for mental illness. West's Ann.Gov.Code § 856; West's Ann.Civ.Code, § 1714.

33. Colleges and Universities ⇨7

Treating psychotherapist's failure to overcome superior's decision that no actions leading to mental patient's confine-

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ment be taken realistically fell within protection afforded by statute immunizing government employees from liability for injury resulting from determining whether to confine a person for mental illness and, hence, the psychotherapist, who was employed at university hospital and to whom patient confided his intentions to kill plaintiffs' daughter, could not be held liable, on theory of failure to confine the patient, for daughter's death at patient's hands; same analysis applied in determining liability of psychotherapist who personally examined patient as well as the superintendent's assistant, who approved decision to arrange commitment. West's Ann.Civ.Code, § 1714; West's Ann.Gov.Code, § 856.

34. Colleges and Universities ⇨7

Although campus police of the University of California at Berkeley technically were not "peace officers" within meaning of mental health statute immunizing a peace officer from liability for any action by a person released at or before the end of 72 hours they were immune from liability for releasing psychiatric patient, who threatened to and who subsequently killed plaintiffs' daughter, after brief confinement during which he appeared rational; courts would not impose a duty on the officers to keep the patient confined yet denied any protection furnished by the statute immunizing those responsible for confinement. West's Ann.Welfare & Inst. Code, §§ 5008(i), 5154.

See publication Words and Phrases for other judicial constructions and definitions.

35. Death ⇨93

Punitive damages are not recoverable in wrongful death action; hence, such damages were not recoverable from supervising psychotherapist for overruling subordinates' recommendation for confinement of a patient, who confided his intentions to kill plaintiffs' daughter and who subse-

quently did so. West's Ann.Civ.Code, § 1714.

George Alexander McKray, San Francisco, for plaintiffs and appellants.

Robert E. Cartwright, San Francisco, Floyd A. Demanes, Burlingame, William H. Lally, Sacramento, Edward I. Pollock, Los Angeles, Leonard Sacks, Encino, Stephen I. Zetterberg, Claremont, Sanford M. Gage, Beverly Hills, Robert O. Angle, Santa Barbara, and Melanie Bellah, Berkeley, as amici curiae for plaintiffs and appellants.

Ericksen, Ericksen, Lynch, Young & Mackenroth, William R. Morton, Richard G. Logan, Oakland, Hanna, Brophy, MacLean, McAleer & Jensen, Hanna & Brophy, and James V. Burchell, San Francisco, for defendants and respondents.

Evelle J. Younger, Atty. Gen., James E. Sabine, Asst. Atty. Gen., John M. Morrison and Thomas K. McGuire, Deputy Attys. Gen., John H. Larson, County Counsel (Los Angeles), Daniel D. Mikesell, Jr., Deputy County Counsel, Richard J. Moore, County Counsel (Alameda), Charles L. Harrington, Deputy County Counsel, Musick, Peeler & Garrett, James E. Ludlam, Los Angeles, Severson, Werson, Berke & Melchior, Kurt W. Melchior, Nicholas S. Freud and Jan T. Chilton, San Francisco, as amici curiae for defendants and respondents.

TOBRINER, Justice.

On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff.¹ Plaintiffs, Tatiana's parents, allege that two months earlier Poddar confided his intention to kill Tatiana to Dr. Lawrence Moore, a psychologist employed by the Cowell Memorial Hospital at the University of California at Berkeley. They allege that on Moore's request, the campus police briefly detained Poddar, but released him when he ap-

1. The criminal prosecution stemming from this crime is reported in *People v. Poddar* (1974)

10 Cal.3d 750, 111 Cal.Rptr. 910, 518 P.2d 342.

peared rational. They further claim that Dr. Harvey Powelson, Moore's superior, then directed that no further action be taken to detain Poddar. No one warned plaintiffs of Tatiana's peril.

Concluding that these facts set forth causes of action against neither therapists and policemen involved, nor against the Regents of the University of California as their employer, the superior court sustained defendants' demurrers to plaintiffs' second amended complaints without leave to amend.² This appeal ensued.

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

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

2. The therapist defendants include Dr. Moore, the psychologist who examined Poddar and decided that Poddar should be committed; Dr. Gold and Dr. Yandell, psychiatrists at Well Memorial Hospital who concurred in Moore's decision; and Dr. Powelson, chief of the department of psychiatry, who countermanded Moore's decision and directed that the staff take no action to confine Poddar.

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

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

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

1. Plaintiffs' complaints.

[3] Plaintiffs, Tatiana's mother and father, filed separate but virtually identical second amended complaints. The issue be-

The police defendants include Officers Atkinson, Brownrigg and Halleran, who detained Poddar briefly but released him; Chief Beall, who received Moore's letter recommending that Poddar be confined; and Officer Teel, who, along with Officer Atkinson, received Moore's oral communication requesting detention of Poddar.

fore us on this complaints now state, causes of a We therefore be pertinent allegatio

Plaintiffs' first "Failure to Detain" alleges that on was a voluntary o py at Cowell Me informed Moore, going to kill an u tifiable as Tatia home from spend Moore, with the who had initially f Yandell, assis de tment of ; Poddar should be tion in a mental notified Officers campus police th mitment. He th Chief William B ance of the polic Poddar's confiner

Officers Atkinson and Halleran took Poddar into custody. Plaintiffs filed that Poddar on his promise to Powelson, direct psychiatry at Co then asked the pe ter, directed tha and notes that M pist be destroyed to place Prosenji ment and evaluat

Plaintiffs' second amended complaint alleged "Failure to

3. Plaintiffs' complaints—Tatiana's mother and father—Tatiana. The defendant therapists, however, failed to apprise her parents who Tatiana of the properly be cur stated in *Mina* (1974) 11 Cal.3d 102, 107, 520 1

fore us on this appeal is whether those complaints now state, or can be amended to state, causes of action against defendants. We therefore begin by setting forth the pertinent allegations of the complaints.³

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

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

Plaintiffs' second cause of action, entitled "Failure to Warn On a Dangerous Pa-

3. Plaintiffs' complaints alleged merely that defendant therapists failed to warn plaintiffs—Tatiana's parents—of the danger to Tatiana. The complaints do not allege that defendant therapists failed to warn Tatiana herself, or failed to warn persons other than her parents who would be likely to apprise Tatiana of the danger. Such omissions can properly be cured by amendment. As we stated in *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 118-119, 113 Cal.Rptr. 102, 107, 520 P.2d 726, 731: "It is azio-

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

Plaintiffs' third cause of action, entitled "Abandonment of a Dangerous Patient," seeks \$10,000 punitive damages against defendant Powelson. Incorporating the crucial allegations of the first cause of action, plaintiffs charge that Powelson "did the things herein alleged with intent to abandon a dangerous patient, and said acts were done maliciously and oppressively."

Plaintiffs' fourth cause of action, for "Breach of Primary Duty to Patient and the Public," states essentially the same allegations as the first cause of action, but seeks to characterize defendants' conduct as a breach of duty to safeguard their patient and the public. Since such conclusory labels add nothing to the factual allegations of the complaint, the first and fourth causes of action are legally indistinguishable.

As we explain in part 4 of this opinion, plaintiffs' first and fourth causes of action, which seek to predicate liability upon the defendants' failure to bring about Poddar's confinement, are barred by governmental immunity. Plaintiffs' third cause of action succumbs to the decisions precluding exemplary damages in a wrongful death action.

matiz that if there is a reasonable possibility that a defect in the complaint can be cured by amendment or that the pleading liberally construed can state a cause of action, a demurrer should not be sustained without leave to amend." (Accord, *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 876, 97 Cal.Rptr. 849, 489 P.2d 1123; *Lemoge Electric v. County of San Mateo* (1958) 48 Cal.2d 659, 664, 297 P.2d 638; *Beckstead v. Superior Court* (1971) 21 Cal.App.3d 780, 782, 98 Cal.Rptr. 779.)

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(1987) 248 Cal.App.
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of such conduct, the common law has tradi-
tionally imposed liability only if the de-
fendant bears some special relationship to
the dangerous person or to the potential
victim. Since the relationship between a
therapist and his patient satisfies this re-
quirement, we need not here decide wheth-
er foreseeability alone is sufficient to cre-
ate a duty to exercise reasonable care to
protect a potential victim of another's con-
duct.

[8-10] Although, as we have stated
above, under the common law, as a general
rule, one person owed no duty to control
the conduct of another⁵ (*Richards v.*
Stanley (1954) 43 Cal.2d 60, 65, 271 P.2d
23; *Wright v. Arcade School Dist.* (1964)
230 Cal.App.2d 272, 277, 40 Cal.Rptr. 812;
Rest.2d Torts (1965) § 315), nor to warn
those endangered by such conduct (Rest.
2d Torts, *supra*, § 314, com. c.; Prosser,
Law of Torts (4th ed. 1971) § 56, p. 341),
the courts have carved out an exception to
this rule in cases in which the defendant
stands in some special relationship to ei-
ther the person whose conduct needs to be
controlled or in a relationship to the fore-

5. This rule derives from the common law's
distinction between misfeasance and nonfeas-
ance, and its reluctance to impose liability
for the latter. (See Harper & Kime, *The*
Duty to Control the Conduct of Another
(1934) 43 Yale L.J. 886, 887.) Morally
questionable, the rule owes its survival to
"the difficulties of setting any standards of
unselfish service to fellow men, and of making
any workable rule to cover possible situations
where fifty people might fail to rescue. . ."
(Prosser, Torts (4th ed. 1971) § 56, p. 341.)
Because of these practical difficulties, the
courts have increased the number of instances
in which affirmative duties are imposed not
by direct rejection of the common law rule,
but by expanding the list of special rela-
tionships which will justify departure from that
rule. (See Prosser, *supra*, § 56, at pp. 348-
350.)

6. The pleadings establish the requisite rela-
tionship between Poddar and both Dr. Moore,
the therapist who treated Poddar, and Dr.
Powelson, who supervised that treatment.
Plaintiffs also allege that Dr. Gold personally
examined Poddar, and that Dr. Yandell, as
Powelson's assistant, approved the decision
to arrange Poddar's commitment. These al-

seeable victim of that conduct (see Rest.
2d Torts, *supra*, §§ 315-320). Applying
this exception to the present case, we note
that a relationship of defendant therapists
to either Tatiana or Poddar will suffice to
establish a duty of care; as explained in
section 315 of the Restatement Second of
Torts, a duty of care may arise from ei-
ther "(a) a special relation . . . be-
tween the actor and the third person which
imposes a duty upon the actor to control
the third person's conduct, or (b) a special
relation . . . between the actor and the
other which gives to the other a right of
protection."

[11,12] Although plaintiffs' pleadings
assert no special relation between Tatiana
and defendant therapists, they establish as
between Poddar and defendant therapists
the special relation that arises between a
patient and his doctor or psychotherapist.⁶
Such a relationship may support affirma-
tive duties for the benefit of third persons.
Thus, for example, a hospital must exer-
cise reasonable care to control the behavior
of a patient which may endanger other
persons.⁷ A doctor must also warn a pa-

legations are sufficient to raise the issue
whether a doctor-patient or therapist-patient
relationship, giving rise to a possible duty by
the doctor or therapist to exercise reasonable
care to protect a threatened person of danger
arising from the patient's mental illness,
existed between Gold or Yandell and Poddar.
(See Harney, *Medical Malpractice* (1973)
p. 7.)

