ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
4564 HHES HB 417 - HB 424

136

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.

I

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

[444 US 281]

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. Amend. 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.

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

[444 US 282]

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

[444 US 283]

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

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4. 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 in 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, ante, at 1196, 62 L Ed 2d 355, 100 S Ct 402.

5. "Martinez says the st[illegible]nent Code section 845.8, subd[illegible]consti-tutional because it perm[illegible]rivation of life, a fundamental right, w[illegible] 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 Francisco, 237 Cal App 2d 23, 24 [. . .]). The California Tort Claims Act as a whole (Gov Code § 810 et seq.) has been found constitutional (Datil v City of Los Angeles, 263 Cal App 2d 655, 660–661 . . .). 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 Com com). 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 lawmakers 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 defeat 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 Claflin 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-

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

[444 US 285]

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 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.[11] 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.

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tutional 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 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 nonspecified 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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James C. Hooley, Public Defender, Oakland, John H. Larson, County Counsel, Los Angeles, Robert C. Lynch, Asst. Chief Deputy County Counsel, and Gordon J. Zuiderweg, Deputy County Counsel, Los Angeles, George Kading, County Counsel, Santa Barbara, Milton Goldinger, County Counsel, Fairfield, L. H. Gibbons, Dist. Atty., Raymond Schneider, County Counsel, Eureka, Stephen M. Dietrich, Jr., County Counsel, Sonora, Joseph W. Kiley, Dist. Atty., Neil B. Van Winkle, County Counsel, Mariposa, L. Joseph DeWald, Jr., County Counsel, Auburn, and Dorothy L. Schechter, County Counsel, Ventura, as amici curiae on behalf of defendant and respondent.

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.

I. *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 844.6.

[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: [¶] (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, namely, 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 728, 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 defendant, 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 [illegible] 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 *Beauchene 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.

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, unaware 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 382, 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.

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]

2. The majority opinion implicitly recognizes the distinction drawn in the quoted language from *Johnson*. In holding plaintiffs' comolaint 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.

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, arouse 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

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, JJ., concur.

131 Cal.Rptr. 14

Vitaly TARASOFF et al., Plaintiffs and Appellants,

v.

The REGENTS OF the UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents.

S. F. 23042.

Supreme Court of California, In Bank.

July 1, 1976.

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 confinement 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 ⇐414
Physicians and Surgeons ⇐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, § 1714.

2. Mental Health ⇐414
Physicians and Surgeons ⇐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, § 1714.

3. Pleading ⇐225(1)

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

tiffs' 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 relationship 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 intented 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 necessarily vary with the facts of each case, in each instance the adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances. 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.

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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 university 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, notwithstanding 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-

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 subsequently 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.

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-

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 Cowell Memorial Hospital who concurred in Moore's decision; and Dr. Powelson, chief of the department of psychiatry, who countermanded Moore's decision and directed that the staff take no action to confine Poddar. The police defendants include Officers Atkinson, Brownrigg and Halleran, who detained Poddar briefly but released him; Chief Beall, who received Moore's letter recommending that Poddar be confined; and Officer Teel, who, along with Officer Atkinson, received Moore's oral communication requesting detention of Poddar.

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

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.

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 axiomatic 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 1113; *Lemoge Electric v. County of San Mateo* (1956) 46 Cal.2d 659, 664, 297 P.2d 638; *Beckstead v. Superior Court* (1971) 21 Cal.App.3d 780, 782, 98 Cal.Rptr. 779.)

(See part 6 of this opinion.) We direct our attention, therefore, to the issue of whether plaintiffs' second cause of action can be amended to state a basis for recovery.

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

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

[4] In analyzing this issue, we bear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. As stated in *Dillon v. Legg* (1968) 68 Cal.2d 728, 734, 69 Cal.Rptr. 72, 76, 441 P.2d 912, 916: "The assertion that liability must . . . be denied because defendant bears no 'duty' to plaintiff 'begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. . . . [Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' (Prosser, Law of Torts [3d ed. 1964] at pp. 332–333.)"

In the landmark case of *Rowland v. Christian* (1968) 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561, Justice Peters recognized that liability should be imposed "for an injury occasioned to another by his want of ordinary care or skill" as expressed in section 1714 of the Civil Code. Thus, Justice Peters, quoting from *Heaven v. Pender* (1883) 11 Q.B.D. 503, 509 stated: "'whenever one person is by circumstances placed in such a position with regard to another . . . that if he did not use ordinary care and skill in his own conduct . . . he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.'"

