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Sheriff’s Liability for Prisoner Suicide: *Helmly v. Bebber*

The alarming number of suicides in jails, viewed in light of the striking similarities in the victims’ profiles and their methods of suicide, raises the issue whether jailers can be held liable for their prisoners’ suicides. In general, given the intentional nature of the act, any liability for suicide rests solely with the victim. Shifting the liability for prisoner suicide to jailers or custodians such as sheriffs, police chiefs, or overseeing government entities, must be based on one of two exceptions to this general rule: (1) negligence by the custodians that causes a prisoner to commit suicide; or (2) negligent failure of the custodians to prevent a prisoner’s suicide.

1. In 1979 there were 419 suicides in United States jails. *Nat’l Center on Institutions & Alternatives, and Darkness Closes In . . . National Study of Jail Suicides ii* (1981) [hereinafter cited as NATIONAL STUDY]. From 1972 to 1976, there were 70 suicides in North Carolina jails and prisons. These suicides accounted for one-third of the total number of deaths (223) in prisons and jails in this period. Hudson & Butts, *Causes of Deaths in North Carolina Jails and Prisons 1972-76, Popular Gov’t*, Fall 1979, at 16, 16-17.

2. Of the 419 suicide victims in jails nationwide in 1979, 67.3% were white; 96.5% were male; 85.4% were below age 38; 69.8% were single, divorced, widowed, or separated; 73.6% were facing charges for nonviolent crimes; 91.4% were awaiting trial at the time of death; and 59.2% were under the influence of alcohol, drugs, or both at the time of incarceration. NATIONAL STUDY, supra note 1, at 18-28.

Of the 70 suicide victims in North Carolina jails and prisons from 1972 to 1976, 85% were intoxicated, 77% were white males, and most were under age 40. Hudson & Butts, supra note 1, at 17.

3. Of the 419 suicides in jails nationwide in 1979, 95.9% were by hanging. Furthermore, 43.6% of the suicide victims used their bedding as the suicide instrument, and 43.6% used their clothing, belt, or shoelaces. NATIONAL STUDY, supra note 1, at 30-32. Additionally, 27% died within the first three hours of incarceration, and 51.1% died within the first 24 hours of incarceration. *Id.* at 36-38; see also *Id.* at 39-41 (table correlating suicide victims’ length of incarceration by type of crime committed).

Of the 70 suicides in North Carolina jails and prisons in 1972-76, 48.5% occurred in the first 12 hours of incarceration and 21% took place in the first 3 hours of incarceration. Moreover, 92.8% of the prisoners hanged themselves and 43.5% of those who hanged themselves used their belts. Hudson & Butts, supra note 1, at 17.


5. This exception to the general rule that suicide is an intentional act and not the result of a tort arises when a tortfeasor negligently causes a mental condition which results in an uncontrollable impulse to commit suicide. See Falkenstein v. City of Bismarck, 268 N.W.2d 787, 790 (N.D. 1978); Prosser & Keeton, supra note 4, § 44, at 310-11; Schwartz, supra note 4, at 226-32; Comment, supra note 4, at 574-76; Comment, *Civil Liability for Causing or Failing to Prevent Suicide*, 12 Loy. L.A.L. Rev. 967, 974-83 (1979); Annot., supra note 4, at 756 (1950); cf. McLaughlin v. Sullivan, 123 N.H 335, 337-39, 461 A.2d 123, 124 (1983) (recognizing the exception but emphasizing that it is a very narrow theory of liability).

6. See Schwartz, supra note 4, at 245-55 (recognizing an affirmative duty to prevent suicide for liquor dispensers, pharmaceuticals dispensers, psychiatrists, hospitals, and those in certain other custodial relationships); Comment, supra note 4, at 581-83 (courts recognize a duty to prevent suicide for hospitals, doctors, hotels, employers, and jailers); Note, *Custodial Suicide Cases: An Analytical Approach to Determine Liability for Wrongful Death*, 62 B.U.L. Rev. 177, 178-94 (1982) (analyzing general principles of liability in custodial settings and the relevant case law); Annot., 79
In Helmly v. Bebber the North Carolina Court of Appeals joined jurisdictions recognizing the duty of a sheriff or other jail custodian to take reasonable steps to prevent a prisoner from committing suicide when the suicide is foreseeable. This Note analyzes Helmly and the rationale behind the court's decision. It concludes that the court correctly held that circumstances can impose on custodians an affirmative duty to attempt to prevent a prisoner's suicide. The Note also discusses guidelines that should be considered by the courts as they apply this newly recognized theory of liability.

In Helmly the wife of a prisoner who hanged himself with his belt while in the Alexander county jail brought a wrongful death action against Alexander County, its sheriff, and the county commissioners, alleging that the defendants were negligent in failing to take reasonable steps to prevent her husband's suicide. Vernon Helmly hanged himself at about 10:30 p.m. on November 24, 1982, approximately an hour and a half after being placed in a jail cell. Two days earlier, on November 22, 1982, Helmly had checked himself into the psychiatric ward of Catawba Memorial Hospital for drug abuse treatment. On the day of his suicide, he discharged himself from the hospital, over the protests of both his wife and doctor. After his discharge, Helmly returned to his home intoxicated, assaulted his wife and daughter, broke dishes and furniture, and drove his truck several times into the side of his house.

Plaintiff called the sheriff's department from a neighbor's house, and two deputies arrived at the Helmly's at 7:02 p.m. The first deputy to arrive observed Helmly approaching his wife, son, and daughter with a cinder block raised above his head. The deputy subdued Helmly and placed him in the patrol car where a second deputy smelled alcohol on Helmly's breath. While in the car, Helmly still seemed to be angry at his family and apparently was satisfied to learn from one of the deputies that he had damaged his truck by driving it into the house.

Helmly was brought before a magistrate at 8:45 p.m. After being charged with assault on a female and assault inflicting serious injury, he was placed alone...
in a cell referred to as the "drunk tank." The radio dispatcher, the only jailer on duty, could not see the cell from his station. While before the magistrate, Helmly had expressed a desire to stay in the jail overnight. At 10:25 p.m., however, Helmly told a deputy that he "wanted out of the jail." The deputy told Helmly he would check on Helmly's request, and at 10:38 p.m., Helmly was found hanging in the cell from his belt. Efforts to revive Helmly were unsuccessful, and at 11:22 p.m. he was pronounced dead.

Plaintiff alleged additional facts to show that her husband's suicide should have been foreseeable to the defendants. When plaintiff learned of Helmly's discharge from the hospital on the day of the suicide, she called the Magistrate of Alexander County inquiring about having her husband involuntarily committed to a hospital. At the hospital following Helmly's arrest, plaintiff's daughter told one of the deputies that Helmly needed "mental help" and that "he was dangerous to himself and others." Also, when appearing before a magistrate between 9:50 p.m. and 10:15 p.m., the plaintiff and her neighbor had related Helmly's history of alcoholism and his recent threats of suicide. The magistrate had shared these statements with the deputies at the jail immediately before Helmly was found hanging.

Defendants moved for summary judgment, alleging that plaintiff's evidence was insufficient to show that Helmly's suicide was foreseeable. Specifically, defendants argued that the mere statement that Helmly was "dangerous to himself and others" was insufficient to put the deputies on notice that Helmly was suicidal. The trial court granted defendants' summary judgment motion.

The court of appeals affirmed summary judgment in favor of the county and the county commissioners stating that "plaintiff [had] failed to produce evidence which would prove that [they] had any duty which was not met." As to the

15. Id. Helmly was the sole occupant of the cell. A closed circuit monitoring system had been installed in the jail, but was not operating at the time of Helmly's arrest. Id. at 277-78, 335 S.E.2d at 184.
16. Id. at 278, 335 S.E.2d at 184.
17. Id. at 278-79, 335 S.E.2d at 184-85.
18. Id. at 276, 335 S.E.2d at 183. Plaintiff apparently informed the magistrate that her husband had checked out of the psychiatric ward of Catawba Memorial Hospital against his doctor's wishes, that he had been drinking, that he had been taking drugs, and that he was "dangerous to himself and others." Id.