7. When a "hospital has notice or knowledge
of facts from which it might reasonably be
concluded that a patient would be likely to
harm himself or others unless preclusive mea-
sures were taken, then the hospital must use
reasonable care in the circumstances to pre-
vent such harm." (*Vistica v. Presbyterian*
Hospital (1967) 67 Cal.2d 465, 469, 62 Cal.
Rptr. 577, 580, 432 P.2d 193, 196.) (Empha-
sis added.) A mental hospital may be liable
if it negligently permits the escape or release
of a dangerous patient (*Semler v. Psychiatric*
Institute of Washington, D. C. (4th Cir.
1976) 44 U.S.L. Week 2439; *Underwood v.*
United States (5th Cir. 1968) 356 F.2d 92;
Fair v. United States (5th Cir. 1956) 234 F.
2d 288). *Greenberg v. Barbour* (E.D.Pa.
1971) 322 F.Supp. 745, upheld a cause of
action against a hospital staff doctor whose

tient if the patient's condition or medication renders certain conduct, such as driving a car, dangerous to others.⁸

[13] Although the California decisions that recognize this duty have involved cases in which the defendant stood in a special relationship *both* to the victim and to the person whose conduct created the danger,⁹ we do not think that the duty should logically be constricted to such situations. Decisions of other jurisdictions hold that the single relationship of a doctor to his patient is sufficient to support the duty to exercise reasonable care to protect others against dangers emanating from the patient's illness. The courts hold that a doctor is liable to persons infected by his patient if he negligently fails to diagnose a contagious disease (*Hofmann v. Blackmon* (Fla.App.1970) 241 So.2d 752), or, having diagnosed the illness, fails to warn members of the patient's family (*Wojcik v. Aluminum Co. of America* (1959) 18 Misc.2d 740, 183 N.Y.S.2d 351, 357-358; *Davis v. Rodman* (1921) 147 Ark. 385, 227 S.W. 612; *Skillings v. Allen* (1919) 143 Minn. 323, 173 N.W. 663; see also *Jones v. Stanko* (1928) 118 Ohio St. 147, 160 N. E. 456).

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

negligent failure to admit a mental patient resulted in that patient assaulting the plaintiff.

8. *Kaiser v. Suburban Transp. System* (1965) 65 Wash.2d 461, 399 P.2d 14; see *Frcese v. Lemmon* (Iowa 1973) 210 N.W.2d 576 (concurring opn. of Uhlenhopp, J.).

9. *Ellis v. D'Angelo* (1953) 116 Cal.App.2d 310, 253 P.2d 675, upheld a cause of action against parents who failed to warn a babysitter of the violent proclivities of their

residence and killed her. Notwithstanding the lack of any "special relationship" between the Veterans Administration and the wife, the court found the Veterans Administration liable for the wrongful death of the wife.

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

Defendants contend, however, that imposition of a duty to exercise reasonable care to protect third persons is unworkable because therapists cannot accurately predict whether or not a patient will resort to violence. In support of this argument amicus representing the American Psychiatric Association and other professional societies cites numerous articles which indicate that therapists, in the present state of the art, are unable reliably to predict violent acts; their forecasts, amicus claims, tend consistently to overpredict violence, and indeed are more often wrong than right.¹⁰ Since

child; *Johnson v. State of California* (1968) 69 Cal.2d 752, 73 Cal.Rptr. 240, 447 P.2d 352, upheld a suit against the state for failure to warn foster parents of the dangerous tendencies of their ward; *Morgan v. City of Yuba* (1964) 230 Cal.App.2d 938, 41 Cal.Rptr. 508, sustained a cause of action against a sheriff who had promised to warn decedent before releasing a dangerous prisoner, but failed to do so.

10. See, e. g., *People v. Burnick* (1975) 14 Cal.3d 306, 325-329, 121 Cal.Rptr. 488, 535

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predictions of violence are often erroneous, amicus concludes, the courts should not render rulings that predicate the liability of therapists upon the validity of such predictions.

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

[14] We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence. Obviously we do not require that the therapist, in making that determination, render a perfect performance; the therapist need only exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances." (*Bardesson v. Michels* (1970) 3 Cal.3d 780, 788, 91 Cal.Rptr. 760, 764, 478 P.2d 480, 484; *Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 159-160, 41 Cal.Rptr. 577, 397 P.2d 161; see 4 Witkin, Summary of Cal.Law (8th ed. 1974) Torts, § 514 and cases cited.) Within the broad range of reasonable practice and treatment in which professional opinion and judgment may differ, the therapist is free to exercise his or her own best judgment without liability;

P.2d 352; Monahan, *The Prevention of Violence, in Community Mental Health in the Criminal Justice System* (Monahan ed. 1975); Diamond, *The Psychiatric Prediction of Dangerousness* (1975) 123 U.Pa.L.Rev. 439; Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom* (1974) 62 Cal.L.Rev. 693.

11. Defendant therapists and amicus also argue that warnings must be given only in

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proof, aided by hindsight, that he or she judged wrongly is insufficient to establish negligence.

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

[15, 16] Amicus contends, however, that even when a therapist does in fact predict that a patient poses a serious danger of violence to others, the therapist should be absolved of any responsibility for failing to act to protect the potential victim. In our view, however, once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger. While the discharge of this duty of due care will necessarily vary with the facts of each case,¹¹ in each instance the adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances. (Accord *Cobbs v. Grant* (1972) 8 Cal.3d 229, 243, 104 Cal.Rptr. 505, 502 P.2d 1.) As explained in Fleming and Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 Cal.L.Rev. 1025, 1067: ". . . the ultimate question of resolving the tension between the conflicting interests of patient and potential victim is one of social policy, not professional expertise. . . . In sum, the therapist owes a legal

those cases in which the therapist knows the identity of the victim. We recognize that in some cases it would be unreasonable to require the therapist to interrogate his patient to discover the victim's identity, or to conduct an independent investigation. But there may also be cases in which a moment's reflection will reveal the victim's identity. The matter thus is one which depends upon the circumstances of each case, and should not be governed by any hard and fast rule.

duty not only to his patient, but also to his patient's would-be victim and is subject in both respects to scrutiny by judge and jury."

[17] Contrary to the assertion of amicus, this conclusion is not inconsistent with our recent decision in *People v. Burnick*, *supra*, 14 Cal.3d 306, 121 Cal.Rptr. 488, 535 P.2d 352. Taking note of the uncertain character of therapeutic prediction, we held in *Burnick* that a person cannot be committed as a mentally disordered sex offender unless found to be such by proof beyond a reasonable doubt. (14 Cal.3d at p. 328, 121 Cal.Rptr. 488, 535 P.2d 352.) The issue in the present context, however, is not whether the patient should be incarcerated, but whether the therapist should take any steps at all to protect the threatened victim; some of the alternatives open to the therapist, such as warning the victim, will not result in the drastic consequences of depriving the patient of his liberty. Weighing the uncertain and conjectural character of the alleged damage done the patient by such a warning against the peril to the victim's life, we conclude that professional inaccuracy in predicting violence cannot negate the therapist's duty to protect the threatened victim.

The risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved. We would hesitate to hold that the therapist who is aware that his patient ex-

12. Counsel for defendant Regents and amicus American Psychiatric Association predict that a decision of this court holding that a therapist may bear a duty to warn a potential victim will deter violence-prone persons from seeking therapy, and hamper the treatment of other patients. This contention was examined in *Fleming and Maximov, The Patient or His Victim: The Therapist's Dilemma* (1974) 62 Cal.L.Rev. 1025, 1038-1044; they conclude that such predictions are entirely speculative. In *In re Lifschutz*, *supra*, 2 Cal. 3d 415, 85 Cal.Rptr. 829, 467 P.2d 557, counsel for the psychiatrist argued that if the state could compel disclosure of some psychotherapeutic communications, psychotherapy could no longer be practiced successfully. (2 Cal.3d at p. 426, 85 Cal.Rptr. 829, 467 P.

pects to attempt to assassinate the President of the United States would not be obligated to warn the authorities because the therapist cannot predict with accuracy that his patient will commit the crime.

Defendants further argue that free and open communication is essential to psychotherapy (see *In re Lifschutz* (1970) 2 Cal. 3d 415, 431-434, 85 Cal.Rptr. 829, 467 P.2d 557); that "Unless a patient . . . is assured that . . . information [revealed by him] can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment . . . depends." (Sen.Com. on Judiciary, comment on Evid.Code, § 1014.) The giving of a warning, defendants contend, constitutes a breach of trust which entails the revelation of confidential communications.¹²

[18] We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy (see *In re Lifschutz*, *supra*, 2 Cal.3d at p. 432, 85 Cal.Rptr. 829, 467 P.2d 557), and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault. The Legislature has undertaken the difficult task of balancing the countervailing concerns. In Evidence Code section 1014, it established a broad rule of privilege to protect confidential

2d 557.) We rejected that argument, and it does not appear that our decision in fact adversely affected the practice of psychotherapy in California. Counsel's forecast of harm in the present case strikes us as equally dubious.

We note, moreover, that Evidence Code section 1024, enacted in 1965, established that psychotherapeutic communication is not privileged when disclosure is necessary to prevent threatened danger. We cannot accept without question counsels' implicit assumption that effective therapy for potentially violent patients depends upon either the patient's lack of awareness that a therapist can disclose confidential communications to avert impending danger, or upon the therapist's advance promise never to reveal nonprivileged threats of violence.

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 tient privilege: "There is no privilege
 . . . if the psychotherapist has reason-
 able cause to believe that the patient is in
 such mental or emotional condition as to be
 dangerous to himself or to the person or
 property of another and that disclosure of
 the communication is necessary to prevent
 the threatened danger."¹³

[19, 20] We realize that the open and
 confidential character of psychotherapeutic
 dialogue encourages patients to express
 threats of violence, few of which are ever
 executed. Certainly a therapist should not
 be encouraged routinely to reveal such
 threats; such disclosures could seriously
 disrupt the patient's relationship with his
 therapist and with the persons threatened.
 To the contrary, the therapist's obligations
 to his patient require that he not disclose a
 confidence unless such disclosure is neces-
 sary to avert danger to others, and even
 then that he do so discreetly, and in a
 fashion that would preserve the privacy of
 his patient to the fullest extent compatible
 with the prevention of the threatened dan-
 ger. (See Fleming & Maximov, *The Pa-
 tient or His Victim: The Therapist's Di-
 lemma* (1974) 62 Cal.L.Rev. 1025, 1065-
 1066.)¹⁴

13. Fleming and Maximov note that "While
 [section 1024] supports the therapist's less
 controversial right to make a disclosure, it
 admittedly does not impose on him a duty to
 do so. But the argument does not have to be
 pressed that far. For if it is once con-
 ceded . . . that a duty in favor of the
 patient's foreseeable victims would accord
 with general principles of tort liability, we
 need no longer look to the statute for a source
 of duty. It is sufficient if the statute can
 be relied upon . . . for the purposes of
 countering the claim that the needs of con-
 fidentiality are paramount and must there-
 fore defeat any such hypothetical duty. In
 this more modest perspective, the Evidence
 Code's 'dangerous patient' exception may be
 invoked with some confidence as a clear ex-
 pression of legislative policy concerning the

The revelation of a communication un-
 der the above circumstances is not a
 breach of trust or a violation of profes-
 sional ethics; as stated in the Principles of
 Medical Ethics of the American Medical
 Association (1957), section 9: "A physi-
 cian may not reveal the confidence entrust-
 ed to him in the course of medical attend-
 ance . . . unless he is required to do
 so by law or unless it becomes necessary in
 order to protect the welfare of the individ-
 ual or of the community."¹⁵ (Emphasis
 added.) We conclude that the public poli-
 cy favoring protection of the confidential
 character of patient-psychotherapist com-
 munications must yield to the extent to
 which disclosure is essential to avert dan-
 ger to others. The protective privilege
 ends where the public peril begins.

[21] Our current crowded and compu-
 tized society compels the interdependence
 of its members. In this risk-infested soci-
 ety we can hardly tolerate the further expo-
 sure to danger that would result from a
 concealed knowledge of the therapist that
 his patient was lethal. If the exercise of
 reasonable care to protect the threatened
 victim requires the therapist to warn the
 endangered party or those who can reason-
 ably be expected to notify him, we see no
 sufficient societal interest that would pro-
 tect and justify concealment. The contain-
 ment of such risks lies in the public inter-

balance between the confidentiality values of
 the patient and the safety values of his fore-
 seeable victims." (Emphasis in original.)
 Fleming & Maximov, *The Patient or His Vi-
 tim: The Therapist's Dilemma* (1974) 62
 Cal.L.Rev. 1025, 1063.