[5–7] We depart from "this fundamental principle" only upon the "balancing of a number of considerations"; major ones "are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved." [4]

The most important of these considerations in establishing duty is foreseeability. As a general principle, a "defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 399, 115 Cal.Rptr. 765, 776, 525 P.2d 669, 680; *Dillon v. Legg, supra*, 68 Cal.2d 728, 739, 69 Cal.Rptr. 72, 441 P.2d 912; *Weirum v. R.K.O. General, Inc.* (1975) 15 Cal.3d 40, 123 Cal.Rptr. 468, 539 P.2d 36; see Civ.Code, § 1714.) As we shall explain, however, when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn

4. See *Merrill v. Buck* (1962) 58 Cal.2d 552, 562, 25 Cal.Rptr. 456, 375 P.2d 304; *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650, 320 P.2d 16; *Walnut Creek Aggregates Co. v. Testing Engineers Inc.* (1967) 248 Cal.App.2d 690, 695, 56 Cal.Rptr. 700.

of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim. Since the relationship between a therapist and his patient satisfies this requirement, we need not here decide whether foreseeability alone is sufficient to create a duty to exercise reasonably care to protect a potential victim of another's conduct.

[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 another[5] (*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 either the person whose conduct needs to be controlled or in a relationship to the foreseeable 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 either "(a) a special relation . . . between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation . . . between the actor and the other which gives to the other a right of protection."

[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 affirmative duties for the benefit of third persons. Thus, for example, a hospital must exercise reasonable care to control the behavior of a patient which may endanger other persons.[7] A doctor must also warn a pa-

5. This rule derives from the common law's distinction between misfeasance and nonfeasance, 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 relationships which will justify departure from that rule. (See Prosser, *supra*, § 56, at pp. 348–350.)

6. The pleadings establish the requisite relationship 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 allegations 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 measures were taken, then the hospital must use reasonable care in the circumstances to prevent such harm." (*Vistica v. Presbyterian Hospital* (1967) 67 Cal.2d 465, 469, 62 Cal. Rptr. 577, 580, 432 P.2d 193, 196.) (Emphasis 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. 1966) 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 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

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, 398 P.2d 14; see *Freese 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 child; *Johnson v. State of California* (1968) 69 Cal.2d 782, 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, 325–328, 121 Cal.Rptr. 488, 535

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." (*Bardessono 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; 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

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

Defendants further argue that free and open communication is essential to psychotherapy (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 Liftschutz*, *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

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.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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communications between patient and psychotherapist. In Evidence Code section 1024, the Legislature created a specific and limited exception to the psychotherapist-patient privilege: "There is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger."[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 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. (See Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 Cal.L.Rev. 1025, 1065–1066.)[14]

The revelation of a communication under the above circumstances is not a breach of trust or a violation of professional ethics; as stated in the Principles of Medical Ethics of the American Medical Association (1957), section 9: "A physician may not reveal the confidence entrusted to him in the course of medical attendance . . . *unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.*"[15] (Emphasis added.) We conclude that the 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. The protective privilege ends where the public peril begins.

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

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 conceded . . . 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 confidentiality are paramount and must therefore 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 expression of legislative policy concerning the balance between the confidentiality values of the patient and the safety values of his foreseeable victims." (Emphasis in original.) Fleming & Maximov, *The Patient or His Victim: 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 detention of the patient. The giving of a warning, 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 515.

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-

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

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.

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 Tatiana 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 governmental immunity for having failed to warn Tatiana 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*

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.

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. 360.) 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 immunity[21] 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. *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.

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 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 "dedud" army firing range assumed to be discretionary but failure to warn person about to go onto range of unsafe condition was not); *Bulloch 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,

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 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

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 . . . ."

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.

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.)

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

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 and 830.2 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 themeselves 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 manyfold 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

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 fecility, 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 received 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 5328, 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*) provides, "*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 108, 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 GAP 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 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*

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 Overlap Between the Lawyer and Other Professionals: Its Implications for the Doctrine of Privileged Communications* (1962) 71 Yale L.J. 1226, 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 psychiatric 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

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):

> "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. [¶] 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, 384; 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 patients. 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, 126.) 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 & Cocozza, *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 W.* (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 over-commitment, 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, 1976.

Rehearing Denied July 28, 1976.

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-

Blacks law Dictionary 5th ed.