The North Carolina involuntary commitment statute provides that anyone can inform a magistrate by affidavit that an individual is mentally ill or dangerous to himself and that the magistrate can accordingly order the individual to be examined by a physician or psychologist. N.C. GEN. STAT. § 122C-261 (Supp. 1985). In Helmly, however, the magistrate informed plaintiff that he lacked jurisdiction and that she would have to call the magistrate in Catawba county where her husband was then located. Helmly, 77 N.C. App. at 276, 335 S.E.2d at 183.
19. Helmly, 77 N.C. App. at 277, 335 S.E.2d at 184.
20. Id. at 278, 335 S.E.2d at 184. Plaintiff was before the Alexander County magistrate with whom she had apparently spoken earlier in the day. Prior to plaintiff's arrival, the deputy who had been with the plaintiff at the hospital told the magistrate of plaintiff's desire to obtain psychiatric treatment for Helmly. Id. Plaintiff admitted that her appearance before the magistrate was the first time she had told a law enforcement official that Helmly might try to commit suicide. Id.
21. Id. at 278, 335 S.E.2d at 184-85.
22. Id. at 282, 335 S.E.2d at 186.
23. Id. at 275-76, 335 S.E.2d at 183.
24. Id. at 283, 335 S.E.2d at 187. It is unclear why the county and the commissioners were not
sheriff, however, the court reversed summary judgment, holding that whether it was foreseeable to the custodian that the prisoner might commit suicide and whether reasonable care was exercised to prevent this harm were questions of fact for a jury.\textsuperscript{25} The court imposed a standard of reasonable care on custodians, stating that "\textit{u}nder the circumstances . . . plaintiff was not required to use the magic word 'suicide' in order to get to the jury" on the question of foreseeability.\textsuperscript{26}

Several North Carolina statutes help delineate the duty that jail custodians owe their prisoners. North Carolina General Statutes section 153A-216 provides that "\textit{local confinement facilities should . . . protect the health and welfare of prisoners and provide for their humane treatment.}"\textsuperscript{27} Also, section 153A-224 states that "personnel shall supervise prisoners closely enough to maintain safe custody and control and to be at all times informed of the prisoners' general health and emergency medical needs."\textsuperscript{28} Arguably, the protection of a prisoner's health as prescribed by section 153A-216 includes the prevention of harm or death even if self-inflicted. Moreover, a literal interpretation of section 153A-244 suggests that jail personnel are required to maintain constant supervision of their prisoners, for only by maintaining constant supervision can jail custodians be aware "at all times" of their prisoners' general health needs.

At common law sheriffs are liable for acts of their deputies in the line of duty and within the scope of their authority.\textsuperscript{29} In contrast, the county usually enjoys governmental immunity from tort liability, which shields it from liability for the tortious acts or negligence of its officers or agents.\textsuperscript{30} Statutory authority, however, permits a county to insure itself and its officers for tort liability; if a county chooses to insure itself under this statute, the county's governmental immunity is waived to the extent of the insurance coverage.\textsuperscript{31}
It is also well established at common law that a sheriff is responsible for the care and custody of prisoners in the county jail. Although Helmly presents a case of first impression in North Carolina as to whether a sheriff or other jail custodian has a duty to prevent a prisoner’s suicide, several cases have examined a custodian’s duty to prisoners in other respects. In addition to establishing the duty to provide for a prisoner’s medical needs, these cases establish that a custodian has a duty to protect a prisoner from other dangerous prisoners and from hazardous jail conditions, particularly when a prisoner lacks sufficient physical or mental capacity to provide the protection. For example, in State ex rel. Dunn v. Swanson the North Carolina Supreme Court recognized a private cause of action against a sheriff who negligently allowed a prisoner to be killed by another prisoner. The sheriff placed a sick prisoner who was in a helpless condition in a cell with a man whom the sheriff knew to be violently insane. During the night the violent prisoner killed the weak prisoner with a leg from a table in the cell.

The court in Dunn indicated that a sheriff’s liability for injuries sustained by a prisoner as a result of the sheriff’s negligence in failing to prevent the willful acts of a third party was equal to the liability for the sheriff’s own willful acts.

Similarly, in State ex rel. Hayes v. Billings the parents of a man who had suffered a nervous breakdown, was mentally unbalanced, and was oblivious to any danger contacted a sheriff to request that their son be placed in a safe place where he would be unable to harm himself. Aware of the man’s condition, the sheriff placed the man in the jail but did not lock him in a cell, leaving him free to roam in an upstairs hallway. While unsupervised, the prisoner fell down a winding stairway to a concrete floor approximately twelve feet below and suffered injuries from which he eventually died. The court in Hayes recognized a wrongful death cause of action in negligence against the sheriff.


32. E.g., Indiana ex rel Tyler v. Gobin, 94 F. 48 (C.C.D. Ind. 1899). Gobin, an often-cited case, speaks of this duty as follows:

If the law imposes a duty of care in respect of animals and goods which [a sheriff] has taken into his possession by virtue of his office, why should not the law impose the duty of care upon him in respect of human beings who are in his custody by virtue of his office? Is a helpless prisoner in the custody of a sheriff less entitled to his care than a bale of goods or a dumb beast? . . . When a sheriff, by virtue of his office, has arrested and imprisoned a human being, he is bound to exercise ordinary and reasonable care, under the circumstances of each particular case, for the preservation of his life and health.

Id. at 50; see N.C. Gen. Stat. § 162-22 (Supp. 1985) ("[t]he sheriff shall have the care and custody of the jail in his county; and shall be, or appoint, the keeper thereof"); see also State v. Jones, 41 N.C. App. 189, 254 S.E.2d 234 (1979) (applying § 162-22).

33. 217 N.C. 279, 7 S.E.2d 563 (1940).

34. Id. at 280, 7 S.E.2d at 564.

35. Id.; see also Davis v. Moore, 215 N.C. 449, 2 S.E.2d 366 (1939) (cause of action against sheriff for deputy’s negligence in slamming cell door on prisoner’s thumb, thereby severing it).


37. Id. at 79, 81 S.E.2d at 151.

38. Id. at 81, 81 S.E.2d at 152-53. If this case had involved an intentional act by the prisoner, it might be dispositive. There is no indication in the opinion, however, that it was suicide rather than an accident.
It is also clear that a jailer must provide necessary medical attention to a prisoner. In *Spicer v. Williamson*, an action by a doctor against a sheriff and the county to recover expenses for the treatment of one of their prisoners, the court stated that “[i]t is clearly the duty of the board of commissioners of a county . . . to provide for necessary medical attention to a prisoner confined in the county jail.” The court reasoned that “the prisoner by his arrest is deprived of his liberty for the protection of the public; it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”

In an analogous North Carolina case, the court in *Pangle v. Appalachian Hall* asserted in dicta that psychiatric hospital personnel have a duty to prevent a psychiatric patient from harming himself or committing suicide. In *Pangle* a patient hanged himself with a rope one month after his personal doctor told a hospital manager of the patient’s suicidal tendencies. Although it affirmed nonsuit in favor of the defendant hospital because of plaintiff’s deficient evidentiary showing, the court in *Pangle* delineated a duty of ordinary and reasonable care that a hospital owes its patients. The court concluded that “hospitals have been held liable for the negligent failure of their officers or employees to guard and restrain insane or delirious patients and prevent them from doing injury to themselves.” Even though the relationship between a hospital and its patients may be distinguished from that between a sheriff and his or her prisoners, *Pangle* represents a relevant imposition by a North Carolina court of a custodian to prevent suicide.

Because a failure to act is classified as a nonfeasance tort, a duty to take reasonable steps to prevent another from committing suicide can be imposed only if two requirements are met. First, there must be a “special relationship” between the potential suicide victim and the party who bears the duty. See

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40. *Id.* at 492, 132 S.E. at 294.
41. *Id.* at 490, 132 S.E. at 293.
42. 190 N.C. 833, 131 S.E. 42 (1925).
43. *Id.* at 833-34, 131 S.E. at 43.
44. *Id.* at 835, 131 S.E. at 43.
45. See Professors *Keeton*, supra note 4, § 56. Nonfeasance or passive inaction is an exception to the general tort forms that are based on misfeasance or active misconduct. Liability for nonfeasance has been slow to receive recognition in the courts. *Id.* § 56, at 373. Successful nonfeasance actions first appeared in the fourteenth century in “public callings” cases in which a duty to serve was imposed on all those in trades and professions necessary to the economy. See Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411, 418-28 (1927). The development of the assumpsit action also extended nonfeasance liability to those involved in a contract. More recently courts have imposed an affirmative duty on those in relationships characterized by the dependence of a plaintiff on a defendant who is in a position to exercise control and power over the plaintiff. See Shapo, *The Duty to Act: Tort Law, Power and Public Policy* (1977) (examining both the private and public duty to act).
46. Professors *Keeton*, supra note 4, § 56, at 383-85; accord *Restatement (Second) of Torts* §§ 314A, 315 (1965); see, e.g., Figueroa v. State, 61 Hawai 369, 376, 604 P.2d 1198, 1202 (1979) (juvenile detention home and resident youth); see also Comment, supra note 5, at 990-91 (discussing general characteristics of special relationships that give rise to liability); Note, supra note 6, at 181-84 (discussing liability for nonfeasance based on special relationships).
ond, the attempted suicide must be foreseeable. If these two prerequisites are met, then the custodian's behavior will be assessed according to a reasonableness standard of care. The custodian may raise contributory negligence and independent intervening cause as defenses to a failure to prevent suicide action.

Because the law does not ordinarily require a person to come to the aid of a fellow human being, there must be a custodial undertaking by a person or institution and an accompanying assumption of responsibility for another's well-being to create an affirmative duty to protect or help another person. A common example of such a "special relationship" may exist between a doctor and a patient. The relationship of a custodian such as a sheriff, police chief, or juvenile officer to persons in their custody also meets this test. In such relationships, the incarcerator generally limits a prisoner's freedom of movement and freedom of decision and therefore accepts responsibility for his or her care and protection.