14. Amicus suggests that a therapist who
 concludes that his patient is dangerous
 should not warn the potential victim, but
 institute proceedings for involuntary deten-
 tion of the patient. The giving of a warn-
 ing, however, would in many cases represent
 a far lesser inroad upon the patient's privacy
 than would involuntary commitment.

15. See also Summary Report of the Task
 Force on Confidentiality of the Council on
 Professions and Associations of the American
 Psychiatric Association (1975).

est. For the foregoing reasons, we find that plaintiffs' complaints can be amended to state a cause of action against defendants Moore, Powelson, Gold, and Yandell and against the Regents as their employer, for breach of a duty to exercise reasonable care to protect Tatiana.¹⁶

[22] Finally, we reject the contention of the dissent that the provisions of the Lanterman-Petris-Short Act which govern the release of confidential information (Welf. & Inst.Code, §§ 5328-5328.9) prevented defendant therapists from warning Tatiana. The dissent's contention rests on the assertion that Dr. Moore's letter to the campus police constituted an "application in writing" within the meaning of Welfare and Institutions Code section 5150, and thus initiates proceedings under the Lanterman-Petris-Short Act. A closer look at the terms of section 5150, however, will demonstrate that it is inapplicable to the present case.

Section 5150 refers to a written application only by a professional person who is "[a] member of the attending staff . . . of an evaluation facility designated by the county," or who is himself "designated by the county" as one authorized to take a person into custody and place him in a facility designated by the county and approved by the State Department of Mental Hygiene. The complaint fails specifically to allege that Dr. Moore was so empowered. Dr. Moore and the Regents cannot rely upon any inference to the contrary that might be drawn from plaintiff's

allegation that Dr. Moore intended to "assign" a "detention" on Poddar; both Dr. Moore and the Regents have expressly conceded that neither Cowell Memorial Hospital nor any member of its staff has ever been designated by the County of Alameda to institute involuntary commitment proceedings pursuant to section 5150.

Furthermore, the provisions of the Lanterman-Petris-Short Act defining a therapist's duty to withhold confidential information are expressly limited to "information and records obtained in the course of providing services under Division 5 (commencing with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7000)" of the Welfare and Institutions Code (Welf. & Inst. Code, § 5328). (Emphasis added.) Divisions 5, 6 and 7 describe a variety of programs for treatment of the mentally ill or retarded.¹⁷ The pleadings at issue on this appeal, however, state no facts showing that the psychotherapy provided to Poddar by the Cowell Memorial Hospital falls under any of these programs. We therefore conclude that the Lanterman-Petris-Short Act does not govern the release of information acquired by Moore during the course of rendition of those services.

[23] Neither can we adopt the dissent's suggestion that we import wholesale the detailed provisions of the Lanterman-Petris-Short Act regulating the disclosure of confidential information and apply them to disclosure of information *not governed by the act*. Since the Legislature did not ex-

we pass only upon the pleadings at this stage and decide if the complaints can be amended to state a cause of action.

16. Moore argues that after Powelson countermanded the decision to seek commitment for Poddar, Moore was obliged to obey the decision of his superior and that therefore he should not be held liable for any dereliction arising from his obedience to superior orders. Plaintiffs in response contend that Moore's duty to members of the public endangered by Poddar should take precedence over his duty to obey Powelson. Since plaintiffs' complaints do not set out the date of Powelson's order, the specific terms of that order, or Powelson's authority to overrule Moore's decisions respecting patients under Moore's care, we need not adjudicate this conflict:

17. Division 5 includes the Lanterman-Petris-Short Act and the Short-Doyle Act (community mental health services). Division 6 relates to programs for treatment of persons judicially committed as mentally disordered sex offenders or mentally retarded. Division 7 encompasses treatment at state and county mental hospitals, the Langley Porter Neuropsychiatric Institute and the Neuropsychiatric Institute of the U.C.L.A. Medical Center.

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tend the act to control all disclosures of confidential matter by a therapist, we must infer that the Legislature did not relieve the courts of their obligation to define by reference to the principles of the common law the obligation of the therapist in those situations not governed by the act.

[24] Turning now to the police defendants, we conclude that they do not have any such special relationship to either Tattiana or to Poddar sufficient to impose upon such defendants a duty to warn respecting Poddar's violent intentions. (See *Hartzler v. City of San Jose* (1975) 46 Cal.App.3d 6, 9-10, 120 Cal.Rptr. 5; *Antique Arts Corp. v. City of Torrance* (1974) 39 Cal.App.3d 588, 593, 114 Cal.Rptr. 332.) Plaintiffs suggest no theory,¹⁸ and plead no facts that give rise to any duty to warn on the part of the police defendants absent such a special relationship. They have thus failed to demonstrate that the trial court erred in denying leave to amend as to the police defendants. (See *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636, 75 Cal.Rptr. 766, 451 P.2d 406; *Filice v. Boccardo* (1962) 210 Cal.App.2d 843, 847, 26 Cal.Rptr. 789.)

3. *Defendant therapists are not immune from liability for failure to warn.*

We address the issue of whether defendant therapists are protected by government-

18. We have considered *sua sponte* whether plaintiffs' complaints could be amended to assert a cause of action against the police defendants under the principles of Restatement Second of Torts (1965), section 321, which provides that "If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect." (See *Hartzler v. City of San Jose*, *supra*, 46 Cal.App.3d 6, 10, 120 Cal.Rptr. 5.) The record, however, suggests no facts which, if inserted into the complaints, might form the foundation for such cause of action. The assertion of a cause of action against the police defendants under this theory would raise difficult problems of causation and of public policy, which should not be resolved on the basis of conjectural facts not averred in the pleadings or in any proposed amendment to those pleadings.

tal immunity for having failed to warn Tattiana or those who reasonably could have been expected to notify her of her peril. We postulate our analysis on section 820.2 of the Government Code.¹⁹ That provision declares, with exceptions not applicable here, that "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion [was] abused."²⁰

[25] Noting that virtually every public act admits of some element of discretion, we drew the line in *Johnson v. State of California* (1968) 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352, between discretionary policy decisions which enjoy statutory immunity and ministerial administrative acts which do not. We concluded that section 820.2 affords immunity only for "basic policy decisions." (Emphasis added.) (See also *Elton v. County of Orange* (1970) 3 Cal.App.3d 1053, 1057-1058, 84 Cal.Rptr. 27; 4 Cal.Law Revision Com. Rep. (1963) p. 810; Van Alstyne, Supplement to Cal. Government Tort Liability (Cont.Ed.Bar 1969) § 3.54, pp. 16-17; Comment, *California Tort Claims Act: Discretionary Immunity* (1966) 39 So. Cal. L.Rev. 470, 471; cf. James, *Tort Liability of Governmental Units and Their Officers*

19. No more specific immunity provision of the Government Code appears to address the issue.

20. Section 815.2 of the Government Code declares that "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." The section further provides, with exceptions not applicable here, that "a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." The Regents, therefore, are immune from liability only if all individual defendants are similarly immune.

(1955) 22 U.Chi.L.Rev. 610, 637-638, 640, 642, 651.)

[26] We also observed that if courts did not respect this statutory immunity, they would find themselves "in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government." (*Johnson v. State of California*, *supra*, 69 Cal.2d at p. 793, 73 Cal.Rptr. at p. 248, 447 P.2d at p. 350.) It therefore is necessary, we concluded, to "isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision." (*Johnson v. State of California*, *supra*, at p. 794, 73 Cal.Rptr., at p. 248, 447 P.2d, at p. 360.) After careful analysis we rejected, in *Johnson*, other rationales commonly advanced to support governmental immunity²¹ and concluded that the immunity's scope should be no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions.

[27, 28] Relying on *Johnson*, we conclude that defendant therapists in the present case are not immune from liability for their failure to warn of Tatiana's peril.

21. We dismissed, in *Johnson*, the view that immunity continues to be necessary in order to insure that public employees will be sufficiently zealous in the performance of their official duties. The California Tort Claims Act of 1963 provides for indemnification of public employees against liability, absent bad faith, and also permits such employees to insist that their defenses be conducted at public expense. (See Gov.Code, §§ 825-825.6, 995-995.2.) Public employees thus no longer have a significant reason to fear liability as they go about their official tasks. We also, in *Johnson*, rejected the argument that a public employee's concern over the potential liability of his or her employer serves as a basis for immunity. (*Johnson v. State of California*, *supra*, at pp. 790-793, 73 Cal. Rptr. 240, 447 P.2d 352.)

22. By analogy, section 830.8 of the Government Code furnishes additional support for

Johnson held that a parole officer's determination whether to warn an adult couple that their prospective foster child had a background of violence "present[ed] no . . . reasons for immunity" (*Johnson v. State of California*, *supra*, at p. 795, 73 Cal. Rptr. 240, 447 P.2d 352), was "at the lowest, ministerial rung of official action" (*id.*, at p. 796, 73 Cal.Rptr., at p. 250, 447 P.2d, at p. 362), and indeed constituted "a classic case for the imposition of tort liability." (*Id.*, p. 797, 73 Cal.Rptr., p. 251, 447 P.2d, p. 363; cf. *Morgan v. County of Yuba*, *supra*, 230 Cal.App.2d 938, 942-943, 41 Cal.Rptr. 508.) Although defendants in *Johnson* argued that the decision whether to inform the foster parents of the child's background required the exercise of considerable judgmental skills, we concluded that the state was not immune from liability for the parole officer's failure to warn because such a decision did not rise to the level of a "basic policy decision."

We also noted in *Johnson* that federal courts have consistently categorized failures to warn of latent dangers as falling outside the scope of discretionary omissions immunized by the Federal Tort Claims Act.²² (See *United Air Lines, Inc. v. Wiener* (9th Cir. 1964) 335 F.2d 379, 397-398, cert. den. *sub nom. United Air Lines, Inc. v. United States*, 379 U.S. 951, 85 S.Ct.

our conclusion that a failure to warn does not fall within the zone of immunity created by section 820.2. Section 830.8 provides: "Neither a public entity nor a public employee is liable . . . for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device . . . was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care." The Legislature thus concluded at least in another context that the failure to warn of a latent danger is not an immunized discretionary omission. (See *Hilts v. County of Solano* (1968) 265 Cal.App.2d 161, 174, 71 Cal.Rptr. 275.)

452, 13 L.Ed.2d 549 (decision to conduct military training flights was discretionary but failure to warn commercial airline was not); *United States v. Washington* (9th Cir. 1965) 351 F.2d 913, 916 (decision where to place transmission lines spanning canyon was assumed to be discretionary but failure to warn pilot was not); *United States v. White* (9th Cir. 1954) 211 F.2d 79, 82 (decision not to "deduct" army firing range assumed to be discretionary but failure to warn person about to go onto range of unsafe condition was not); *Bullock v. United States* (D.Utah 1955) 133 F.Supp. 885, 888 (decision how and when to conduct nuclear test deemed discretionary but failure to afford proper notice was not); *Hernandez v. United States* (D.Hawaii 1953) 112 F. Supp. 369, 371 (decision to erect road block characterized as discretionary but failure to warn of resultant hazard was not).

We conclude, therefore, that the therapist defendants' failure to warn Tatiana or those who reasonably could have been expected to notify her of her peril does not fall within the absolute protection afforded by section 820.2 of the Government Code. We emphasize that our conclusion does not raise the specter of therapists employed by the government indiscriminately being held liable for damage despite their exercise of sound professional judgment. We require of publicly employed therapists only that quantum of care which the common law requires of private therapists. The imposition of liability in those rare cases in which a public employee falls short of this standard does not contravene the language or purpose of Government Code section 820.2.

4. *Defendant therapists are immune from liability for failing to confine Poddar.*

[29, 30] We sustain defendant therapists' contention that Government Code section 856 insulates them from liability under plaintiffs' first and fourth causes of action for failing to confine Poddar. Section 856 affords public entities and their employees absolute protection from liability

for "any injury resulting from determining in accordance with any applicable enactment . . . whether to confine a person for mental illness." Since this section refers to a determination to confine "in accordance with any applicable enactment," plaintiffs suggest that the immunity is limited to persons designated under Welfare and Institutions Code section 5150 as authorized finally to adjudicate a patient's confinement. Defendant therapists, plaintiffs point out, are not among the persons designated under section 5150.