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

Ne exeat regno /niy éksiyat régnow/. 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 éksiyat rəpəblikə/. 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 /níyfæs/. Lat. That which is against right or the divine law. A wicked or impious thing or act.

Nefastus /nəfæstəs/. 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 /nəgéysh(iy)ow kənklúwz(h)iyównəs èst érhər in líyjiy/. The denial of a conclusion is error in law.

Negatio destruit negationem, et ambæ faciunt affirmationem /nəgéysh(iy)ow dəstruwət nəgèyshiyównəm èd æmbiy féyshiyənt æfərméyshiyównəm/. A negative destroys a negative, and both make an affirmative.

Negatio duplex est affirmatio /nəgéysh(iy)ow d(y)úwplèks èst æfərméysh(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.

Negglidare. 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 necessaries 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 willful 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. Holman 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

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 /nèglajénsh(iy)ə/. 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 /nèglajénsh(iy)ə sémpər hébəd inforchúwn(i)yəm kómədəm/. 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 /nəgówS/. Fr. Business; trade; management of affairs.

Negotiability /nəgówsh(iy)əbílədiy/. Legal character of being negotiable *(q.v.).*

Negotiable /nəgówsh(iy)əbəl/. 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

STATE OF ALASKA
1988 LEGISLATIVE SESSION

Bill Version: HB 417
Publish Date:

DRAFT

FISCAL NOTE

REQUEST:

Revision Date: February 1, 1988
Title: An act limiting liability . . . persons . . . State custody.
Sponsor: Rules/by request of the Governor
Requestor: House/Hess

Agency Affected: Administration
BRU: Risk Management
Components:

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:

DRAFT

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

Rev. 1/11/87

DRAFT

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							
	88	89	90	91	92	93	94	TOTAL
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		

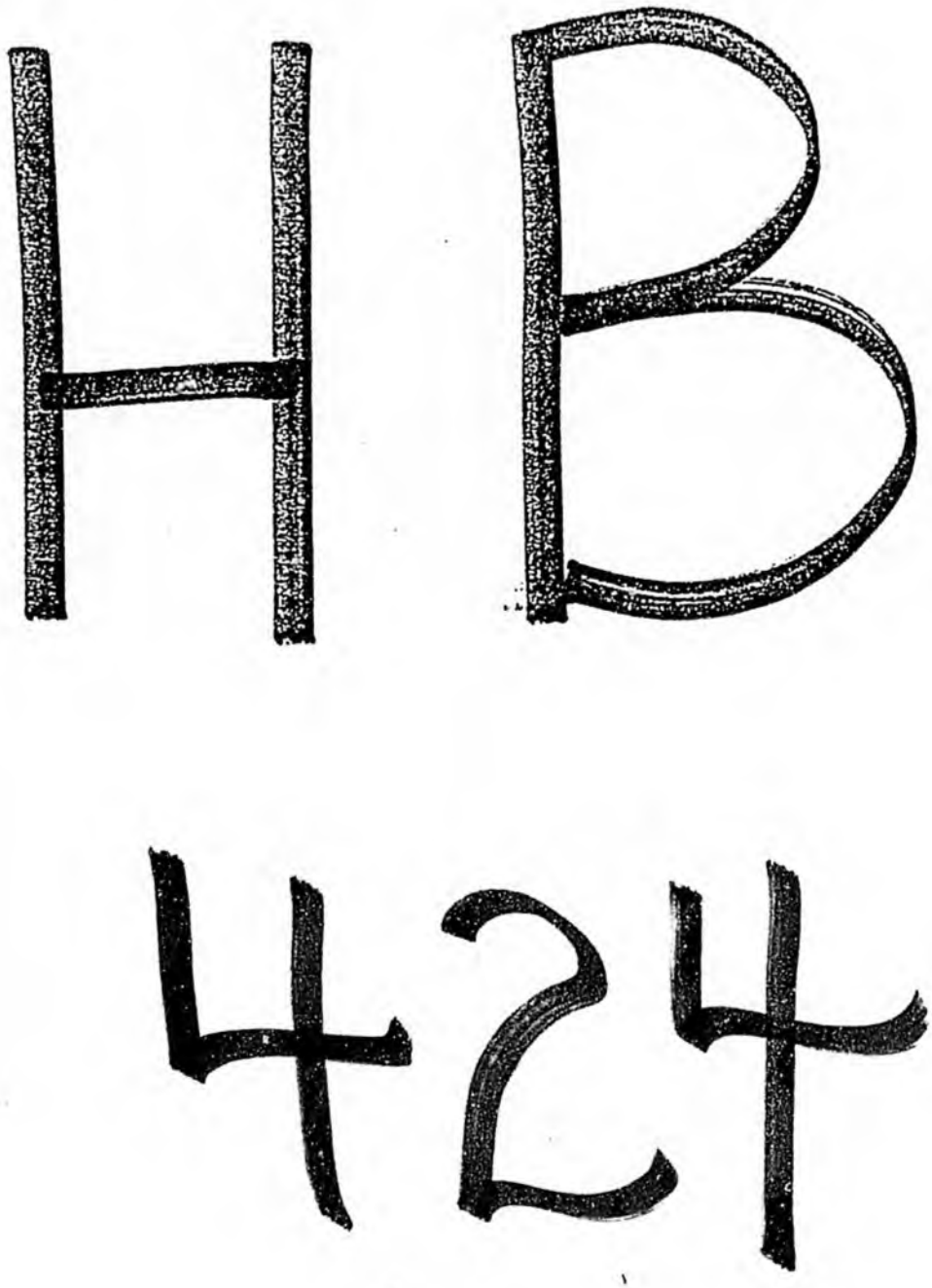
These payments are projected using the following payment pattern for general liability claims:

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

DRAFT

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.



STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

House Hess:

February 18, 1988

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

House Hess:

February 18, 1988

(7)

HOUSE COMMITTEE REPORT

Date referred: 2/3/88 FURTHER REFERRALS: Finance

DATE: 2-18-88

The Health, Education and Social Services Committee has considered HB 424

"An Act relating to the state Board of Education."

RECOMMENDS:

[X] replace with CS HB 424 (HESS) [ ] the same title

[ ] attached amendment(s) [ ] a new title

- [ ] do pass
- [ ] do not pass
- [ ] no recommendation
- [ ] individual recommendations
- [ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- [ ] fiscal impact
- [X] zero fiscal note
- [ ] zero with analysis
- [ ] same as previous fiscal note published _____
- [ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

CC-Chairman's signature

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : HB-424
Publish Date :

Revision Date:
Title : . . State Board of Education . .

Agency Affected : Education
BRU : Boards and Commissions

Sponsor : Ellis
Requestor : House HESS

Components : State Board of Education

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		Ø	Ø	Ø	Ø	Ø
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		Ø	Ø	Ø	Ø	Ø
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by : Steve Hole
Division : Commissioner's Office

Phone : 465-2800
Date : 2/17/88

Approved by Commissioner : William G. Demmert
Agency : Department of Education

Date : 2/17/88

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

Alaska State Legislature
House of Representatives
COMMITTEE ON HEALTH, EDUCATION
AND SOCIAL SERVICES

OFFICIAL BUSINESS

POUCH V
JUNEAU, AK 99811
465-3759

DRAFT DRAFT DRAFT

LETTER OF INTENT
TO
HB 424
BY THE
HOUSE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

It is the intent of the House Health, Education and Social Services Committee that the governor consider the state Board of Education's traditional method of selecting student and military members when making appointments.

The student and military members are currently appointed through a two tiered selection process. The Alaska Association of Student Governments (AASG) and the Commanding General each submit a list of three candidates for appointment. The state Board of Education then interviews the finalists and selects the representative members.

Rep. Niilo Koponen, Co-Chair
House HESS Committee

Rep. Johnny Ellis, Co-Chair
House HESS Committee

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

☐ *1031 W 4th AVENUE*
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

☐ *1st NATIONAL CENTER*
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679

☒ *P.O. BOX K—STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

465-3603

February 11, 1988

Honorable Johnny Ellis
Honorable Niilo E. Koponen
Co-chairmen
House Health, Education, and
Social Services Committee
Alaska State House
P.O. Box V
Juneau, Alaska 99811

Re: Potential constitutional problem with HB 424 (State Board of Education members)

Dear Co-chairmen Ellis and Koponen:

House Bill 424 would amend the statutes governing the State Board of Education to provide that the member representing military reservation schools and the student member would be full voting members of the board, rather than mere advisory members, as they are under present board bylaws. While that may be a laudable goal, we believe the bill may have a constitutional problem.