A leading case recognizing that the relationship of custodian to prisoner gives rise to a duty to take reasonable steps to prevent suicide is Logue v. United States. In Logue an eighteen year-old prisoner in a federal prison was diagnosed as psychotic with suicidal tendencies following a suicide attempt. After being returned from a hospital to the prison, the prisoner hanged himself the next day with a bandage. The prison officers, having knowledge of the prisoner's diagnosis, were found negligent for failing to provide adequate surveillance of

47. Kanayurak v. North Slope Borough, 677 P.2d 893, 897 (Alaska 1984); Pretty on Top v. City of Hardin, 182 Mont. 311, 316, 597 P.2d 58, 61 (1979); see Comment, supra note 5, at 991-93; Note, supra note 6, at 185.

48. See infra notes 79-85 and accompanying text.

49. PROSSER & KEETON, supra note 4, § 56, at 375. For example, an expert swimmer has no duty to come to the aid of someone drowning in shallow water. Id.

50. McLaughlin v. Sullivan, 123 N.H. 335, 338, 461 A.2d 123, 126, (1983). The court in McLaughlin recognized two classes of individuals that accept a custodial duty of care: (1) those with actual physical custody of and substantial control over an individual, and (2) those specially trained in medicine or mental health who have the precise duty and control necessary to care for the well-being of a patient. See also Falkenstein v. City of Bismarck, 268 N.W.2d 787 (N.D. 1978) (upholding city's liability for inmate's suicide because sheriff's mistreatment of the prisoner contributed to the mental condition leading to suicide).


the prisoner.\textsuperscript{53} In discussing the government's duty, the Logue court noted that "once it became aware . . . of the psychotic condition and suicidal tendencies of this prisoner, the reasonable care which the government was required to take was that care necessary to make certain the prisoner did not commit suicide in jail."\textsuperscript{54}

As Logue indicates, the duty of a custodian to prevent a prisoner's suicide does not arise unless the suicide is foreseeable. The suicidal tendencies of a prisoner can manifest themselves in a number of ways: suicidal threats, previous suicide attempts, medical diagnoses of suicidal tendencies, or general conditions suggesting the potential for suicide.\textsuperscript{55} Studies characterizing jail suicide victims also suggest that jail officials should be able to identify prisoners with a high risk of suicide. These studies may be of limited use to jailers, however, because they characterize young, white, intoxicated males as the highest suicide risk.\textsuperscript{56} This class no doubt describes a large percentage of all persons taken into custody daily, the vast majority of whom do not attempt suicide.

Several cases have identified the foreseeability of the prisoner's suicide as the controlling factor in establishing a custodian's duty to prevent the suicide. In Sudderth \textit{v.} White\textsuperscript{57} the Kentucky Court of Appeals recognized a wrongful death action against a jailer after a college student hanged himself with his belt on the same day he was arrested. The court based its holding on evidence that the jailer knew the deceased was suicidal, including evidence that the jailer knew that the prisoner had previously cut his wrists.\textsuperscript{58} The court in Sudderth stated that "if a jailer knows or has reason to believe that a prisoner might do harm to himself, he has a duty to exercise reasonable care to assure that such harm does not occur."\textsuperscript{59}

A prisoner's suicide is not always foreseeable.\textsuperscript{60} In Pretty on Top \textit{v.} City of Hardin,\textsuperscript{61} for example, a prisoner being held in a detoxification center stabbed himself with a wooden paring knife. One jail worker knew that the prisoner had the knife in his possession, but did not report this fact.\textsuperscript{62} The court affirmed summary judgment for the defendant in a wrongful death action because "[w]ithout a showing of 'special circumstances' which would elevate the defend-

\textsuperscript{53} The prisoner attempted suicide by slashing his arm, which prompted his transfer to a hospital for psychiatric diagnosis. The prisoner was returned to the jail contrary to the doctor's recommended treatment. Logue, 334 F. Supp. at 324.
\textsuperscript{54} \textit{Id.} at 325.
\textsuperscript{55} See Note, supra note 6, at 184.
\textsuperscript{56} See supra note 2.
\textsuperscript{57} 621 S.W.2d 33 (Ky. Ct. App. 1981).
\textsuperscript{58} The court concluded that the jailer knew the student had previously attempted suicide by cutting his wrists based on the sheriff's deposition testimony that "[s]omebody saw the cuts on his hands and wrists that hadn't healed up yet good." The court also stated that the sheriff knew the deceased was in poor physical condition since paramedics had come to treat him and he had been taken to a hospital for treatment. \textit{Id.} at 35.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} See, e.g., Maricopa Co. \textit{v.} Cowart, 106 Ariz. 69, 471 P.2d 265 (1970) (supervisors at juvenile home not liable for juvenile's suicide because they did not have information from which to anticipate he would commit suicide).
\textsuperscript{61} 182 Mont. 311, 597 P.2d 58 (1979).
\textsuperscript{62} \textit{Id.} at 313, 597 P.2d at 59.
ant's duty of care and thereby create the possibility that defendant's acts were the proximate cause of the death, the District Court was required to follow the general rule that suicide is an intentional act." In refusing to find that the jailer had a duty to prevent the suicide, the court noted that the prisoner's general demeanor, attitude, and activities were normal on each day prior to his death, that the prisoner had no history of mental disease or emotional disturbances, and that he had not attempted suicide previously.

Similarly, in Delasky v. Hinsdale the court found that it was reasonable for a jury to conclude that the prisoner's suicide was not foreseeable. In Delasky the suicide victim was arrested at his home during a domestic dispute. At the scene of his arrest, the victim, who was then intoxicated, uttered statements to the effect of "shoot me or I'll take your gun and shoot myself," and then tried to grab one of the officer's guns. Despite the victim's conduct, the court concluded that it was reasonable for the police not to foresee his suicide because there was no evidence that the prisoner was under the influence of alcohol when he was put in his cell. Furthermore, the prisoner was calm, submissive and apologetic when incarcerated.

If a prisoner's suicide is foreseeable, the duty imposed on a custodian is the duty to take reasonable steps to prevent the suicide. A paramount issue centers on what level of conduct by a custodian will satisfy this standard of reasonable care. Custodians may limit the opportunity for suicide attempts in their jails in two ways: (1) by limiting a prisoner's access to dangerous instruments and (2) by maintaining adequate surveillance of a prisoner.

Reasonable steps required of a custodian to limit a prisoner's access to dangerous instruments may include removal of obviously dangerous weapons such as knives and guns, as well as removal of less evident yet dangerous items such as a prisoner's belt, shoestrings, and other items of clothing. Cell bars, furniture, and fixtures in the cell may provide opportunities for a suicide act. Furthermore, bed sheets and prison clothing, unless designed to tear away under stress, may be used by a prisoner in a suicide attempt. Problems with the structure of the jail itself may also give rise to liability for a prisoner's suicide.

Adequate surveillance has also been identified as an element of the reason-

63. Id. at 318, 597 P.2d at 62.
64. Id. at 314, 597 P.2d at 60.
66. Id. at 978, 441 N.E.2d at 369.
67. Id. at 979, 441 N.E.2d at 370.
68. Id. at 982, 441 N.E.2d at 372.
69. Helmy, 77 N.C. App. at 280, 335 S.E.2d at 186.
70. See, e.g., Sudderth, 621 S.W.2d at 35.
71. Wrongful death actions have also been brought against architects for negligence in design of prison cells. See La Bombarbe v. Phillips Swager Assoc., 130 Ill. App. 3d 896, 474 N.E.2d 942 (1985) (court refused to impose liability because the duty was considered too great a burden on architects).
able care custodians must take to prevent a prisoner’s foreseeable suicide. Surveillance of a prisoner may be accomplished by putting suicidal prisoners in cells visible to a jailer, by using closed-circuit cameras to monitor the cells, or by frequently checking the cells. It has also been noted that placing potential victims in cells with other prisoners may decrease the opportunity for a suicide attempt in some cases.

Custodians are not insurers, however, of the safety of their prisoners and will not be held liable if they exercise reasonable care. In *Kozlowski v. City of Amsterdam* the court recognized a duty to take reasonable steps to prevent a prisoner’s suicide, but affirmed a jury’s finding that this duty was met even though the prisoner was intoxicated when arrested, uncooperative during the booking process, and expressive of suicidal tendencies shortly before hanging himself with his socks. The court held that affirmative acts by the police in removing the prisoner’s shoes and belt, in calming him before placing him in his cell, and in checking on him at thirty minute intervals were sufficient to meet the custodian’s duty of reasonable care.