The language and legislative history of section 856, however, suggest a far broader immunity. In 1963, when section 856 was enacted, the Legislature had not established the statutory structure of the Lanterman-Petris-Short Act. Former Welfare and Institutions Code section 5050.3 (renumbered as Welf. & Inst. Code § 5880; repealed July 1, 1969) which resembled present section 5150, authorized emergency detention at the behest only of peace officers, health officers, county physicians, or assistant county physicians; former section 5047 (renumbered as Welf. & Inst. Code § 5551; repealed July 1, 1969), however, authorized a petition seeking commitment by any person, including the "physician attending the patient." The Legislature did not refer in section 856 only to those persons authorized to institute emergency proceedings under section 5050.3; it broadly extended immunity to all employees who acted in accord with "any applicable enactment," thus granting immunity not only to persons who are empowered to confine, but also to those authorized to request or recommend confinement.

[31] The Lanterman-Petris-Short Act, in its extensive revision of the procedures for commitment of the mentally ill, eliminated any specific statutory reference to petitions by treating physicians, but it did not limit the authority of a therapist in government employ to request, recommend or initiate actions which may lead to commitment of his patient under the act. We believe that the language of section 856,

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which refers to any action in the course of employment and in accordance with any applicable enactment, protects the therapist who must undertake this delicate and difficult task. (See Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 Cal.L.Rev. 1025, 1064.) Thus the scope of the immunity extends not only to the final determination to confine or not to confine the person for mental illness, but to all determinations involved in the process of commitment. (Cf. *Hernandez v. State of California* (1970) 11 Cal.App.3d 895, 899-900, 90 Cal.Rptr. 205.)

[32] Turning first to Dr. Powelson's status with respect to section 856, we observe that the actions attributed to him by plaintiffs' complaints fall squarely within the protections furnished by that provision. Plaintiffs allege Powelson ordered that no actions leading to Poddar's detention be taken. This conduct reflected Powelson's determination not to seek Poddar's confinement and thus falls within the statutory immunity.

[33] Section 856 also insulates Dr. Moore for his conduct respecting confinement, although the analysis in his case is a bit more subtle. Clearly, Moore's decision that Poddar be confined was not a proximate cause of Tatiana's death, for indeed if Moore's efforts to bring about Poddar's confinement had been successful, Tatiana might still be alive today. Rather, any confinement claim against Moore must rest upon Moore's failure to overcome Powelson's decision and actions opposing confinement.

Such a claim, based as it necessarily would be, upon a subordinate's failure to prevail over his superior, obviously would derive from a rather onerous duty. Whether to impose such a duty we need

23. Section 856 includes the exception to the general rule of immunity "for injury proximately caused by . . . negligent or wrongful acts or omission in carrying out or failing to carry out . . . a determination to confine or not to confine a person for mental illness . . ."

not decide, however, since we can confine our analysis to the question whether Moore's failure to overcome Powelson's decision realistically falls within the protection afforded by section 856. Based upon the allegations before us, we conclude that Moore's conduct is protected.

Plaintiffs' complaints imply that Moore acquiesced in Powelson's countermand of Moore's confinement recommendation. Such acquiescence is functionally equivalent to determining not to seek Poddar's confinement and thus merits protection under section 856. At this stage we are unaware, of course, precisely how Moore responded to Powelson's actions; he may have debated the confinement issue with Powelson, for example, or taken no initiative whatsoever, perhaps because he respected Powelson's judgment, feared for his future at the hospital, or simply recognized that the proverbial handwriting was on the wall. None of these possibilities constitutes, however, the type of careless or wrongful behavior subsequent to a decision respecting confinement which is stripped of protection by the exception in section 856.²³ Rather each is in the nature of a decision not to continue to press for Poddar's confinement. No language in plaintiffs' original or amended complaints suggests that Moore determined to fight Powelson, but failed successfully to do so, due to negligent or otherwise wrongful acts or omissions. Under the circumstances, we conclude that plaintiffs' second amended complaints allege facts which trigger immunity for Dr. Moore under section 856.²⁴

5. *Defendant police officers are immune from liability for failing to confine Poddar in their custody.*

[34] Confronting, finally, the question whether the defendant police officers are

24. Because Dr. Gold and Dr. Yandell were Dr. Powelson's subordinates, the analysis respecting whether they are immune for having failed to obtain Poddar's confinement is similar to the analysis applicable to Dr. Moore.

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immune from liability for releasing Poddar after his brief confinement, we conclude that they are. The source of their immunity is section 5154 of the Welfare and Institutions Code, which declares that: "[t]he professional person in charge of the facility providing 72-hour treatment and evaluation, his designee, and the peace officer responsible for the detainment of the person shall not be held civilly or criminally liable for any action by a person released at or before the end of 72 hours" (Emphasis added.)

Although defendant police officers technically were not "peace officers" as contemplated by the Welfare and Institutions Code,²⁵ plaintiffs' assertion that the officers incurred liability by failing to continue Poddar's confinement clearly contemplates that the officers were "responsible for the detainment of [Poddar]." We could not impose a duty upon the officers to keep Poddar confined yet deny them the protection furnished by a statute immunizing those "responsible for . . . [confinement]." Because plaintiffs would have us treat defendant officers as persons who were capable of performing the functions of the "peace officers" contemplated by the Welfare and Institutions Code, we must accord defendant officers the protections which that code prescribed for such "peace officers."

6. *Plaintiffs' complaints state no cause of action for exemplary damages.*

[35] Plaintiff's third cause of action seeks punitive damages against defendant Powelson. The California statutes and decisions, however, have been interpreted to bar the recovery of punitive damages in a wrongful death action. (See *Pease v. Beech Aircraft Corp.* (1974) 38 Cal.App.3d 450, 460-462, 113 Cal.Rptr. 416, and authorities there cited.)

25. Welfare and Institutions Code section 5008, subdivision (i), defines "peace officer" for purposes of the Lanterman-Petris-Short Act as a person specified in sections 830.1

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7. *Conclusion.*

For the reasons stated, we conclude that plaintiffs can amend their complaints to state a cause of action against defendant therapists by asserting that the therapists in fact determined that Poddar presented a serious danger of violence to Tatiana, or pursuant to the standards of their profession should have so determined, but nevertheless failed to exercise reasonable care to protect her from that danger. To the extent, however, that plaintiffs base their claim that defendant therapists breached that duty because they failed to procure Poddar's confinement, the therapists find immunity in Government Code section 856. Further, as to the police defendants we conclude that plaintiffs have failed to show that the trial court erred in sustaining their demurrer without leave to amend.

The judgment of the superior court in favor of defendants Atkinson, Beall, Brownrigg, Hallernan, and Teel is affirmed. The judgment of the superior court in favor of defendants Gold, Moore, Powelson, Yandell, and the Regents of the University of California is reversed, and the cause remanded for further proceedings consistent with the views expressed herein.

WRIGHT, C. J., and SULLIVAN and RICHARDSON, JJ., concur.

MOSK, Justice (concurring and dissenting).

I concur in the result in this instance only because the complaints allege that defendant therapists did in fact predict that Poddar would kill and were therefore negligent in failing to warn of that danger. Thus the issue here is very narrow: we are not concerned with whether the therapists, pursuant to the standards of their profession, "should have" predicted potential

and §30.2 of the Penal Code. Campus police do not fall within the coverage of section 830.1 and were not included in section 830.2 until 1971.

violence; they allegedly did so in actuality. Under these limited circumstances I agree that a cause of action can be stated.

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

I cannot concur, however, in the majority's rule that a therapist may be held liable for failing to predict his patient's tendency to violence if other practitioners, pursuant to the "standards of the profession," would have done so. The question is, what standards? Defendants and a responsible amicus curiae, supported by an impressive body of literature discussed at length in our recent opinion in *People v. Burnick* (1975) 14 Cal.3d 306, 121 Cal.Rptr. 488, 535 P.2d 352, demonstrate that psychiatric predictions of violence are inherently unreliable.

In *Burnick*, at pages 325-326, 121 Cal. Rptr. at page 501, 535 P.2d at page 365, we observed: "In the light of recent studies it is no longer heresy to question the reliability of psychiatric predictions. Psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession. It must be conceded that psychiatrists still experience considerable difficulty in confidently and accurately *diagnosing* mental illness. Yet those difficulties are multiplied manifold when psychiatrists venture from diagnosis to prognosis and undertake to predict the consequences of such illness: "A diagnosis of mental illness tells us nothing about whether the person so diagnosed is or is not dangerous. Some mental patients are dangerous, some are not. Perhaps the psychiatrist is an expert at deciding whether a person is mentally ill, but is he an expert at predicting which of the persons so diagnosed are dangerous? Sane people, too, are dangerous, and it may legitimately be

inquired whether there is anything in the education, training or experience of psychiatrists which renders them particularly adept at predicting dangerous behavior. Predictions of dangerous behavior, no matter who makes them, are incredibly inaccurate, and there is a growing consensus that psychiatrists are not uniquely qualified to predict dangerous behavior and are, in fact, less accurate in their predictions than other professionals." (*Murel v. Baltimore City Criminal Court* (1972) 407 U.S. 355, 364-365, fn. 2, 92 S.Ct. 2091, 32 L.Ed.2d 791, 796-797 (Douglas, J., dissenting from dismissal of certiorari).) (Fns. omitted.) (See also authorities cited at p. 327 & fn. 18 of 14 Cal.3d, 121 Cal. Rptr. 488, 535 P.2d 352.)

The majority confidently claim their opinion is not offensive to *Burnick*, on the stated ground that *Burnick* involved proceedings to commit an alleged mentally disordered sex offender and this case does not. I am not so sanguine about the distinction. Obviously the two cases are not factually identical, but the similarity in issues is striking: in *Burnick* we were likewise called upon to appraise the ability of psychiatrists to predict dangerousness, and while we declined to bar all such testimony (*id.* at pp. 327-328, 121 Cal.Rptr. 488, 535 P.2d 352) we found it so inherently untrustworthy that we would permit confinement even in a so-called civil proceeding only upon proof beyond a reasonable doubt.

I would restructure the rule designed by the majority to eliminate all reference to conformity to standards of the profession in predicting violence. If a psychiatrist does in fact predict violence, then a duty to warn arises. The majority's expansion of that rule will take us from the world of reality into the wonderland of clairvoyance.

CLARK, Justice (dissenting).

Until today's majority opinion, both legal and medical authorities have agreed that confidentiality is essential to effectively treat the mentally ill, and that imposing a

duty on doctors to disclose patient threats to potential victims would greatly impair treatment. Further, recognizing that effective treatment and society's safety are necessarily intertwined, the Legislature has already decided effective and confidential treatment is preferred over imposition of a duty to warn.

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

The majority rejects the balance achieved by the Legislature's Lanterman-Petris-Short Act. (Welf. & Inst. Code, § 5000 et seq., hereafter the act.)¹ In addition, the majority fails to recognize that, even absent the act, overwhelming policy considerations mandate against sacrificing fundamental patient interests without gaining a corresponding increase in public benefit.

STATUTORY PROVISIONS

Although the parties have touched only briefly on the nondisclosure provisions of the act, amici have pointed out their importance. The instant case arising after ruling on demurrer, the parties must confront the act's provisions in the trial court. In these circumstances the parties' failure to fully meet the provisions of the act would not justify this court's refusal to discuss and apply the law.

Having a grave impact on future treatment of the mentally ill in our state, the majority opinion clearly transcends the interests of the immediate parties and must

discuss all applicable law. It abdicates judicial responsibility to refuse to recognize the clear legislative policy reflected in the act.

Effective 1 July 1969, the Legislature created a comprehensive statutory resolution of the rights and duties of both the mentally infirm and those charged with their care and treatment. The act's purposes include ending inappropriate commitment, providing prompt care, protecting public safety, and safeguarding personal rights. (§ 5001.) The act applies to both voluntary and involuntary commitment, and to both public and private institutions; it details legal procedure for commitment; it enumerates the legal and civil rights of persons committed; and it spells out the duties, liabilities and rights of the psychotherapist. Thus the act clearly evinces the Legislature's weighing of the countervailing concerns presently before us—when a patient has threatened a third person during psychiatric treatment.