Section 3 of the bill would amend AS 14.03.085(b) to provide that the representative of the military reservation schools and the student member "shall be appointed from a list of nominees proposed by the board and submitted to the governor." We believe that provision would be an infringement on the executive power of appointment under art. III, § 26, Alaska Constitution. That section provides:

> When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the

appointment shall be subject to the approval of the governor.

Section 25 of art. III is similar with respect to other department heads, providing for appointment by the governor subject to confirmation by a joint session of the legislature. At issue is whether the legislature may impose additional restrictions on the governor's appointment power, limiting the governor to appointment from a list of nominees submitted by some other entity, in this case the incumbent State Board of Education.

In Bradner v. Hammond, 553 P.2d 1 (Alaska 1976), in considering whether the legislature could by statute make other executive branch officers subject to legislative confirmation, or whether art. III, §§ 25 and 26, describe the outer limits of the legislature's confirmation authority, the Alaska Supreme Court held that legislative confirmation is not a distinct legislative power, but rather is a specific attribute of the appointment power of the executive. It held that sections 25 and 26 "mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government."

We believe the courts would reach a similar result in determining whether the legislature can impose by statute a requirement that the governor's appointments to a board that is "at the head of a principal department or a regulatory or quasi-judicial agency" be made from a list of nominees submitted by some other entity. Because the appointment power is an executive power and the only role constitutionally delegated to the legislature is that of confirmation, the doctrine of separation of powers leads us to conclude that the legislature does not have the constitutional authority to require that the governor make appointments to those bodies from a list of nominees submitted by some other entity. Any statute imposing such a requirement is likely to be struck down by the courts as an unconstitutional legislative infringement on the executive appointment power.

For the above reasons, we recommend that HB 424 be amended to remove the sentence beginning on page 1, line 28. AS 14.07.085(a) would still require that the governor consider recommendations made by recognized educational associations in the state, but would not require that the appointment be made from lists of nominees submitted by those organizations. Please

contact me if you have questions regarding my comments on this matter.

Sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Thomas E. Wagner
Thomas E. Wagner
Assistant Attorney General

TEW:jal

cc: Arthur H. Peterson
Bob Evans

1024 WEST SIXTH AVENUE
ANCHORAGE, ALASKA 99501
(907) 274-4031

WHILE IN SESSION
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3704

ALASKA STATE HOUSE

OFFICE OF MAJORITY WHIP

CO-CHAIR
HEALTH, EDUCATION & SOCIAL SERVICES

LABOR & COMMERCE
SUBCOMMITTEE ON FOREIGN TRADE

REPRESENTATIVE JOHNNY ELLIS

M E M O R A N D U M

TO: All House Members

FROM: Rep. Johnny Ellis JE

DATE: January 25, 1988

SUBJECT: Co-sponsorship of State Board of Education Legislation

---

I plan to introduce the attached legislation which is in response to the 1987 Alaska Girl's and Boy's State legislation and the Alaska Association of School Governments resolution requests that the student and military members of the State Board of Education be granted voting rights.

Currently the State Board of Education consists of seven voting members apointed by the Governor for five year terms. The student and military representatives are appointed by the Board of Education for one year advisory terms.

The enclosed legislation would grant the student and military members voting privileges and make their yearly appointments the responsibility of the Governor. As is currently the tradition of the Board, representatives may be reappointed for successive terms if they remain qualified. Nominess for appointment will be proposed by the Board and submitted to the Governor.

I ask for your support in encouraging greater student and military participation on the Board by granting their requests to become voting members. I plan to introduce this legislation on Friday January 29th. Please contact Leola Weimer of my staff at x3704 by this Thursday if you wish your name to be added as co-sponsor of this bill.

Student Vote Resolution

Whereas, current Alaska Statute stipulates that a student member of the Alaska Association of School Governments serve on the Alaska State Board of Education in an advisory capacity, and

Whereas, past experience has shown that the student advisory members posses sufficient levels of maturity and competence to handle the responsibility of voting; and

Whereas, policies effected by the Alaska State Board of Education have a large and direct impact on the student population, and

Whereas, students are aware of problems and situations on the education system that adults may not be immediately cognizant of, and

Whereas, other states, including California and Rhode Island, have had favorable results with having a voting student member on their State Boards of Education, and

Whereas, Alaska Girl's State 1987 and Alaska Boy's State 1987 have passed legislation supporting this concept.

Therefore, be it resolved, that the Alaska Association of School Governments supports and encourages legislative measures to increase the size of the Alaska State Board of Education by one member, establishing the student advisory member as a full voting member.