In contrast, the court in *Sudderth* held that a jury could infer that failure to remove the prisoner’s belt before placing him in a jail cell constituted a breach of the jailer’s duty to prevent the suicide. The case law provides little guidance on which items must be removed from a prisoner and precisely how much surveillance of the prisoner is required to satisfy a custodian’s duty to take reasonable steps to prevent a suicide.

A final issue regarding custodial liability for a prisoner’s suicide is the availability of two defenses to the action: contributory negligence and independent intervening cause. If a cause of action is allowed, a custodian may be able to assert these defenses. For example, in *City of Belen v. Harrell* a seventeen year-old prisoner arrested for armed robbery hanged himself with his shirt after several threats to commit suicide. The prisoner had been stripped of all clothing

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75. Cf. Broussard v. State, 356 So. 2d 94 (La. Ct. App. 1978), cert. denied, 358 So. 2d 639 (La. 1978). In *Broussard* the patient committed suicide behind a privacy screen following two earlier attempts. The court determined that the hospital had a duty to take reasonable steps to prevent the patient’s suicide and that this duty had been met. Id.
77. Id. at 478, 488 N.Y.S.2d at 864.
78. *Sudderth*, 621 S.W.2d at 35.
79. See *Prosser & Keeton, supra* note 4, § 65. Contributory negligence is an act or omission on the part of the plaintiff amounting to a want of ordinary care. In North Carolina contributory negligence completely bars recovery if it contributes to plaintiff’s injury as a proximate cause. *Griffin v. Ward*, 267 N.C. 296, 148 S.E.2d 133 (1966).
80. See Hester v. Miller, 41 N.C. App. 509, 513, 255 S.E.2d 318, 321 (“In order to insulate the negligence of one party, the intervening negligence of another must be such as to break the sequence or causal connection between the negligence of the first party and the injury.”), *disc. rev. denied*, 298 N.C. 296, 259 S.E.2d 913 (1979); *Prosser & Keeton, supra* note 4, § 44;
except his undershorts after he arrived at the prison, but officials let him dress for a visit from his mother and failed to retake his clothing.\footnote{82} The court in \textit{Harrell} found that a custodian was not liable for a prisoner's suicide if the prisoner's conduct constituted contributory negligence or if the suicide was an independent intervening cause of death.\footnote{83}

The result in \textit{Harrell}, allowing a defendant to assert these defenses in a failure to prevent suicide case, seems anomalous in light of the foreseeability requirement of this tort.\footnote{84} These defenses seem inappropriate because the suicide victim's act was intentional, and the duty of the defendant was to take reasonable steps to prevent that foreseeable act. Normally, suicide is an unforeseen intervening act that absolves any earlier negligence on the part of a defendant. However, failure to prevent suicide cases are an exception to this general rule based on the victim's dependence on the custodian and the foreseeability of the act.\footnote{85} Thus, if a court finds that a prisoner's suicide was foreseeable, this finding should eliminate the possibility of raising contributory negligence or independent intervening act as defenses.

Consideration of cases from other jurisdictions specifically addressing prisoner suicide liability and of North Carolina law relating to the duty of care custodians owe their prisoners suggests that the North Carolina Court of Appeals reached a sound decision in recognizing custodial liability for failure to take reasonable steps to prevent their prisoners from committing suicide. The duty of custodians in North Carolina, to take steps to protect their prisoners from attacks by third parties\footnote{86} and to protect them from jail conditions,\footnote{87} may reasonably be extended to include protecting prisoners from self-inflicted harm when the suicidal act is foreseeable. Statutory guidelines concerning the health and supervision of prisoners also support this duty.\footnote{88} The rationale underlying the imposition of this duty hinges on the custodian's control over the prisoner's actions and surroundings and the prisoner's subsequent dependence on the custodian.\footnote{89}

Application of tort principles to negligent failure to prevent suicide cases will not be simple, however, and every case of a jail suicide should not proceed to a jury on the question of the custodian's liability. A threshold that plaintiffs must cross to state a cause of action should be established based on the founda-

\footnote{82} \textit{Id.} at 603, 603 P.2d at 713. 
\footnote{83} The court ordered a new trial because the trial court did not instruct the jury on issues of contributory negligence and intervening cause. \textit{Id.} at 604, 603 P.2d at 714; see also \textit{Lucas v. City of Long Beach}, 60 Cal. App. 3d 341, 351, 131 Cal. Rptr. 470, 476 (1976) (prisoner's suicide was supervening act relieving city of liability because suicide was not foreseeable). 
\footnote{84} If the intervening act and resultant injury could have been reasonably foreseen, it will not insulate the person responsible for the prior negligence from liability. \textit{See Brown v. Atlantic Coast R.R. Co.}, 276 N.C. 398, 404, 172 S.E.2d 502, 506 (1970). 
\footnote{86} \textit{See supra} notes 33-35 and accompanying text. 
\footnote{87} \textit{See supra} notes 36-38 and accompanying text. 
\footnote{88} \textit{See supra} notes 27-28 and accompanying text. 
\footnote{89} \textit{See Pangle}, 190 N.C. at 835, 131 S.E. at 43 (dicta identifying a hospital's duty of care to prevent suicide).
tional elements of the failure to prevent suicide tort: the special relationship of the custodian and the person in his charge, the foreseeability of the suicide, and the required standard of care.

The courts should carefully assess the specific relationship between a custodian and his or her prisoners before imposing a duty to prevent suicide.\(^9\) The nature of the custodial undertaking and the custodian's capabilities prescribe his or her ability to recognize suicidal tendencies in a prisoner and the steps that reasonably can be taken to prevent a suicide. Thus, the standard of care in this tort must necessarily vary depending on the type of custodian involved.

The custodial relationship between a sheriff and his or her prisoners is principally one of restraint and involuntary confinement. On behalf of the county, sheriffs incarcerate persons charged with unlawful behavior. Although such imprisonment is generally not an undertaking for the benefit of the prisoner, a sheriff is responsible for meeting the immediate physical needs of the prisoner because of the prisoner's inability to do so.\(^9\) This relationship, based on control and confinement, differs from other custodial relationships, such as that between a hospital and a patient, in which the express undertaking is to provide care and assistance and little restraint is involved.

Although it is difficult to draw a bright-line test in this area, the courts should establish guidelines to identify those situations in which a sheriff or other custodian should be able to foresee the likelihood of a prisoner's suicide. Actual knowledge of suicide threats or attempts are obvious indications that should be sufficient, though not necessary, to put any custodian, including sheriffs, on notice that a prisoner may attempt suicide. Awareness of past mental illness or current depression might also indicate to sheriffs that suicide is possible. Sheriffs and similar custodians are not, however, as qualified to foresee suicide as those custodians with more medical training and experience such as doctors and hospital employees.\(^9\) Therefore, they should not be expected to foresee suicide based on subtle, less obvious characteristics of victims.

Although most persons taken into custody while under the influence of drugs, alcohol, or both do not attempt suicide, an inordinately large percentage of those who do commit suicide in jails are under the influence of such substances.\(^9\) Thus, a prisoner's intoxication should alert custodians of the increased likelihood of self-inflicted injury. In addition, findings that many suicides occur in the early hours of incarceration\(^9\) should alert custodians to the increased risk during this time period.

Once the duty to prevent the suicide is imposed, the issue is what level of

\(^9\) The prerequisite of a special relationship will always be met in the sheriff/prisoner situation. Therefore, the court's only task will be to define that relationship and proceed to the question of foreseeability.

\(^9\) See supra text accompanying note 41.

\(^9\) "As the particular relationship fails to resemble the caretaking relationship of hospital toward patient, it becomes less likely that the person in a superior position will be able to recognize another's suicidal tendencies." Comment, supra note 5, at 992.

\(^9\) See supra note 2.

\(^9\) See supra note 3.
custodial conduct is required to satisfy the standard of reasonable care. Because sheriffs and other custodians are not guarantors or insurers of their prisoners' health and safety, only reasonable conduct is required of them. What is reasonable can only be determined in light of the degree of foreseeability in a given case and in light of the resources available to the custodian and his or her background and training.

Determining what is reasonable under tort law requires a balancing test like that first advocated by Judge Learned Hand. Under this balancing test, the cost of a course of conduct is weighed against the probability of a harm occurring absent that conduct, multiplied by the gravity of the potential harm. In suicide cases, the gravity of the harm—death—is obviously great. Therefore, some action is required by the custodian if the suicide is in any way foreseeable. In almost all cases in which suicide is a possibility, sheriffs and other custodians should be required to take relatively low cost preventive measures to assure the prisoner's safety. As the level of foreseeability increases, the duty of custodians should also rise so as to require increased surveillance of the prisoner and possibly to require obtaining assistance from mental health professionals. The reasonableness of the custodian's actions should also be judged in light of the financial and physical resources reasonably available to the custodian. Although increased training and additional personnel would ameliorate the situation, these factors should be considered in light of the costs that facilities can reasonably be expected to bear.