Reflecting legislative recognition that disclosing confidences impairs effective treatment of the mentally ill, and thus is contrary to the best interests of society, the act establishes the therapist's duty to *not* disclose. Section 5328 provides in part that "[a]ll information and records obtained in the course of providing services . . . to either voluntary or involuntary recipients of services *shall* be confidential." (Italics added.) Further, a patient may enjoin disclosure in violation of statute and may recover the greater of \$500 or three times the amount of actual damage for unlawful disclosure. (§ 5330.)

However, recognizing that some private and public interests must override the patient's, the Legislature established several limited exceptions to confidentiality.² The

1. All statutory references, unless otherwise stated, are to the Welfare and Institutions Code.

2. Section 5328 provides: "All information and records obtained in the course of providing services under Division 5 (commencing

with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7000), to either voluntary or involuntary recipients of services shall be confidential. Information and records may be disclosed only: [¶] (a) In communications between qualified professional persons in the

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limited nature of these exceptions and the legislative concern that disclosure might impair treatment, thereby harming both patient and society, are shown by section 5328.1. The section provides that a therapist may disclose "to a member of the family of a patient the information that the patient is presently a patient in the facility or that the patient is seriously physically ill . . . if the professional person in charge of the facility determines that the

release of such information is in the best interest of the patient." Thus, disclosing even the fact of treatment is severely limited.

As originally enacted the act contained no provision allowing the therapist to warn anyone of a patient's threat. In 1970, however, the act was amended to permit disclosure in two limited circumstances. Section 5328 was amended, in subdivision (g), to allow disclosure "[t]o governmen-

provision of services or appropriate referrals, or in the course of conservatorship proceedings. The consent of the patient, or his guardian or conservator must be obtained before information or records may be disclosed by a professional person employed by a facility to a professional person not employed by the facility who does not have the medical responsibility for the patient's care. [¶] (b) When the patient, with the approval of the physician in charge of the patient, designates persons to whom information or records may be released, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family; [¶] (c) To the extent necessary for a recipient to make a claim, or for a claim to be made on behalf of a recipient for aid, insurance, or medical assistance to which he may be entitled; [¶] (d) If the recipient of services is a minor, ward, or conservatee, and his parent, guardian, or conservator designates, in writing, persons to whom records or information may be disclosed, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family; [¶] (e) For research, provided that the Director of Health designates by regulation, rules for the conduct of research. Such rules shall include, but need not be limited to, the requirement that all researchers must sign an oath of confidentiality as follows:

.....
Date

As a condition of doing research concerning persons who have received services from (fill in the facility, agency or person), I,, agree not to divulge any information obtained in the course of such research to unauthorized persons, and not to publish or otherwise make public any information regarding persons who have re-

ceived services such that the person who received services is identifiable. I recognize that unauthorized release of confidential information may make me subject to a civil action under provisions of the Welfare and Institutions Code.

.....
Signed

[¶] (f) To the courts, as necessary to the administration of justice. [¶] (g) To governmental law enforcement agencies as needed for the protection of federal and state elective constitutional officers and their families. [¶] (h) To the Senate Rules Committee or the Assembly Rules Committee for the purposes of legislative investigation authorized by such committee. [¶] (i) If the recipient of services who applies for life or disability insurance designates in writing the insurer to which records or information may be disclosed. [¶] (j) To the attorney for the patient in any and all proceedings upon presentation of a release of information signed by the patient, except that when the patient is unable to sign such release, the staff of the facility, upon satisfying itself of the identity of said attorney, and of the fact that the attorney does represent the interests of the patient, may release all information and records relating to the patient except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family. [¶] The amendment of subdivision (d) of this section enacted at the 1970 Regular Session of the Legislature does not constitute a change in, but is declaratory of, the preexisting law."

Subdivisions (g), (h), and (i) were added by amendment in 1972. Subdivision (j) was added by amendment in 1974.

Section 5323, specifically enumerating exceptions to the confidentiality requirement, does not admit of an interpretation importing implied exceptions. (*County of Riverside v. Superior Court*, 42 Cal.App.3d 478, 481, 116 Cal.Rptr. 886.)

tal law enforcement agencies as needed for the protection of federal and state elective constitutional officers and their families." (Italics added.) In addition, section 5328.3 was added to provide that when "necessary for the protection of the patient or others due to the patient's disappearance from, without prior notice to, a designated facility and his whereabouts is unknown, notice of such disappearance may be made to relatives and governmental law enforcement agencies designated by the physician in charge of the patient or the professional person in charge of the facility or his designee." (Italics added.)

Obviously neither exception to the confidentiality requirement is applicable to the instant case.

Not only has the Legislature specifically dealt with disclosure and warning, but it also has dealt with therapist and police officer liability for acts of the patient. The Legislature has provided that the therapist and the officer shall not be liable for prematurely releasing the patient. (§§ 5151, 5154, 5173, 5278, 5305, 5306.)

Ignoring the act's detailed provisions, the majority has chosen to focus on the "dangerous patient exception" to the psychotherapist-patient privilege in Evidence Code sections 1014, 1024 as indicating that "the Legislature has undertaken the difficult task of balancing the countervailing concerns." (*Ante*, p. 440, p. 26 of 131 Cal.Rptr., p. 346 of 551 P.2d.) However, this conclusion is erroneous. The majority fails to appreciate that when disclosure is permitted in an evidentiary hearing, a fourth interest comes into play—the court's concern in judicial supervision. Because they are necessary to the administration of justice, disclosures to the courts are excepted from the nondisclosure requirement by section 5328, subdivision (f). However, this case does not involve a court disclosure. Subdivision (f) and the Evidence Code sections relied on by the majority are clearly inapposite.

The provisions of the act are applicable here. Section 5328 (see fn. 2, *supra*) pro-

vides, "All information and records obtained in the course of providing services under Division 5 . . . shall be confidential." (Italics added.) Dr. Moore's letter describing Poddar's mental condition for purposes of obtaining 72-hour commitment was undisputedly a transmittal of information designed to invoke application of division 5. As such it constituted information obtained in providing services under division 5. This is true regardless of whether Dr. Moore has been designated a professional person by the County of Alameda. Although section 5150 provides that commitment for 72 hours' evaluation shall be based on a statement by a peace officer or person designated by the county, section 5328 prohibits disclosure of all information, not just disclosure of the committing statement or disclosure by persons designated by the county. In addition, section 5330 gives the patient a cause of action for disclosure of confidential information by "an individual" rather than the persons enumerated in section 5150.

Moreover, it appears from the allegations of the complaint that Dr. Moore is in fact a person designated by the county under section 5150. The complaint alleges that "On or about August 20, 1969, defendant Dr. Moore notified Officers Atkinson and Teel, he would give the campus police a letter of diagnosis on Prosenjit Poddar, so the campus police could pick up Poddar and take him to Herrick Hospital in Berkeley where Dr. Moore would assign a 72-hour Emergency Psychiatric Detention on Prosenjit Poddar." Since there is no allegation that Dr. Moore was not authorized to sign the document, it must be concluded that under the allegations of the complaint he was authorized and thus a professional person designated by the county.

Whether we rely on the facts as stated in the complaint that Dr. Moore is a designated person under section 5150 or on the strict prohibitions of section 5328 prohibiting disclosure of "all information," the imposition of a duty to warn by the major-

ity flies directly in the face of the Lanterman-Petris-Short Act.

Under the act, there can be no liability for Poddar's premature release. It is likewise clear there exists no duty to warn. Under section 5328, the therapists were under a duty *to not disclose*, and no exception to that duty is applicable here. Establishing a duty to warn on the basis of general tort principles imposes a Draconian dilemma on therapists—either violate the act thereby incurring the attendant statutory penalties, or ignore the majority's duty to warn thereby incurring potential civil liability. I am unable to assent to such.

If the majority feels that it must impose such a dilemma, then it has an obligation to specifically enumerate the circumstances under which the Lanterman-Petris-Short Act applies as opposed to the circumstances when "general tort principles" will govern. The majority's failure to perform this obligation—leaving to the therapist the subtle questions as to when each opposing rule applies—is manifestly unfair.

DUTY TO DISCLOSE IN THE ABSENCE OF CONTROLLING STATUTORY PROVISION

Even assuming the act's provisions are applicable only to conduct occurring after commitment, and not to prior conduct, the act remains applicable to the most dangerous patients—those committed. The Legislature having determined that the balance of several interests requires nondisclosure in the graver public danger commitment, it would be anomalous for this court to reweigh the interests, requiring disclosure for those less dangerous. Rather, we should follow the legislative direction by refusing to require disclosure of confidential information received by the therapist either before or in the absence of commitment. The Legislature obviously is more capable than is this court to investigate, debate and weigh potential patient harm through disclosure against the risk of public harm by nondisclosure. We should defer to its judgment.

COMMON LAW ANALYSIS

Entirely apart from the statutory provisions, the same result must be reached upon considering both general tort principles and the public policies favoring effective treatment, reduction of violence, and justified commitment.

Generally, a person owes no duty to control the conduct of another. (*Richards v. Stanley* (1954) 43 Cal.2d 60, 65, 271 P.2d 23; *Wright v. Arcade School Dist.* (1964) 230 Cal.App.2d 272, 277, 40 Cal.Rptr. 812; Rest.2d Torts (1965) § 315.) Exceptions are recognized only in limited situations where (1) a special relationship exists between the defendant and injured party, or (2) a special relationship exists between defendant and the active wrongdoer, imposing a duty on defendant to control the wrongdoer's conduct. The majority does not contend the first exception is appropriate to this case.

Policy generally determines duty. (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734, 69 Cal.Rptr. 72, 441 P.2d 912.) Principal policy considerations include foreseeability of harm, certainty of the plaintiff's injury, proximity of the defendant's conduct to the plaintiff's injury, moral blame attributable to defendant's conduct, prevention of future harm, burden on the defendant, and consequences to the community. (*Rowland v. Christian* (1968) 69 Cal.2d 109, 113, 70 Cal.Rptr. 97, 443 P.2d 561.)

Overwhelming policy considerations weigh against imposing a duty on psychotherapists to warn a potential victim against harm. While offering virtually no benefit to society, such a duty will frustrate psychiatric treatment, invade fundamental patient rights and increase violence.

The importance of psychiatric treatment and its need for confidentiality have been recognized by this court. (*In re Lifschutz* (1970) 2 Cal.3d 415, 421-422, 85 Cal.Rptr. 829, 467 P.2d 557.) "It is clearly recognized that the very practice of psychiatry vitally depends upon the reputation in the community that the psychiatrist will not tell." (Slovenko, *Psychiatry and a Second*

Look at the Medical Privilege (1960) 6 Wayne L.Rev. 175, 188.)

Assurance of confidentiality is important for three reasons.

DETERRENCE FROM TREATMENT

First, without substantial assurance of confidentiality, those requiring treatment will be deterred from seeking assistance. (See Sen. Judiciary Com. comment accompanying § 1014 of Evid.Code; Slovenko, *supra*, 6 Wayne L.Rev. 175, 187-188; Goldstein & Katz, *Psychiatrist-Patient Privilege: The G-AP Proposal and the Connecticut Statute* (1962) 36 Conn.Bar J. 175, 178.) It remains an unfortunate fact in our society that people seeking psychiatric guidance tend to become stigmatized. Apprehension of such stigma—apparently increased by the propensity of people considering treatment to see themselves in the worst possible light—creates a well-recognized reluctance to seek aid. (Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications* (1964) 10 Wayne L.Rev. 609, 617; Slovenko, *supra*, 6 Wayne L.Rev. 175, 188; see also Rappeport, *Psychiatrist-Patient Privilege* (1963) 23 Md.L.J. 39, 46-47.) This reluctance is alleviated by the psychiatrist's assurance of confidentiality.