IN THE SENATE BY EDUCATION

SENATE BILL NO. 4

IN THE LEGISLATURE OF ALASKA GIRLS STATE

A Bill for an Act entitled: "An Act relating to the change in membership status and voting rights of the student member on the State Board of Education; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF BOYS' STATE

*Section 1. AS 14.07.075 is amended to read:

Creation. There is created at the head of the Department of Education a Board of Education consisting of nine [seven] members. (1 ch 96 SLA 1967)

*Section 2. AS 14.07.085 is amended to read:

Appointment of members. (a) The nine [seven] members of the board, no more than five [four] of whom shall be members of the same political party as the governor, shall be appointed by the legislature in joint session. In appointing board members, the governor shall consider recommendations made by recognized educational associations in the state.

(b) One member shall be appointed from each of the four judicial districts and three from the state at large with at least one member representing regional educational attendance areas. One student member shall be appointed from the state at large who, during his/her term of office, is currently enrolled in any Alaska high school. The governor shall appoint the student member only upon the endorsement of the student by the Alaska Association of School Governments (A.A.S.G.) and the State Board of Education currently instated. One military member

*Section 2. This Act takes effect on

Signed by: HOUSE SPEAKER [signature] CHIEF CLERK Linda Dinkel

SENATE PRESIDENT [signature] SENATE SECRETARY [signature]

GOVERNOR [signature] Date: 11 JUNE 87

shall be appointed from the state at large who, during his term of office, is currently stationed at any military base within the state of Alaska. The governor shall appoint the military member only upon the endorsement of the military joint command and the State Board of Education.

(c) The members are entitled to the expenses, travel, and per diem allowances provided by law.

(d) A member may act and receive compensation from the date of appointment until confirmation or rejection by the legislature. (1 ch 96 SLA 1967)

*Section 3. AS 14.07.095. is amended to read:

Term of office. The members of the board, with the exception of the student member, shall be appointed for overlapping five-year terms commencing February 1 of the year of appointment. A member appointed to fill a vacancy serves for the unexpired term of the member whose vacancy is filled. A vacancy occurring during a term of office is filled in the same manner as the original appointment. The student member shall be appointed for one, one year term commencing on the first August meeting of the board and terminating at the end of the first June meeting of the board. (1 ch 96 SLA 1967)

*Section 4. AS 14.07.105. is amended to read:

Quorum and chairman. (a) Five [Four] members constitute a quorum.

(b) The board shall designate one member of the board as the chairman who serves as chairman of the board at the pleasure of the board. (1 ch 96 SLA 1967)

*Section 5. AS 14.07.110. is amended to read:

Removal. Members of the board serve at the pleasure of the governor with exception of the military and student member. The military and/or student members may be removed upon request of the governor and majority vote of the board. (1 ch 96 SLA 1967)

*Section 6. AS 39.05.100. is amended to read:

Qualifications for appointment. (a) A person appointed to a board or commission of the state government, with the exception of a student appointee, shall be and have been before the last general election, (1) a

registered voter in the state, if the appointment is made at large or (2) a registered voter from the judicial district, if the appointment is made from a specific judicial district.

(b) A member of a board or commission of the state government who ceases to reside in the state during the member's term terminates membership on the board or commission. For the purposes of this section, the acceptance of employment outside the state for a six-month period or longer, or physical absence from the state for one year or longer, or registration as a voter in a voting precinct outside the state is considered as discontinuing residence in the state. (ch 64 SLA 1955; am ch 167 SLA 1957)

*Section 7. AS 44.19.130. is amended to read:

Appointment to boards and commissions. (a) Notwithstanding AS 39.05.100 or a provision of law relating to age, the governor may appoint any resident of Alaska to a board or commission if recommended by the commission.

(b) A young person recommended by the commission may be appointed to boards or commissions with or without special qualifications for membership if the proposed nominee, except for age, meets the required qualifications as set by law.

(c) An individual appointed to a board or commission under this section is entitled to the rights, privileges, and responsibilities of other members, and the appointment is subject to confirmation by the legislature when required by law. No additional seat on a board or commission is created by virtue of AS 44.19.125--44.19.130. (§ 1 ch 121 SLA 1971)

M E M O R A N D U M

February 5, 1988

SUBJECT: House Bill 424, relating to the composition of the State Board of Education

TO: Representative Johnny Ellis

FROM: Jack Chenoweth

May I submit the enclosed for addition to the record as the House considers the above-captioned bill.