Analyzing the facts of Helmly under the preceding analysis, a special relationship sufficient to invoke a duty to prevent suicide clearly existed from the time of Helmly's arrest. Whether Helmly's suicide was foreseeable, however, is more ambiguous. The custodians' knowledge of Helmly's drunkenness and his violent behavior, and their possible knowledge of his history of psychiatric treatment raised an issue of fact whether his suicide was foreseeable.

With respect to the reasonableness of the sheriff's conduct, the failure to remove Helmly's belt may be sufficient for a jury to find that the custodians acted unreasonably. Other relevant factors in determining whether the custodians exercised reasonable care include the degree of foreseeability of Helmly's suicide, the advisability of placing Helmly in a cell not visible to a jailer, and the

95. See supra notes 75-77 and accompanying text.
96. "A person or entity will not be held liable for another's suicide unless his conduct falls below the standard of care imposed by the law." The occurrence of a suicide alone is not necessarily an indication of negligence in custodian cases. Comment, supra note 5, at 993-95.
97. See Figuera v. State, 61 Hawaii 369, 380, 604 P.2d 1198, 1204 (1979) (reasonableness of care in supervision should be determined in part by the nature of the institution).
98. See United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).
99. If the burden of increased duty is less than the product of the probability of harm and the severity of harm, the defendant is negligent. Id. at 173.
100. Such relatively affordable measures include removing possible instruments of suicide such as guns, knives, and belts from prisoners and removing blunt objects and other possible suicide instruments from cells. See supra text accompanying note 70.
101. See supra text accompanying notes 11-21.
102. See supra text accompanying note 17.
fact the only jailer on duty was busy with other responsibilities.\textsuperscript{103}

In conclusion, the court of appeals in \textit{Helmly} correctly reversed summary judgment for the sheriff under applicable law. Although precision in applying the test discussed above may be impossible, the factors identified should guide courts in assessing liability for failure to prevent suicide. In general, the custodial relationship and the foreseeability of the suicide are fundamental in determining whether to impose a duty of reasonable care to prevent suicide. A careful review of the particular custodial relationship is essential to both a determination of the foreseeability of suicide and a delineation of the duty of reasonableness that is required. In addition, use of a cost-benefit analysis can help determine the reasonableness of the steps taken by the custodian. Courts must recognize, however, that a facility cannot be expected to do more than its resources allow. Courts should also recognize the inappropriateness of allowing defendants to assert the contributory negligence and independent intervening act defenses in these cases.

Adherence to these guidelines should help North Carolina courts as they expand the liability of sheriffs and other custodians to include negligent failure to prevent foreseeable suicides and other self-inflicted injuries. The interplay of special relationships, foreseeability, and subsequent intentional self-harm in this area of the law may present difficult problems in determining negligence and proximate cause in cases involving suicide. By following these guidelines and applying an appropriate tort framework, however, courts can successfully unravel the current tangle of legal principles in this area and impose this newly recognized liability in a just and consistent manner.

\textit{Charles Mark Holt}
Psychiatrists' Liability to Third Parties for Harmful Acts Committed by Dangerous Patients

Under traditional common-law principles, unless a special relationship exists between two persons, neither has a duty to control the other's conduct or to warn of the other's dangerous tendencies. Generally referred to as the "no-duty rule," this doctrine has been greatly eroded by the recent receptivity of courts to suits brought by victims of crime against the government or against other third parties responsible for the negligent release into the community of a dangerous person who later injures the victim. One dimension of this development is a psychiatrist's liability to third parties. This liability is based on the theory that the special relationship between psychiatrist and patient creates a duty on the part of the therapist to protect others from a patient's violent conduct. In the recent decision of Pangburn v. Saad, the North Carolina Court of Appeals held for the first time that a staff psychiatrist may be held liable to a foreseeable victim injured by the wrongful release of a psychiatric patient. This Note examines the scope of a psychiatrist's liability to third parties and discusses the implications such liability may have on the mental health profession in North Carolina.

1. See RESTATEMENT (SECOND) OF TORTS § 315 (1965) (no duty to control the conduct of a third person unless a special relationship exists between the actor and the third person, or a special relationship exists between the actor and the other which gives rise to an expectation of protection) [hereinafter cited as RESTATEMENT].

A special relationship exists when one person takes charge of another. Special relationships traditionally recognized by courts are parent-child, employer-employee, carrier-passenger, innkeeper-guest, landlord-tenant, custodian-charge, and occupier of land-invitee. See PROSSER AND KEETON ON THE LAW OF TORTS, § 56, at 383-85 (W. Keeton 5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

2. See Note, Tort Liability in Georgia for the Criminal Acts of Another, 18 GA. L. REV. 361, 362 (1984). Traditionally, common-law courts found a person liable if his or her affirmative acts—misfeasance—injured another, but refused to impose liability for failure to take steps to protect another from injury—nonfeasance. The reason for the distinction was that a defendant's misfeasance created a new risk of harm to another, while mere nonfeasance caused no additional harm to the plaintiff. PROSSER & KEETON, supra note 1, § 56, at 373. This early distinction between action and inaction often influences whether a duty exists today. Id.

3. See Tinsley, Government Entity's Liability For Injuries Caused By Negligently Released Individual, 19 AM. JUR. PROOF OF FACTS 2D 583, 590 (1979). For a discussion of cases imposing liability for negligent failure to confine a dangerous person, see Carrington, Victims' Rights Litigation: A Wave of the Future?, 11 U. RICH. L. REV. 447, 459-65 (1977). The premise of "victims rights" suits is that a criminal was in a position to injure the victim because some third party breached a duty owed to the victim. Id. at 459.


6. The term "release" covers a variety of programs whereby patients are given freedom from 24-hour confinement. Release programs include day-trips, weekend passes, outpatient treatment, placement in community centers and other treatment methods allowing the patient to enjoy freedom outside hospital confines. Comment, Psychotherapists' Liability For the Release of Mentally I1 Offenders: A Proposed Expansion of the Theory of Strict Liability, 126 U. PA. L. REV. 204, 204 n.2 (1977).

7. For the purposes of this Note, the terms "psychiatrist," "psychologist," "therapist," and "psychotherapist" will be used interchangeably. Courts have disregarded the technical distinctions between these professions when addressing the issue of psychiatrists' liability to third parties.
On March 3, 1982, Daniel Pangburn was involuntarily committed to a state hospital in Goldsboro, North Carolina. His commitment was based on a history of emotional disorders and violent behavior which included physical attacks on family members. On the morning of March 26, 1982, Dr. Saad, a staff psychiatrist at the hospital, informed Daniel's parents that Daniel was to be released. The parents, fearful of their son, objected to Dr. Saad's decision and asked that Daniel be placed in a chronic care unit. Daniel nonetheless was released. That same night he attacked and stabbed his sister approximately twenty times with a kitchen knife, inflicting "disfiguring and life-threatening wounds."

The sister brought suit against Dr. Saad for injuries resulting from the wrongful release of a psychiatric patient. Defendant asserted that because he was a staff psychiatrist at a state mental health facility he was cloaked with immunity by statute and therefore free from personal liability. The court of appeals concluded that Dr. Saad had only a qualified immunity by statute and therefore free from personal liability. The court addressed the issue whether plaintiff had stated a cause of action against defendant on the

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8. Pangburn, 73 N.C. App. at 347, 326 S.E.2d at 372.
9. Id. Daniel had been committed at least seven times since 1979. Id.
10. Id. at 347, 326 S.E.2d at 372-73.
11. Id. at 347-48, 326 S.E.2d at 373.
12. Id. at 337, 326 S.E.2d at 367.
13. Id. at 337, 326 S.E.2d at 366-67.
14. The relevant statute raised as a defense by Dr. Saad was N.C. GEN. STAT. § 122-24 (1981) which provided:

   No administrator, chief of medical services or any staff member under the supervision and direction of the administrator or chief of medical services of any State hospital shall be personally liable for any act or thing done under or in pursuance of any of the provisions of this Chapter.


15. Pangburn, 73 N.C. App. at 346-47, 326 S.E.2d at 372. Before reaching the issue of the scope of former N.C. GEN. STAT. § 122-24, the court addressed plaintiff's constitutional challenge. Finding no suspect class or fundamental right, the court applied the rational basis test, under which a statute must bear a rational relationship to a legitimate governmental interest. Id. at 340, 326 S.E.2d at 368. Noting that certain policy considerations justified providing immunity to state psychiatrists, the court sustained the constitutionality of the statute. Id. With respect to plaintiff's "open courts" challenge, the court, citing Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 88 (1983), upheld the general assembly's right to define whether a particular cause of action is cognizable or not. Pangburn, 73 N.C. App. at 340-41, 326 S.E.2d at 368-69.

   After sustaining the constitutionality of the statute, the court defined the scope of immunity provided by that statute. The court found persuasive authority in the recent judicial interpretation of the exclusive remedy provision of the North Carolina Worker's Compensation Act, codified at N.C. GEN. STAT. § 97-1 to -122 (1985), because the exclusive remedy provision of that Act is conceptually similar to § 122-24. Pangburn, 73 N.C. App. at 342-43, 326 S.E.2d at 370.