FULL DISCLOSURE

Second, the guarantee of confidentiality is essential in eliciting the full disclosure necessary for effective treatment. (*In re Lifschutz*, *supra*, 2 Cal.3d 415, 431, 85 Cal. Rptr. 829, 467 P.2d 557; *Taylor v. United States* (1955), 95 U.S.App.D.C. 373, 222 F.2d 398, 401; Goldstein & Katz, *supra*, 36 Conn.Bar J. 175, 178; Heller, *Some Comments to Lawyers on the Practice of Psychiatry* (1957) 30 Temp.L.Q. 401; Guttmacher & Weihofen, *Privileged Communications Between Psychiatrist and Patient* (1952) 28 Ind.L.J. 32, 34.)³ The psychiatric patient approaches treatment with

3. One survey indicated that five of every seven people interviewed said they would be less likely to make full disclosure to a psychiatrist in the absence of assurance of confidentiality. (See, Comment, *Functional*

conscious and unconscious inhibitions against revealing his innermost thoughts. "Every person, however well-motivated, has to overcome resistances to therapeutic exploration. These resistances seek support from every possible source and the possibility of disclosure would easily be employed in the service of resistance." (Goldstein & Katz, *supra*, 36 Conn.Bar J. 175, 179; see also, 118 Am.J.Psych. 734, 735.) Until a patient can trust his psychiatrist not to violate their confidential relationship, "the unconscious psychological control mechanism of repression will prevent the recall of past experiences." (Butler, *Psychotherapy and Griswold: Is Confidentiality a Privilege or a Right?* (1971) 3 Conn.L.Rev. 599, 604.)

SUCCESSFUL TREATMENT

Third, even if the patient fully discloses his thoughts, assurance that the confidential relationship will not be breached is necessary to maintain his trust in his psychiatrist—the very means by which treatment is effected. "[T]he essence of much psychotherapy is the contribution of trust in the external world and ultimately in the self, modelled upon the trusting relationship established during therapy." (Dawidoff, *The Malpractice of Psychiatrists*, 1966 Duke L.J. 696, 704.) Patients will be helped only if they can form a trusting relationship with the psychiatrist. (*Id.* at p. 704, fn. 34; Burham, *Separation Anxiety* (1965) 13 Arch.Gen. Psychiatry 346, 356; Heller, *supra*, 30 Temp.L.Q. 401, 406.) All authorities appear to agree that if the trust relationship cannot be developed because of collusive communication between the psychiatrist and others, treatment will be frustrated. (See, e.g., Slovenko (1973) *Psychiatry and Law*, p. 61; Cross, *Privileged Communications Between Participants in Group Psychotherapy* (1970) *Law and the Social Order*, 191, 199; Hollender, *The*

Overlap Between the Lawyer and Other Professionals: Its Implications for the Doctrine of Privileged Communications (1962) 71 Yale L.J. 1228, 1255.)

Psychiatrist and the Release of Patient Information (1960) 116 Am.J. Psychiatry 828, 829.)

Given the importance of confidentiality to the practice of psychiatry, it becomes clear the duty to warn imposed by the majority will cripple the use and effectiveness of psychiatry. Many people, potentially violent—yet susceptible to treatment—will be deterred from seeking it; those seeking it will be inhibited from making revelations necessary to effective treatment; and, forcing the psychiatrist to violate the patient's trust will destroy the interpersonal relationship by which treatment is effected.

VIOLENCE AND CIVIL COMMITMENT

By imposing a duty to warn, the majority contributes to the danger to society of violence by the mentally ill and greatly increases the risk of civil commitment—the total deprivation of liberty—of those who should not be confined.⁴ The impairment of treatment and risk of improper commitment resulting from the new duty to warn will not be limited to a few patients but will extend to a large number of the mentally ill. Although under existing psychiat-

4. The burden placed by the majority on psychiatrists may also result in the improper deprivation of two other constitutionally protected rights. First, the patient's constitutional right of privacy (*In re Lifschutz, supra*, 2 Cal.3d 415, 85 Cal.Rptr. 829, 467 P.2d 557) is obviously encroached upon by requiring the psychotherapist to disclose confidential communications. Secondly, because confidentiality is essential to effective treatment, the majority's decision also threatens the constitutionally recognized right to receive treatment. (*People v. Feagley* (1975) 14 Cal.3d 338, 359, 121 Cal.Rptr. 509, 535 P.2d 373; *Wyatt v. Stickney* (M.D.Ala.1971) 325 F. Supp. 781, 784, affd. sub nom. *Wyatt v. Aderholt* (5th Cir. 1974) 503 F.2d 1305; *Nason v. Superintendent of Bridgewater State Hosp.* (1968) 353 Mass. 604, 233 N.E.2d 908.)

5. A shocking illustration of psychotherapists' inability to predict dangerousness, cited by this court in *People v. Burnick, supra*, 14 Cal.3d 306, 326-327, fn. 17, 121 Cal.Rptr. 488, 535 P.2d 352, is cited and discussed in Ennis, *Prisoners of Psychiatry: Mental Patients, Psychiatrists, and the Law* (1972):

ric procedures only a relatively few receiving treatment will ever present a risk of violence, the number making threats is huge, and it is the latter group—not just the former—whose treatment will be impaired and whose risk of commitment will be increased.

Both the legal and psychiatric communities recognize that the process of determining potential violence in a patient is far from exact, being fraught with complexity and uncertainty. (E.g., *People v. Burnick* (1975) 14 Cal.3d 306, 326, 121 Cal.Rptr. 488, 535 P.2d 352, quoting from *Murel v. Baltimore City Criminal Court* (1972) 407 U.S. 355, 364-365, fn. 2, 92 S.Ct. 2091, 32 L.Ed. 2d 791 (Douglas, J., dissenting from dismissal of certiorari); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal.L.Rev. 693, 711-716; Rector, *Who Are the Dangerous?* (July 1973) Bull. of Amer.Acad. of Psych. & L. 186; Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness* (1972) 18 Crime & Delinquency 371; Justice & Birkman, *An Effort to Distinguish the Violent From the Nonviolent* (1972) 65 So.Med.J. 703.)⁵ In fact precision has not even been

"In a well-known study, psychiatrists predicted that 989 persons were so dangerous that they could not be kept even in civil mental hospitals, but would have to be kept in maximum security hospitals run by the Department of Corrections. Then, because of a United States Supreme Court decision, those persons were transferred to civil hospitals. After a year, the Department of Mental Hygiene reported that one-fifth of them had been discharged to the community, and over half had agreed to remain as voluntary patients. During the year, only 7 of the 989 committed or threatened any act that was sufficiently dangerous to require retransfer to the maximum security hospital. Seven correct predictions out of almost a thousand is not a very impressive record. [9] Other studies, and there are many, have reached the same conclusion: psychiatrists simply cannot predict dangerous behavior." (*Id.* at p. 227.) Equally illustrative studies are collected in Rosenhan, *On Being Sane in Insane Places* (1973) 13 Santa Clara Law. 379, 394; Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, supra*, 62 Cal.L.Rev. 693, 750-751.)

attained in predicting who of those having already committed violent acts will again become violent, a task recognized to be of much simpler proportions. (Kozol, Boucher & Garofalo, *supra*, 18 Crime & Delinquency 371, 384.)

This predictive uncertainty means that the number of disclosures will necessarily be large. As noted above, psychiatric patients are encouraged to discuss all thoughts of violence, and they often express such thoughts. However, unlike this court, the psychiatrist does not enjoy the benefit of overwhelming hindsight in seeing which few, if any, of his patients will ultimately become violent. Now, confronted by the majority's new duty, the psychiatrist must instantaneously calculate potential violence from each patient on each visit. The difficulties researchers have encountered in accurately predicting violence will be heightened for the practicing psychiatrist dealing for brief periods in his office with heretofore nonviolent pa-

tients. And, given the decision not to warn or commit must always be made at the psychiatrist's civil peril, one can expect most doubts will be resolved in favor of the psychiatrist protecting himself.

Neither alternative open to the psychiatrist seeking to protect himself is in the public interest. The warning itself is an impairment of the psychiatrist's ability to treat, depriving many patients of adequate treatment. It is to be expected that after disclosing their threats, a significant number of patients, who would not become violent if treated according to existing practices, will engage in violent conduct as a result of unsuccessful treatment. In short, the majority's duty to warn will not only impair treatment of many who would never become violent but worse, will result in a net increase in violence.⁶

The second alternative open to the psychiatrist is to commit his patient rather than to warn. Even in the absence of threat of civil liability, the doubts of psy-

6. The majority concedes that psychotherapeutic dialogue often results in the patient expressing threats of violence that are rarely executed. (*Ante*, p. 441, p. 27 of 131 Cal. Rptr., p. 347 of 551 P.2d.) The practical problem, of course, lies in ascertaining which threats from which patients will be carried out. As to this problem, the majority is silent. They do, however, caution that a therapist certainly "should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationships with his therapist and with the persons threatened." (*Id.*)

Thus, in effect, the majority informs the therapists that they must accurately predict dangerousness—a task recognized as extremely difficult—or face crushing civil liability. The majority's reliance on the traditional standard of care for professionals that "therapist need only exercise 'that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances'" (*ante*, p. 438, p. 25 of 131 Cal. Rptr., p. 345 of 551 P.2d) is seriously misplaced. This standard of care assumes that, to a large extent, the subject matter of the specialty is ascertainable. One clearly ascertainable element in the psychiatric field is that the therapist cannot accurately predict dangerousness, which, in turn, means that

the standard is inappropriate for lack of a relevant criterion by which to judge the therapist's decision. The inappropriateness of the standard the majority would have us use is made patent when consideration is given to studies, by several eminent authorities, indicating that "[t]he chances of a second psychiatrist agreeing with the diagnosis of a first psychiatrist 'are barely better than 50-50; or stated differently, there is about as much chance that a different expert would come to some different conclusion as there is that the other would agree.'" (Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, *supra*, 62 Cal.L.Rev. 693, 701, quoting, Ziskin, *Coping With Psychiatric and Psychological Testimony*, 123.) The majority's attempt to apply a normative scheme to a profession which must be concerned with problems that balk at standardization is clearly erroneous.

In any event, an ascertainable standard would not serve to limit psychiatrist disclosure of threats with the resulting impairment of treatment. However compassionate, the psychiatrist hearing the threat remains faced with potential crushing civil liability for a mistaken evaluation of his patient and will be forced to resolve even the slightest doubt in favor of disclosure or commitment.

chiatrists as to the seriousness of patient threats have led psychiatrists to overcommit to mental institutions. This overcommitment has been authoritatively documented in both legal and psychiatric studies. (Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, *supra*, 62 Cal.L.Rev. 693, 711 et seq.; Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 Cal.L.Rev. 1025, 1044-1046; Am. Psychiatric Assn. Task Force Rep. 8 (July 1974) Clinical Aspects of the Violent Individual, pp. 23-24; see Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U.Pa.L.Rev. 75, 84.) This practice is so prevalent that it has been estimated that "as many as twenty harmless persons are incarcerated for every one who will commit a violent act." (Steadman & Coccozza, *Stimulus/Response: We Can't Predict Who is Dangerous* (Jan. 1975) 8 Psych. Today 32, 35.)

Given the incentive to commit created by the majority's duty, this already serious situation will be worsened, contrary to Chief Justice Wright's admonition "that liberty is no less precious because forfeited in a civil proceeding than when taken as a consequence of a criminal conviction." (*In re IV*, (1971) 5 Cal.3d 296, 307, 96 Cal.Rptr. 1, 9, 486 P.2d 1201, 1209.)

CONCLUSION

In adopting the act, the Legislature fully recognized the concerns that must govern our decision today—adequate treatment for the mentally ill, safety of our society, and our devotion to individual liberty, making overcommitment of the mentally ill abhorrent. (§ 5001.) Again, the Legislature balanced these concerns in favor of nondisclosure (§ 5328), thereby promoting effective treatment, reducing temptation for overcommitment, and ensuring greater safety for our society. Psychiatric and legal expertise on the subject requires the same judgment.

The tragedy of Tatiana Tarasoff has led the majority to disregard the clear legislative mandate of the Lanterman-Petris-

Short Act. Worse, the majority impedes medical treatment, resulting in increased violence from—and deprivation of liberty to—the mentally ill.