The author of the letter served five years as the advisory military representative on the State Board of Education, concluding his service this past summer due to his reassignment to a Florida Air Force Base.

Enclosure

DEPARTMENT OF THE AIR FORCE
AIR FORCE SYSTEMS COMMAND REGIONAL HOSPITAL EGLIN (AFSC)
EGLIN AIR FORCE BASE, FLORIDA 32542-5300

22 Jan 98

Dear State Board Members,

Recently, I was asked to proffer an opinion regarding the military advisor position on the State Board of Education. Specifically, the question was raised whether the military advisor should be a voting member or remain in an advisory capacity. As in most things, I do have an opinion!

Evaluating my own role and overall effectiveness for the last five years as a non-voting advisory member is better left to your judgement. However, I certainly came to one conclusion, and that was in regard to the student member. I watched four young adults spend their time and energy, often to the detriment of their grades, and certainly for the most part not a lot of fun, dedicate themselves to the issues as tenaciously as any of the more senior members. The question is then, why shouldn't they vote, assuming the political climate is right for such a change? I respected their opinions but sometimes wondered if those opinions were brushed aside because they did not have the weight of a valid vote. I suspect that I am correct. Not when the issues were relatively innocuous but when they became more emotional and heated. And as they did, shorter attention was paid to either advisory members comments. This is certainly not to be condemnatory, but merely a philosophical observation, I believe, of human nature.

Should the military member vote? As with all the board members, the time I spent on Board duties impacted on my private and professional life. Should my time spent be any less 'important' than theirs? The implication being that if the advisory member was not present, it certainly did not affect the legal status of the board. The question was raised by legal counsel in 1983, although ignored, whether advisory members could even sit in executive session. Somewhat demeaning wouldn't you think? The military in the State of Alaska I suspect, approaches fifteen percent of the total population or even better. Although I never really thought of myself as 'representing' only the military of Alaska, it is certainly viewed that way by many others and presumed that we could act on matters that impacted the military member or their families. I believe that is a sizeable responsibility and should be honored with a valid vote.

The real danger is for the advisory member to lose interest and is probably more critical for the military member than the student, due to the normal tenure of one year for the student. If your comments are not taken seriously, if it does not really matter if you are present or not, and if you come and go rather more frequently than the regular member it is easy to not take any issue too seriously. Whether this happens to others I cannot say, but it did on occasion happen to me. I would not have lasted with the first board because of the closed attitude they appeared to have toward the advisory members. The second board was about one-half of the present members, and was much, much more open and easier to work with. The present board? Only the current advisory members can say. I say they should vote, why not ask them?

Roger K. Strosnider

ROGER K. STROSNIDER, Colonel, USAF, DC
Base Dental Surgeon

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M January 7, 1988

SUBJECT: Draft bill relating to the membership of the Board of Education (W.O. 5-1565 A)

TO: Representative Johnny Ellis, Jr.

FROM: George Utermohle GU
Legislative Counsel

Enclosed is a bill enlarging the State Board of Education by adding two members - a military reservation school representative and a student member.

Under the bill as drafted, the military reservation school representative must be a registered Alaska voter. Military personnel frequently retain their residence in another state while they are stationed in Alaska. As a result, a large body of potentially interested, and otherwise qualified persons will be disqualified from serving on the board. The registered voter requirement for the military reservation school representative can be waived, if you want to exempt this person from the requirement.

For your information, the current military reservation school liaison to the board is not a registered voter in Alaska according to the Division of Elections.

Enclosure

GU:bb
WKB1/24

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM January 25, 1988

SUBJECT: Appointment of Members of the State Board of Education (W.O. 5-1565)

TO: Representative Johnny Ellis

FROM: George Utermohle GU
Legislative Counsel

This memorandum is in response to the question of whether the State Board of Education could appoint the student and military members of the board, subject to the approval of the Governor.

The authority to appoint the members of a board that is at the head of a principal department lies exclusively with the Governor under Article III, Section 26 of the Alaska Constitution.

> When a board or commission is at the head of a principal department or regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. . . . Art. III, Sec. 26 (in part)

The State Board of Education is at the head of the Department of Education, a principal department of state government. The Governor has the exclusive authority to appoint the members of the board. The Governor's authority to appoint members of the board cannot be limited by a statute that forces the Governor to appoint a specific individual. The proposal to allow the State Board of Education to select the student and military members of the board subject to the approval of the Governor would result in an invasion of the Governor's authority to appoint. Even though the Governor could reject the person selected by the board, and thus retain the ultimate control over who is appointed to the board, the fact that the Governor could only accept or reject the person would defeat the intent of

the constitution that the Governor have exclusive authority to appoint members of the board. A law delegating responsibility for appointments of certain members of the State Board of Education to the board would be subject to constitutional challenge.