   In Andrews v. Peters, 55 N.C. App. 124, 127-28, 284 S.E.2d 748, 750 (1981), disc. rev. denied, 305 N.C. 395, 290 S.E.2d 364 (1982), the court held that the exclusive remedy provision of the North Carolina Worker's Compensation Act, codified at N.C. GEN. STAT. § 97-10.1 (1985), did not preclude a tort suit by an employee against a co-employee who had injured him intentionally. The North Carolina Supreme Court in Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985) had expanded Andrews by holding that the Worker's Compensation Act does not protect a co-employee from liability for willful, wanton, and reckless negligence. Id. at 716, 325 S.E.2d at 249. For a further discussion of Pleasant, see Note, Pleasant v. Johnson: The North
theory of wrongful release.\textsuperscript{16} Citing with approval an analogous Georgia case,\textsuperscript{17} the court suggested that if a physician in the course of treatment exercises control over a patient and determines or should determine that the patient is likely to cause harm to others, an independent duty arises from this physician-patient relationship that requires the physician to exercise a reasonable degree of control over the patient to prevent injury to others. The court held that plaintiff stated a claim for actionable negligence\textsuperscript{18} against defendant—that Dr. Saad, by releasing a patient likely to behave violently, breached a duty owed to the foreseeable plaintiff and the breach of this duty was the proximate cause of her injuries.\textsuperscript{19}

The court's application of general negligence principles is consistent with cases in other jurisdictions that have recognized a cause of action for wrongful release.\textsuperscript{20} The legal duty a psychiatrist owes essentially arises from his or her charge over an inpatient.\textsuperscript{21} This duty, analogous to that in the parent-child\textsuperscript{22} and employer-employee\textsuperscript{23} relationships, requires that psychiatrists take reason-

\textsuperscript{16} Pangburn, 73 N.C. App. at 347-48, 326 S.E.2d at 372-73.

\textsuperscript{17} Bradley Center, Inc. v. Wessner, 250 Ga. 199, 296 S.E.2d 693 (1982). In Bradley plaintiffs sued a private health facility seeking compensation for the murder of their mother by her husband, a patient at the facility. \textit{Id.} at 199, 296 S.E.2d at 694. During the husband's treatment, he revealed that he would likely cause bodily harm to his wife if given a chance. \textit{Id.} Nonetheless, pursuant to a restrictive voluntary admission program, the patient was issued an unrestricted weekend pass by the facility. While away, he obtained a gun and killed his wife and her lover. \textit{Id.} The Georgia Supreme Court found that the special relationship that existed between the facility and the patient created an exception to the no-duty rule. \textit{Id.} at 201, 296 S.E.2d at 696. The court held that under tort principles of negligence defendant breached its duty to exercise reasonable control over the patient and that this breach resulted in the death of plaintiffs' mother. \textit{Id.} at 200, 296 S.E.2d at 696.

\textsuperscript{18} The North Carolina Supreme Court has established that in order to find actionable negligence,

"[p]laintiff must show that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed to the plaintiff under the circumstances in which they were placed, and that such negligence was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would have not occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed."


\textsuperscript{19} Pangburn, 73 N.C. App. at 338-39, 326 S.E.2d at 367. The court found that plaintiff's complaint sufficiently alleged "both wilful, wanton or reckless negligence and intentional wrongdoing" so as to preclude Dr. Saad's statutory protection. \textit{Id.} at 348, 326 S.E.2d at 373.


\textsuperscript{21} An inpatient is defined as "a patient who is lodged and fed in a hospital, clinic, etc. while receiving treatment." \textsc{Webster's New World Dictionary} 727 (2d ed. 1980).

\textsuperscript{22} The parent-child relationship imposes an affirmative duty on the parent to control the child and to prevent the child from injuring others. \textsc{See Restatement}, supra note 1, § 316.

\textsuperscript{23} The employer-employee relationship requires that the employer exercise reasonable care to
able steps to control dangerous patients in an effort to prevent harm to third parties. Privity between the psychiatrist and the injured plaintiff is unnecessary. Rather, a psychiatrist’s capacity to control a patient forms the basis of the duty, and the psychiatrist’s failure to exercise reasonable control over the patient justifies the imposition of liability for harm the patient causes.

The capacity of the psychiatrist to “control,” addressed in Pangburn, is critical in wrongful release cases. Once a patient attains the status of an inpatient, the psychiatrist presumably can exert control over the patient’s conduct. The psychiatrist’s ability to observe the patient and thereby to obtain firsthand knowledge of the patient’s behavior, coupled with the right to enforce the patient’s confinement, demands that the psychiatrist exercise due care when releasing the patient. That control is critical to a finding of liability for wrongful release was highlighted in Hasenei v. United States. In Hasenei, John Hock, an alcoholic diagnosed as a paranoid schizophrenic, was released as an outpatient from a Veterans Administration hospital. Later that year he voluntarily returned to the hospital’s outpatient clinic. Approximately one month later, Hock, while under the influence of alcohol, collided head-on with plaintiffs’ car. Plaintiffs brought an action alleging that the hospital and its staff had been negligent either in failing to persuade Hock to hospitalize himself or in not pursuing involuntary commitment proceedings against him. The court stated that before a hospital has a duty to control the conduct of a patient it must possess the right or ability to control his or her employee to prevent him or her from injuring others. See Restatement, supra note 1, § 317.

24. The duty to control, as exemplified by the parent-child and employer-employee relationships, is distinguishable from relationships imposing a duty to protect. The latter duty arises when the relationship between the defendant and plaintiff is such that the defendant assumes a duty to protect the plaintiff from foreseeable harmful conduct. See supra note 1. North Carolina has recognized that a defendant owes a duty to exercise reasonable care to protect another in the landowner-invitee, innkeeper-guest, and carrier-passenger contexts. See, e.g., Foster v. Winston Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981); Leake v. Queen City Coach Co., 270 N.C. 669, 155 S.E.2d 161 (1962); Smith v. Camel City Cab Co., 227 N.C. 572, 42 S.E.2d 657 (1947); Urbano v. Days Inn, 58 N.C. App. 795, 295 S.E.2d 240 (1982).

25. The psychiatrist’s liability to injured parties can be traced to the Restatement, supra note 1, § 319 which reads: “One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.”


27. Id. at 1003.

28. Id. Hock underwent a thorough medical examination after his return. The examination showed that Hock’s schizophrenia was in partial remission, that he was not taking his prescribed medication, and that he was depressed over his son’s recent death. Id. The doctor then prescribed new medication to combat Hock’s depression and scheduled a follow-up visit for one month later. Id. at 1004.

29. Id. at 1004. At the time of the accident, Hock was driving his car on the wrong side of the road without his headlights on. Id.

30. Id. at 1004-05. Plaintiffs contended that the psychiatrist knew or should have known that Hock was an alcoholic who could not safely operate an automobile. Id. at 1001. In addition, plaintiffs alleged that Hock had suicidal tendencies and was dangerous to himself and to others. Id.

31. Id. at 1009.
control him.\textsuperscript{32}

In \textit{Semler v. Psychiatric Institute}\textsuperscript{33} the United States Court of Appeals for the Fourth Circuit considered whether a psychiatrist could be liable in tort for releasing a patient in contravention of a court order. By court order the patient, J. Gilbreath, was to receive treatment and remain confined in defendant’s institution.\textsuperscript{34} The judge gave the hospital staff limited discretion to issue release passes to Gilbreath.\textsuperscript{35} The staff, however, abused its discretion and issued Gilbreath an extended pass without obtaining court approval.\textsuperscript{36} In addition, the hospital began to treat Gilbreath on an outpatient basis without court approval.\textsuperscript{37} Two months after being assigned to outpatient status, Gilbreath killed Natalia Semler.\textsuperscript{38} The court of appeals concluded that the state court’s order had given rise to a special relationship between the hospital and Gilbreath and thus had imposed a duty on the hospital to protect the public by maintaining custody of Gilbreath until he was released by judicial action.\textsuperscript{39} Because Semler had been a foreseeable victim of defendant’s breach of that duty, the hospital was liable in tort.\textsuperscript{40}

The \textit{Semler} decision illustrates that the degree and manner of a therapist’s control over a patient is often a key factor in negligent release cases. A decision to release a patient ordinarily is measured by the “normally prudent psychiatrist” standard of care.\textsuperscript{41} Because the decision to release Gilbreath contravened the state court’s explicit instructions, however, the court applied a negligence \textit{per se} analysis.\textsuperscript{42} Thus, the staff’s violation of the court order foreclosed further evaluation of the reasonableness of its conduct.\textsuperscript{43} Under this reasoning, a psychiatrist who is not negligent in releasing a patient but who does so in violation of a court order\textsuperscript{44} may incur liability for harm the patient commits.\textsuperscript{45} This approach raises questions about the appropriate level of judicial intervention in