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

The judgment should be affirmed.

McCOMB, J., concurs.



131 Cal.Rptr. 42
NATIONAL INSURANCE UNDERWRITERS, Plaintiff and Respondent,

v.

Maurice CARTER et al., Defendants and Appellants.

L. A. 30384.

Supreme Court of California,
In Bank.

June 30, 1978.

Rehearing Denied July 28, 1978.

Airplane liability insurer filed declaratory relief action to determine extent of its liability, if any, arising out of airplane crash, which occurred when airplane was occupied by three nonpaying guests and by unqualified pilot, who had insured owners' permission to pilot airplane, and which resulted in lawsuits against owners and the unqualified pilot. The Superior Court, Los Angeles County, Campbell M. Lucas, J., entered summary judgment in favor of insurer, and owners and pilot appealed. The Supreme Court, Richardson, J., held that policy was inapplicable to accident since pilot was not covered under exclusion clause despite language in insuring clause of policy defining the word "insured" to include persons using or riding in the airplane with the permission of the owners; that that pilot exclusion clause accorded with reasonable expectations of the insured, that policy provision excluding coverage for pi-

jurisdiction. *August v. August*, 65 Ga.App. 883, 16 S.E.2d 784, 785.

Ne exeat regno /niy ěksiyat rěgnow/. Lat. In English practice, a writ which issues to restrain a person from leaving the kingdom. It was formerly used for political purposes, but is now only resorted to in equity when the defendant is about to leave the kingdom; it is only in cases where the intention of the party to leave can be shown that the writ is granted.

Ne exeat republica /niy ěksiyat rěpĕblĕkĕ/. Lat. In American practice, a writ similar to that of *ne exeat regno* (q.v.), available to the plaintiff in a civil suit, under some circumstances, when the defendant is about to leave the state.

Nefas /niyfĕs/. Lat. That which is against right or the divine law. A wicked or impious thing or act.

Nefastus /nafĕstĕs/. Lat. Inauspicious. Applied, in the Roman law, to a day on which it was unlawful to open the courts or administer justice.

Negatio conclusionis est error in lege /nĕgĕysh(iy)ow kĕnkĕlwz(h)iyowĕnas ěst ěhrĕr in liyjij/. The denial of a conclusion is error in law.

Negatio destruit negationem, et ambæ faciunt affirmationem /nĕgĕysh(iy)ow dĕstruwĕt nĕgĕyshiyowĕnĕm ěd ěmbiy fĕyshiyĕnt ěfarmĕyshiyowĕnĕm/. A negative destroys a negative, and both make an affirmative.

Negatio duplex est affirmatio /nĕgĕysh(iy)ow d(y)uwplĕks ěst ěfarmĕysh(iy)ow/. A double negative is an affirmative.

Negative. A denial; a proposition by which something is denied; a statement in the form of denial. Two negatives do not make a good issue.

As to negative Covenant; Easement; Servitude; Statute; and Testimony, see those titles.

Negative averment. As opposed to the traverse or simple denial of an affirmative allegation, a negative averment is an allegation of some substantive fact, e.g., that premises are not in repair, which, although negative in form, is really affirmative in substance, and the party alleging the fact of non-repair must prove it. An averment in some of the pleadings in a case in which a negative is asserted. *U. S. v. Eisenminger*, D.C.Del., 16 F.2d 816, 819.

Negative condition. One by which it is stipulated that a given thing shall not happen.

Negative covenant. A provision in an employment agreement or a contract of sale of a business which prohibits the employee or seller from competing in the same area or market. Such restriction must be reasonable in scope and duration.

Negative easement. A right in owner of dominant tenement to restrict owner of servient tenement in exercise of general and natural rights of property. *Fort Dodge, D. M. & S. Ry. v. American Community Stores Corp.*, 256 Iowa 1344, 131 N.W.2d 515, 521. A negative easement is one effect of which is not to authorize doing of act by person entitled to easement, but merely to preclude owner of land subject to easement from doing of an act which, if no easement

existed, he would be entitled to do. *McLaughlin v. Neiger*, Mo.App., 286 S.W.2d 380, 383.

Negative evidence. Testimony that an alleged fact did not exist. See *Rebuttal evidence*.

Negative pregnant. In pleading, a negative implying also an affirmative. Such a form of negative expression as may imply or carry within it an affirmative. A denial in such form as to imply or express an admission of the substantial fact which apparently is controverted; or a denial which, although in the form of a traverse, really admits the important facts contained in the allegations to which it relates. *Cramer v. Aiken*, 63 App.D.C. 16, 68 F.2d 761, 762.

Negligidare. To claim kindred.

Neglect. May mean to omit, fail, or forbear to do a thing that can be done, or that is required to be done, but it may also import an absence of care or attention in the doing or omission of a given act. And it may mean a designed refusal or unwillingness to perform one's duty. In *re Perkins*, 234 Mo.App. 716, 117 S.W.2d 686, 692.

The term is used in the law of bailment as synonymous with "negligence." But the latter word is the closer translation of the Latin "*negligentia*."

Failure to pay money which the party is bound to pay without demand. An omission to do or perform some work, duty, or act. Failure to perform or discharge a duty, covering positive official misdoing or official misconduct as well as negligence.

See also *Excusable neglect*; *Negligence*.

Culpable neglect. Such neglect which exists where the loss can fairly be ascribed to the party's own carelessness, improvidence, or folly. *State ex rel. Fulton v. Coburn*, 133 Ohio St. 192, 12 N.E.2d 471, 477, 10 O.O. 249.

Willful neglect. The neglect of the husband to provide for his wife the common necessities of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy, or dissipation.

Neglected child. A child is "neglected" when his parent or custodian, by reason of cruelty, mental incapacity, immorality or depravity, is unfit properly to care for him, or neglects or refuses to provide necessary physical, affectional, medical, surgical, or institutional or hospital care for him, or he is in such condition of want or suffering, or is under such improper care or control as to endanger his morals or health. In *re DuMond*, 196 Misc. 16, 17, 92 N.Y.S.2d 805.

Neglected minor. One suffering from neglect and in state of want. *People v. De Pue*, 217 App.Div. 321, 217 N.Y.S. 205, 206. See *Neglected child*.

Negligence. The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.

Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to

do what a person of ordinary prudence would have done under similar circumstances. *Amoco Chemical Corp. v. Hill*, Del.Super., 318 A.2d 614, 617. Conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm; it is a departure from the conduct expectable of a reasonably prudent person under like circumstances. *Pence v. Ketchum*, La., 326 So.2d 831, 836.

The term refers only to that legal delinquency which results whenever a man fails to exhibit the care which he ought to exhibit, whether it be slight, ordinary, or great. It is characterized chiefly by inadvertence, thoughtlessness, inattention, and the like, while "wantonness" or "recklessness" is characterized by willfulness. The law of negligence is founded on reasonable conduct or reasonable care under all circumstances of particular case. Doctrine of negligence rests on duty of every person to exercise due care in his conduct toward others from which injury may result.

See also *Actionable negligence*; *Active negligence*; *Cause*; *Comparative negligence*; *Concurrent negligence*; *Fault*; *Imputed negligence*; *Invitation*; *Joint negligence*; *Laches*; *Legal negligence*; *Palsgraph doctrine*; *Parental liability*; *Product liability*; *Reasonable man doctrine*; *Reckless*; *Simple negligence*; *Standard of care*; *Strict liability*; *Supervening negligence*.

Actionable negligence. See *Actionable negligence*.

Active negligence. See *Active negligence*.

Collateral negligence. In the law relating to the responsibility of an employer or principal for the negligent acts or omissions of his employee, the term "collateral" negligence is sometimes used to describe negligence attributable to a contractor employed by the principal and for which the latter is not responsible, though he would be responsible for the same thing if done by his servant. *Weber v. Buffalo Railway Co.*, 20 App.Div. 292, 47 N.Y.S. 7.

Comparative negligence. See *Comparative negligence*.

Concurrent negligence. Arises where the injury is proximately caused by the concurrent wrongful acts or omissions of two or more persons acting independently. See also *Concurrent negligence*.

Contributory negligence. The act or omission amounting to want of ordinary care on part of complaining party, which, concurring with defendant's negligence, is proximate cause of injury. *Honaker v. Crutchfield*, 247 Ky. 495, 57 S.W.2d 502. Conduct by a plaintiff which is below the standard to which he is legally required to conform for his own protection and which is a contributing cause which cooperates with the negligence of the defendant in causing the plaintiff's harm. *Li v. Yellow Cab Co. of California*, 13 Cal.3d 804, 119 Cal.Rptr. 858, 864, 532 P.2d 1226.

Conduct for which plaintiff is responsible amounting to a breach of duty which law imposes on persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to injury complained of as a proximate cause. *Cowan v. Dean*, 81 S.D. 486, 137 N.W.2d 337, 341.

The defense of contributory negligence has been replaced by the doctrine of comparative negligence (q.v.) in many states. See also *Exceptions and limitations, infra*.

An affirmative defense which must be pleaded and proved by defendant. Fed.R.Civil P., Rule 8(c).

Doctrine is also applicable to one who through his own negligence has contributed to material alteration of a negotiable instrument. U.C.C. § 3-406.

Criminal negligence. Criminal negligence which will render killing a person manslaughter is the omission on the part of the person to do some act which an ordinarily careful and prudent man would do under like circumstances, or the doing of some act which an ordinarily careful, prudent man under like circumstances would not do by reason of which another person is endangered in life or bodily safety; the word "ordinary" being synonymous with "reasonable" in this connection.

Negligence of such a character, or occurring under such circumstances, as to be punishable as a crime by statute; or (at common law) such a flagrant and reckless disregard of the safety of others, or wilful indifference to the injury liable to follow, as to convert an act otherwise lawful into a crime when it results in personal injury or death.

That species of want of care by which a person may be criminally liable. It varies from jurisdiction to jurisdiction and is called culpable negligence in some. However, it generally refers to conduct which is not intentional and ordinarily not wilful, wanton and reckless.

See *Negligent homicide*; *Negligently*; *Negligent manslaughter*.

Culpable negligence. Failure to exercise that degree of care rendered appropriate by the particular circumstances, and which a man of ordinary prudence in the same situation and with equal experience would not have omitted.

Degrees of negligence. While there are degrees of care, and failure to exercise proper degree of care is "negligence," most courts hold that there are no degrees (e.g. slight, ordinary, gross) of negligence, except in bailment cases or under automobile guest statutes. *Murray v. De Luxe Motor Stages of Illinois*, Mo.App., 133 S.W.2d 1074, 1078. The prevailing view is that there are no "degrees" of care in negligence, as a matter of law; there are only different amounts of care as a matter of fact. To the extent that the degrees of negligence survive, they are described below.

Exceptions and limitations. The general rule in automobile accident cases that contributory negligence bars recovery for the injuries sustained is subject to various exceptions and limitations. Thus the defense of contributory negligence may be inapplicable where defendant's negligence is of a gross or wilful character. Moreover, application of the doctrine of contributory negligence is limited by the last clear chance doctrine or similar doctrines, or by comparative negligence statutes.

Gross negligence. The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another.

It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. But it is something less than the wilful, wanton and reckless conduct which renders a defendant who has injured another liable to the latter even though guilty of contributory negligence, or which renders a defendant in rightful possession of real estate liable to a trespasser whom he has injured. It falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure.

Gross negligence consists of conscious and voluntary act or omission which is likely to result in grave injury when in face of clear and present danger of which alleged tortfeasor is aware. *Glaab v. Caudill*, Fla.App., 236 So.2d 180, 182, 183, 185. That entire want of care which would raise belief that act or omission complained of was result of conscious indifference to rights and welfare of persons affected by it. *Claunch v. Bennett*, Tex.Civ.App., 395 S.W.2d 719, 724; *Snyder v. Jones*, Tex.Civ.App., 392 S.W.2d 504, 505, 507. Indifference to present legal duty and utter forgetfulness of legal obligations, so far as other persons may be affected, and a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence.

Hazardous negligence. Such careless or reckless conduct as exposes one to very great danger of injury or to imminent peril.