The Alaska Supreme Court strictly construes the Alaska Constitution in regard to the power of the Governor to make executive appointments. In Bradner v. Hammond, 553 P.2d 1 (Alaska, 1976), the court found that the Legislature's only powers to "meddle" in appointments by the Governor were limited to those powers expressly mentioned in the constitution. The Legislature could not extend its powers by enacting a statute. Given the court's position that the Legislature cannot extend its power over the Governor's appointments by statute, it is unlikely that the court would allow the Legislature to dilute the Governor's authority to make appointments by requiring the Governor to accept or reject appointments made by the State Board of Education.

A process whereby the Governor would select the student and military members of the board from a list of nominees prepared by the board is less offensive to the Governor's authority than the proposal discussed above. However, this process could become suspect if the Governor must select appointees from the list, because the Governor's authority and discretion would be limited. If the Governor is allowed to appoint the student and military members from this list of nominees, rather than required to appoint from the list, there would not be an unconstitutional invasion of the Governor's authority. The Governor would retain full authority and discretion to appoint whomever the Governor desired.

If I can provide further discussion of this issue, please contact me.

GU:bb
WKB1/095

MEMORANDUM

State of Alaska
Department of Education

TO: Members, State Board of Education DATE: January 15, 1988

FILE NO: 88-74

THRU: Commissioner William Demmert TELEPHONE NO: 465-2800

FROM: Rosemary Hagevig

SUBJECT: Consideration of Regulation for Adoption: 4 AAC 03 Adoption, Repeal, Amendment of State Board of Education Regulations

HISTORICAL BACKGROUND

In the context of the annual review of the Bylaws of the State Board of Education, the committee found that much of the material that had been contained in the Bylaws would be more appropriately placed in regulation. As a result the attached regulations were revised and were sent out for public comment. No adverse comments were received and the regulations are now ready for adoption.

ALTERNATIVES

1. Adopt the regulations as presented.

2. Postpone action until a date certain.

DEPARTMENT RECOMMENDTION

It is recommended that the Board adopt the regulations in 4 AAC 03.101-.03.100 dealing with adoption, repeal and amendment of the regulations clarifying and expanding the organization, duties, meeting procedures and membership of the State Board of Education.

Sealed:
adopted by the
State Board of
Education Jan 27, 1988.
rh

4 AAC 03 is amended by adding a new subsection to read:

4 AAC 03.025. ADVISORY MEMBERS OF STATE BOARD. (a) In addition to the number of members authorized by law, the board shall appoint as advisory members

(1) one military representative; and

(2) one student, who is enrolled in a state secondary education program.

(b) Installation commanders at Elemendorf AFB, Fort Richardson, Eielson AFB, Fort Wainwright, Fort Greely, and Adak Naval station may each select one person to serve as the military representative under (a)(1) of this section. The senior military commander in Alaska shall nominate the three best qualified persons among those selected by the installation commanders, or may nominate any others whom the senior military commander wishes the board to consider as the military representative. The senior military commander in Alaska shall submit the names of the three nominees to the board, providing a written statement of qualifications or resume for each candidate whose name is submitted. The board shall select an advisory member from among the nominees whose names have been submitted by the senior military commander, and shall set a term of membership for the military representative appointed not to exceed three years.

(c) The Alaska Association of School Governments may nominate candidates for the appointment of a student representative under (a)(2) of this section. The association shall nominate not less than two nor more than five persons for consideration for appointment as the student representative, and summit the names of nominees to the board, providing a written statement of qualifications or resume for each nominee whose name is submitted. The board shall select a student advisory member from among the nominees whose names have been submitted. The board shall select the student advisory member at the last regular meeting of the school year. The term of the student advisory member is one year, commencing with the first board meeting of each school year.

(d) Advisory members appointed under this section are entitled to expenses, travel, and per diem allowances provided by law.

(e) Advisory members appointed under this section may participate in the work of the board, and may deliberate and debate matters brought to the attention of the board. An advisory member may cast an advisory vote, but an advisory vote is not counted in determining the disposition of board matters.