\textsuperscript{32} \textit{Id.} at 1011-12.
\textsuperscript{33} 538 F.2d 121 (4th Cir.), \textit{cert. denied}, 429 U.S. 827 (1976).
\textsuperscript{34} \textit{Id.} at 123.
\textsuperscript{35} The state judge approved a plan whereby Gilbreath would become a day care patient. Gilbreath was to receive psychiatric treatment during the day, while being placed under parental care for nights and weekends. \textit{Id.}
\textsuperscript{36} \textit{Id.} at 123-24. Gilbreath was issued a three-day pass and a fourteen-day pass to visit Ohio and investigate the possibility of moving there. \textit{Id.}
\textsuperscript{37} \textit{Id.} at 124.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.} at 125. The court relied on \textit{RESTATEMENT}, \textit{supra} note 1, § 319, to find that defendant had a duty to control Gilbreath. \textit{See supra} note 25.
\textsuperscript{40} \textit{Semler}, 538 F.2d at 126.
\textsuperscript{41} Comment, \textit{supra} note 6, at 218.
\textsuperscript{42} Comment, \textit{supra} note 6, at 218.
\textsuperscript{43} Comment, \textit{supra} note 6, at 218.
\textsuperscript{44} N.C. GEN. STAT. § 122C-277(a) (Supp. 1985) allows the attending physician to discharge a committed person unconditionally when the physician determines inpatient commitment no longer is needed. Subsection (b) provides that the attending physician must receive court approval before releasing a patient who was committed after being charged with a violent crime and found not guilty by reason of insanity. \textit{Id.} § 122C-277(b).
\textsuperscript{45} Comment, \textit{supra} note 6, at 219-21.
psychiatric decisionmaking and illustrates how liability for wrongful release may inhibit therapists' willingness to release patients.

A few courts have refused to hold psychiatrists liable for harm their patients cause. In *Sherrill v. Wilson* an involuntarily committed patient was released on a two-day pass. When the patient failed to return to the hospital, no hospital employee sought his return. The patient subsequently killed a boy by shooting him in the head eleven times with a rifle. Addressing plaintiff's claim of wrongful release, the Missouri Supreme Court held that a psychiatrist owes no duty to the general public with regard to a patient's release. The court stated that liability for wrongful release would have a deleterious effect on the public service rendered by psychiatrists. The court therefore concluded that when a psychiatrist negligently releases a patient, he or she should not be held liable even for foreseeable damages.

Although *Sherrill* is not in accord with North Carolina's approach to wrongful release actions, it does raise important questions regarding psychiatrists' liability to third parties. First, in those jurisdictions that do recognize a cause of action for wrongful release, what standard of care must a psychiatrist exercise to escape liability for harm caused by a patient? Second, does a cause of action for wrongful release outweigh the policy interests in favor of deinstitutionalization of the mentally ill?

The North Carolina Court of Appeals' application of traditional negligence principles in *Pangburn* implies that when deciding to release a patient, a psychiatrist must exercise that degree of care ordinarily practiced by the psychiatric profession. This approach is consistent with the recent enactment of the Mental Health, Mental Retardation, and Substance Abuse Act (Mental Health Act), which codifies what is apparently a "customary practice" standard for state mental health employees. The relevant provision affecting liability to third parties states:

46. One author argues that judicial oversight of day-to-day decisions would inhibit the development of effective release programs. Comment, supra note 6, at 219-21.
47. 653 S.W.2d 661 (Mo. 1983).
48. Id. at 662.
49. Id.
50. Plaintiff also sought to hold defendants liable for negligently failing to secure the patient's return to custody. Id. at 667. The court concluded that it was in the public interest to deny liability against public employees who fail to secure the return to custody of a temporarily released mental patient. Id. at 669.
51. Id. at 664.
52. The court emphasized that psychiatric patients benefit by being placed in the least restrictive environment. Id. Imposing liability for a physician's negligent judgment to release would encourage psychiatrists to keep patients in a more restrictive setting. Id.
53. Id. at 667.
55. The formulation of a customary practice standard recognizes the superior skill, knowledge, and training of a professional. Byrd, The North Carolina Medical Malpractice Statute, 62 N.C.L. REV. 711, 713 (1984). These factors are to be considered in the determination whether a professional acted reasonably. A customary practice standard is not only applicable to the professional but also to any individual who holds himself or herself out as belonging to a group whose members possess unique ability or knowledge. Id.
No facility or any of its officials, staff, or employees, or any physician or other individual who is responsible for the examination, management, supervision, treatment, or release of a client and who follows accepted professional judgment, practice, and standards is civilly liable, personally or otherwise, for actions arising from these responsibilities or for actions of the client. This immunity is in addition to any other legal immunity from liability to which these facilities or individuals may be entitled.\[56\]

The statute articulates a concept of customary practice similar to the statutory medical malpractice standard\[57\] and incorporates an objective minimum standard of care traditionally applied in all negligence cases.\[58\] Although phrased in terms of providing "immunity" to state mental health employees, the statutory language clearly provides that state psychiatrists now will be liable for ordinary negligence in cases of wrongful release.\[59\]

The formulation of an objective standard of care in wrongful release cases must necessarily take into account the unique characteristics of the psychiatric profession.\[60\] The objective factors available to a psychiatrist when assessing a patient's behavior prior to discharge are often tenuous at best. At present, the diagnosis of psychiatric disorders is an imprecise art.\[61\] Establishing an objective standard for a profession in which schools of thought proliferate and disintegrate rapidly is a difficult task.\[62\]

A major assumption of an objective standard of care in wrongful release cases is that psychotherapists can predict the dangerousness of their patients.\[63\] Courts usually have premised wrongful release liability on the ground that the therapist determined, or should have determined, that a patient was likely to engage in violent conduct if released. However, widespread disagreement exists among courts and psychiatrists as to the ability of psychiatrists to predict dan-

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57. The North Carolina Medical Malpractice standard provides:

   In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment for damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

58. Cf. Byrd, supra note 55, at 740 ("The objective standard is a basic principle of all negligence law, which traditionally has been applied to hold the health care provider to the level of skill, training, and learning possessed by other practitioners in the field.").
59. The failure of a psychiatrist to follow accepted professional standards with regard to his or her decision to release a psychiatric patient will subject him or her to tort liability.
60. The North Carolina Court of Appeals recognizes that psychiatrists are subjected to a unique risk when they decide to release a patient. Pangburn, 73 N.C. App. at 340, 326 S.E.2d at 368.
62. Id.
gerousness. Most studies suggest that such predictions are highly inaccurate. In the controversial decision of *Tarasoff v. Regents of the University of California* the American Psychiatric Association submitted an amicus brief noting that, given the present state of psychiatric knowledge, therapists are unable to predict reliably a patient's violent acts and often tend to over-predict violence.

Most courts, however, have rejected the argument that the difficulty in predicting dangerousness should relieve psychiatrists from liability for the harmful acts of their negligently released patients. Instead, these courts emphasize that the standard of care required by mental health professionals takes into account the difficulties associated with evaluating human behavior. Regarding the complexity of defining a standard of care for psychiatrists, the court in *Lipari v. Sears, Roebuck & Co.* stated that it may be difficult for medical professionals to predict whether a particular mental patient may pose a danger to himself or others. This factor alone, however, does not justify barring recovery in all situations. The standard of care for health professionals adequately takes into account the difficult nature of the problems facing psychotherapists. . . . Under this standard, a therapist who uses the proper psychiatric procedures is not negligent even if his diagnosis may have been incorrect.

*Lipari’s* articulation of an objective standard of care for the psychiatric profession should be applicable to North Carolina’s “accepted practice” standard and to Pangburn’s application of ordinary negligence principles. Thus, if psy-

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64. See, e.g., AMERICAN PSYCHIATRIC ASSOCIATION, Clinical Aspects of Violent Individual, Task Force Report 8, 28 (1974) (“neither psychiatrists nor anyone else have [sic] reliably demonstrated an ability to predict future violence or ‘dangerousness’ ”); Usdin, Broader Aspects of Dangerousness, in THE CLINICAL EVALUATION OF THE DANGEROUSNESS OF THE MENTALLY ILL 43 (J. Rappeport ed. 1967) (“The psychiatrist cannot predict even with reasonable certainty that an individual will be dangerous to himself or to others.”).

With respect to the determination of dangerousness, N.C. GEN. STAT. § 122C-3(11)(b) (Supp. 1985) defines “dangerous to others” to mean

[i]t that within the recent past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm to another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct.


66. Id. at 438, 551 P.2d at 344, 131 Cal. Rptr. at 25. The various articles cited in the amicus brief included: Diamond, The Psychiatric Prediction of Dangerousness, 123 U. PA. L. REV. 439 (1975); Ennis & Litwick, Psychiatry and The Presumption of Expertise: Flipping Coins in the Courtroom, 62 CAL. L. REV. 693 (1974); Monahan, The Prevention of Violence, in COMMUNITY MENTAL HEALTH IN THE CRIMINAL JUSTICE SYSTEM (Monahan ed. 1975). Although the court in *Tarasoff* discussed psychiatrists’ ability to predict dangerousness in the context of duty-to-warn situations, the ability to accurately predict violent conduct is also a crucial factor in whether courts will impose liability on therapists in wrongful release cases.