Imputed negligence. Refers to doctrine that places upon one person responsibility for the negligence of another; such responsibility or liability is imputed by reason of some special relationship of the parties, such as parent and child, husband and wife, driver and passenger, owner of vehicle and driver, bailor and bailee, master and servant, joint enterprise, and parent and custodian of a child. *Schmidt v. Martin*, 212 Kan. 373, 510 P.2d 1244, 1246.

Generally the doctrine of imputed negligence, as applied to automobile accidents, visits on one person legal responsibility for the negligent conduct of another. The doctrine applies only in limited classes of cases, as where there is a right to control in the relationship of master and servant, principal and agent, or a joint enterprise. The independent negligence of one person ordinarily is not imputable to another person except where the relation between the persons gives rise to an express or implied agency in the person committing the act of negligence.

Legal negligence. See Legal negligence.

Ordinary negligence. The omission of that care which a man of common prudence usually takes of his own concerns. *Briggs v. Spaulding*, 141 U.S. 132, 11 S.Ct. 924, 35 L.Ed. 662. Failure to exercise care of an ordinarily prudent person in same situation. A want of that care and prudence that the great majority of mankind exercise under the same or similar circumstances. Wherever distinctions between gross, ordinary and slight negligence are observed, "ordinary negligence" is said to be the want of ordinary care.

Ordinary negligence is based on fact that one ought to have known results of his acts, while "gross negligence" rests on assumption that one knew results of his acts, but was recklessly or wantonly indifferent to results. The distinction between "ordinary negligence" and "gross negligence" is that the former lies in the field of inadvertence and the latter in the field of actual or constructive intent to injure.

Passive negligence. Failure to do something that should have been done. It is negligence which permits defects, obstacles, or pitfalls to exist on premises; that is, negligence which causes dangers arising from physical condition of land. *Pachowitz v. Milwaukee & Suburban Transport Corp.*, 56 Wis.2d 383, 202 N.W.2d 268, 275.

Difference between "active" and "passive" negligence is that one is only passively negligent if he merely fails to act in fulfillment of duty of care which law imposes upon him, while one is actively negligent if he participates in some manner in conduct or omission which caused injury. *King v. Timber Structures, Inc. of Cal.*, 240 Cal.App.2d 178, 49 Cal.Rptr. 414, 417.

Per se negligence. The unexcused violation of a statute which is applicable is per se or automatic negligence in some states. See also Negligence per se.

Slight negligence. A failure to exercise great care. Slight negligence is defined to be only an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use. *Briggs v. Spaulding*, 141 U.S. 132, 11 S.Ct. 924, 35 L.Ed. 662.

Subsequent negligence. Exists where defendant sees plaintiff in a position of danger and fails to exercise due and proper precaution to prevent injury to plaintiff. *Holtzman v. Brady*, 241 Ala. 487, 3 So.2d 30, 33.

Wilful, wanton or reckless negligence. These terms are customarily treated as meaning essentially the same thing. The usual meaning assigned to "wilful," "wanton" or "reckless," according to taste as to the word used, is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences, amounting almost to willingness that they shall follow; and it has been said that this is indispensable. See for example *Tyndall v. Rippon*, 5 Del.Super. 458, 61 A.2d 422; *Wolters v. Venhaus*, 350 Ill.App. 322, 112 N.E.2d 747; *Clarke v. Storchak*, 384 Ill. 564, 52 N.E.2d 229, appeal dismissed 322 U.S. 713, 64 S.Ct. 1270, 88 L.Ed. 1555; *Tighe v. Diamond*, 149

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Ohio St. 520, 80 N.E.2d 122, 37 O.O. 243. The result is that "wilful," "wanton" or "reckless" conduct tends to take on the aspect of highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. As a result there is often no clear distinction at all between such conduct and "gross" negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence, differing in quality rather than in degree from ordinary lack of care. It is at least clear, however, that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simple inattention.

"Wantonness" constituting gross and wanton negligence within automobile guest statute indicates a realization of imminence of danger and a reckless disregard, complete indifference, and unconcern of probable consequences of the wrongful act. Mann v. Good, 202 Kan. 631, 451 P.2d 233, 236.

Negligence, estoppel by. An estoppel which occurs when one who is under a legal duty, either to the person injured or to the public, to act with due care, fails to do so, and such failure is the natural and proximate cause of misleading that person to alter his position. An estoppel arises when one by acts, representations, intentionally or negligently, induces another to change his position for the worse. Smith v. Vara, 136 Misc. 500, 241 N.Y.S. 202, 209.

An estoppel arises when one by acts, representations, or admissions, or by silence when he ought to speak, intentionally or through culpable negligence, induces another to believe certain facts to exist and such other rightfully relies and acts on such belief so that he will be prejudiced if the former is permitted to deny the existence of such facts.

Estoppel may exist where a party has led another into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and the other party has acted upon such belief to his prejudice. Scott v. First Nat. Bank, 343 Mo. 77, 119 S.W.2d 929, 938.

Negligence in law. "Actionable negligence" or "negligence in law" grows out of nonobservance of a duty prescribed by law. See also *Negligence per se*.

Negligence per se. Conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes. See also *Strict liability*.

Negligent. See *Negligence*.

Negligent escape. Where prisoner escapes through officer's negligence. Hershey v. People, 91 Colo. 113, 12 P.2d 345, 347.

Negligent homicide. The criminal offense committed by one whose negligence is the direct and proximate cause of another's death. The crime of negligent homicide consists of three component elements: (1) death of human being (2) by instrumentality of motor vehicle (3) operated on highway in negligent manner. State v. Colombo, 4 Conn.Cir. 671, 238 A.2d 806, 808. See also *Homicide (Vehicular homicide)*.

Negligentia /nɛglɪjəns(i)yə/. Lat. In the civil law, carelessness; inattention; the omission of proper care or forethought. The term is not exactly equivalent to our "negligence," inasmuch as it was not any *negligentia*, but only a high or gross degree of it, that amounted to *culpa* (actionable or punishable fault).

Negligentia semper habet infortunium comitem /nɛglɪjəns(i)yə sɛmpɔr hɛybəd ɪnfɔrchʊwn(i)yəm kɔmɔdəm/. Negligence always has misfortune for a companion.

Negligently. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. Model Penal Code, § 2.02. See also *Negligence*.

Negligently done. The doing of an act where ordinary care required that it should not have been done at all, or that it should have been done in some other way, and where the doing of the act was not consistent with the exercise of ordinary care under the circumstances. See *Negligence*.

Negligent manslaughter. A statutory crime in some jurisdictions consisting of an unlawful and unjustified killing of a person by negligence but without malice.

Negligent offense. One which ensues from a defective discharge of a duty, which defect could have been avoided by the exercise of that care which is usual, under similar circumstances, with prudent persons of the same class. People v. Gaydica, 122 Misc. 31, 203 N.Y.S. 243, 258.

Negligent violation of statute. One occasioned by or accompanied with negligent conduct.

Negoce /nɛgɔws/. Fr. Business; trade; management of affairs.

Negotiability /nɛgɔwsh(i)yəbɪlədi/. Legal character of being negotiable (q.v.).

Negotiable /nɛgɔwsh(i)yəbəl/. Legally capable of being transferred by endorsement or delivery. Usually said of checks and notes and sometimes of stocks and bearer bonds. See *Commercial paper*; *Negotiable Instruments*; *Non-negotiable*.

Negotiable bond. Type of bond which may be transferred by negotiation from original holder to another.

Negotiable document of title. A document is negotiable if by its terms the goods are to be delivered to "bearer", or to the order of a named party, or, where

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FISCAL NOTE

REQUEST:

Revision Date: February 1, 1988 Agency Affected: Administration
Title: An act limiting liability . . . BRU: Risk Management
persons . . . State custody.
Sponsor: Rules/by request of the Governor Components: _____
Requestor: House/Hess

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 |
|------------------------|-------|--------|---------|---------|---------|---------|
| PERSONAL SERVICES | 0 | 0 | 0 | 0 | 0 | 0 |
| TRAVEL | 0 | 0 | 0 | 0 | 0 | 0 |
| CONTRACTUAL | 0 | 0 | 0 | 0 | 0 | 0 |
| SUPPLIES | 0 | 0 | 0 | 0 | 0 | 0 |
| EQUIPMENT | 0 | 0 | 0 | 0 | 0 | 0 |
| LAND & STRUCTURES | 0 | 0 | 0 | 0 | 0 | 0 |
| GRANTS, CLAIMS | 0 | (64.0) | (137.0) | (246.0) | (377.0) | (523.0) |
| MISCELLANEOUS | 0 | 0 | 0 | 0 | 0 | 0 |
| TOTAL OPERATING | 0 | (64.0) | (137.0) | (246.0) | (377.0) | (523.0) |
| CAPITAL | 0 | 0 | 0 | 0 | 0 | 0 |
| REVENUE | 0 | 0 | 0 | 0 | 0 | 0 |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---------------|---|--------|---------|---------|---------|---------|
| GENERAL FUND | 0 | 0 | 0 | 0 | 0 | 0 |
| FEDERAL FUNDS | 0 | 0 | 0 | 0 | 0 | 0 |
| OTHER | 0 | (64.0) | (137.0) | (246.0) | (377.0) | (523.0) |
| TOTAL | 0 | (64.0) | (137.0) | (246.0) | (377.0) | (523.0) |

| POSITIONS: | 0 | 0 | 0 | 0 | 0 | 0 |
|------------|---|---|---|---|---|---|
| FULL-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| PART-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| TEMPORARY | 0 | 0 | 0 | 0 | 0 | 0 |

ANALYSIS: (Attach a separate page if necessary)

Please see attached Analysis.

Prepared By: Don Hitchcock, Director
Division: Risk Management

Phone: 465-2180
Date: March 2, 1988

Approved by Commissioner: John M. Andrews
Agency: Department of Administration

Date: _____

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

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CONTINUATION of FISCAL NOTE ANALYSIS
For HB 417

If enacted, this bill will generate significant future savings to the State.

As it will only apply to liability claims not yet incurred, the fiscal benefit is difficult to accurately project. Based on the State's present claims experience we project a 10% reduction in ultimate loss and loss adjustment expense per fiscal year on general liability claims for bodily injury and property damage. Using projections of the State's actuarial experience, the following conservatively projected savings should occur.

CASH FLOW SAVINGS ESTIMATED BY FISCAL YEAR (000)

| Year of Savings | YEAR OF OCCURANCE | | | | | | | TOTAL |
|-----------------|-------------------|------|-------|-------|-----|-------|-------|--------|
| | 88 | 89 | 90 | 91 | 92 | 93 | 94 | |
| 88 | 0 | 0 | | | | | | 0 |
| 89 | | 64 | | | | | | 64.0 |
| 90 | | 57 | 80 | | | | | 137.0 |
| 91 | | 74.5 | 71.25 | 100.0 | | | | 245.75 |
| 92 | | 70 | 93 | 89 | 125 | | | 377.0 |
| 93 | | 52.5 | 87.5 | 116 | 111 | 156 | | 523.0 |
| 94 | | | 65.75 | 109 | 145 | 139 | 195.2 | 653.95 |
| 95 | | | | 82 | 136 | 182 | | |
| 96 | | | | | 102 | 171 | | |
| 97 | | | | | | 128 | | |
| BALANCE | | 182 | 227 | 284 | 355 | 444 | | |
| TOTAL | | 500 | 625 | 781 | 976 | 1,220 | | |

These payments are projected using the following payment pattern for general liability claims:

- 12 months - 12.8%
- 24 months - 11.4%
- 36 months - 14.9%
- 48 months - 14.0%
- 60 months - 10.5%
- Balance - 36.4%

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CONTINUATION of FISCAL NOTE ANALYSIS
For HB 417

This projection does not reflect savings for unusually large claims, but rather a statistical trend of the average past claims. The State and its liability insurance carriers have paid several significantly large individual claims in the past that would be affected by this bill. The most notable being the Neakok case where \$5,000,000 was paid in settlement of that one individual case.

Therefore, the State could very easily realize substantially larger savings, but we are unable to predict them with certainty at this time.

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