67. *Tarasoff*, 17 Cal. 3d at 438 n.10, 551 P.2d at 344-45 n.10, 131 Cal. Rptr. at 24-25 n.10; see Hicks v. United States, 511 F.2d 407, 145 (D.C. Cir. 1975). In Greenwood v. United States, 350 U.S. 366, 375 (1956), the Supreme Court recognized “the uncertainty of diagnosis . . . and the tentativeness of professional judgment” in the psychiatric profession.


70. See supra notes 56-58 and accompanying text.

71. See supra notes 18-19 and accompanying text.
psychiatrists follow accepted professional standards and use reasonable judgment in their decisions to release patients, they will not incur liability for harmful acts their patients commit.

A more difficult question regarding the applicable standard of care concerns the definition or scope of "accepted practice." More precisely, does this standard go beyond the exercise of reasonable control over a patient and impose on the psychiatrist an affirmative duty to warn of a patient's violent propensities? No North Carolina court has addressed this question. However, a number of courts in other jurisdictions have found that reasonable care includes a duty to warn. The landmark case of Tarasoff was the first to recognize a duty to warn third parties. In Tarasoff plaintiffs alleged that Prosenjit Poddar, a voluntary outpatient at a student health facility, was examined by a psychiatrist and found to have a dangerous attachment to Tatiana Tarasoff. Plaintiffs further alleged that Poddar informed his therapist that he intended to kill an "unnamed girl, readily identifiable as Tatiana." In addition, evidence showed that the physicians at the student health facility knew that Poddar intended to purchase a gun. One of the therapists at the health facility notified the campus police that Poddar was dangerous, and the police subsequently detained Poddar for observation. Appearing rational, Poddar was released shortly thereafter. Neither the therapists nor the campus police warned Tatiana or her parents of Poddar's threat. Approximately two months later, Poddar shot and killed Tatiana.

In holding that defendants could be found liable, the California Supreme Court stated that "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." Recognizing that the discharge of this duty will vary in each instance, the court suggested that the therapist might be required "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." The court based defendant's potential liability on the special relationship between Poddar and his therapist.

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73. Id. at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21.
74. Id. Tatiana was in South America at the time Poddar threatened "to kill an unnamed girl... when she returned home from spending the summer in Brazil." Id.
75. Id. Plaintiffs alleged that the psychiatrist in charge of the clinic "directed that no further action be taken to detain Poddar." Id. at 430, 551 P.2d at 340, 131 Cal. Rptr. at 20.
76. Id.
77. Id. at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25. The court emphasized that the conduct of the therapist would be judged against the traditional negligence standard of reasonable care. Id.
78. Id. at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.
79. Id. at 435-36, 551 P.2d at 343, 131 Cal. Rptr. at 23. The court cited to the special relationship doctrine in RESTATEMENT, supra note 1, § 315. Reliance on § 315 in duty to warn cases is questionable because that section deals with the duty to control the conduct of a third person, which differs significantly from the duty to warn potential victims. When a psychiatrist is treating a patient on an outpatient basis the necessary element of control is absent. See also Schopp & Quattrocchi, Tarasoff, The Doctrine of Special Relationships, and the Psychiatrist's Duty to Warn, 12 J. Psychiatry & Law 13, 20 (1984) (noncustodial cases presented by the Tarasoff court not easily reconciled with the special relationships doctrine).
which could support an affirmative duty on the part of the therapist to protect Tatiana.\textsuperscript{80}

In reaching its decision, the Tarasoff court relied on cases imposing a duty to warn in other areas of medical practice.\textsuperscript{81} For example, physicians must warn a patient of side-effects of medication if the effects could pose danger to others.\textsuperscript{82} Physicians also are required in some circumstances to warn others of a patient's contagious disease.\textsuperscript{83} The court concluded that Dr. Moore, by not warning either Tatiana or her parents of Poddar's dangerous threat, may have failed to discharge his duty of reasonable care.\textsuperscript{84}

The Tarasoff duty to warn standard, although accepted by a number of courts,\textsuperscript{85} has been limited by subsequent decisions.\textsuperscript{86} In Thompson v. County of Alameda\textsuperscript{87} the California Supreme Court limited the duty to warn requirement to those potential victims who are “known [and] identifiable.”\textsuperscript{88} In Thompson, the parents of a young boy sued the county for their son’s wrongful death. The parents alleged that the county had been aware that James F., a juvenile offender, had a dangerous propensity toward other children.\textsuperscript{89} In addition, plaintiffs alleged that James had indicated to authorities that if released he would kill a child in the neighborhood.\textsuperscript{90} James nevertheless was released from custody and within twenty-four hours he sexually assaulted and killed plaintiffs’ son.\textsuperscript{91} At no time did the County warn the local police, the delinquent’s mother, or neighborhood parents that James was to be released.

The court refused to impose liability on the County for its failure to warn.\textsuperscript{92}

\begin{itemize}
  \item \textsuperscript{80} Tarasoff, 17 Cal. 3d at 436, 551 P.2d at 343, 131 Cal. Rptr. at 23.
  \item \textsuperscript{81} Id. at 437, 551 P.2d at 343-44, 131 Cal. Rptr. at 24.
  \item \textsuperscript{82} Id. at 436 & n.8, 551 P.2d at 343-44 & n.8, 131 Cal. Rptr. at 23-24 & n.8 (citing Kaiser v. Suburban Transp. System, 65 Wash. 2d 461, 398 P.2d 14 (1965)).
  \item \textsuperscript{83} Tarasoff, 17 Cal. 3d at 436-37, 551 P.2d at 344, 131 Cal. Rptr. at 24 (citing Wojcik v. Aluminum Co. of Am., 18 Misc. 2d 740, 183 N.Y.S.2d 351 (1959)). The court also relied on several negligent release cases imposing liability on hospitals or staff members for failing to exercise reasonable control over psychiatric patients. Tarasoff, 17 Cal. 3d at 436 n.7, 551 P.2d at 343 n.7, 131 Cal. Rptr. at 23 n.7.
  \item \textsuperscript{84} Id. at 442, 551 P.2d at 348, 131 Cal. Rptr. at 28. According to the court, the public interest in providing protection from violent assaults justified the duty to warn requirement. \textit{Id.}
  \item \textsuperscript{86} See Thomson v. County of Alameda, 27 Cal. 3d 741, 753-54, 614 P.2d 728, 734, 167 Cal. Rptr. 70, 76 (1980) (psychiatrist has a duty to warn when potential victims are “readily identifiable”) (citation omitted); Mavroudis v. Superior Court, 102 Cal. App. 3d 594, 600, 162 Cal. Rptr. 724, 729 (1981) (psychiatrist has a duty to warn those whose identity can be determined after a “moment’s reflection”) (quoting \textit{Tarasoff}, 17 Cal. 3d at 439 n.11, 551 P.2d at 345 n.11, 131 Cal. Rptr. at 25 n.11).
  \item \textsuperscript{87} 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).
  \item \textsuperscript{88} Id. at 758, 614 P.2d at 738, 167 Cal. Rptr. at 80. A known and identifiable victim is one against whom the patient has made threats of harm. See \textit{id.} at 752-53, 614 P.2d at 734, 167 Cal. Rptr. at 76.
  \item \textsuperscript{89} Id. at 746, 614 P.2d at 730, 167 Cal. Rptr. at 72.
  \item \textsuperscript{90} Id.
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} Plaintiff also alleged that the county failed to exercise due care in maintaining control over James. \textit{Id.} The court never reached the issue of wrongful release because the court held that Cal. Gov't. Code §§ 820.2 and 845.8 (West 1980) immunized the county from tort liability for its decision to release James. \textit{Thompson,} 27 Cal. 3d at 747, 614 P.2d at 731, 167 Cal. Rptr. at 73.
\end{itemize}
Although the children of the neighborhood were foreseeable victims of the assault, the County had no duty to warn because there were too many potential victims to warn. The court stated that the duty to warn involves foreseeability of harm to a specific prospective victim who is "readily identifiable." In \textit{Thompson} no potential victim could be identified because James had made a threat towards a general group.

Justice Tobriner, who wrote the majority opinion in \textit{Tarasoff}, vigorously dissented, arguing that the special relationship between the County and James imposed a duty on the County to warn potential victims about James' threats and his release. He emphasized that no precedent supported the "identifiable victims" limitation; rather, the \textit{Tarasoff} duty extended to all "foreseeable" victims.

The foreseeable victims approach urged by Justice Tobriner is consistent with traditional principles of tort law. These principles require a psychiatrist to act reasonably in fulfilling a duty of care to third persons. Whether a psychiatrist acts reasonably toward victims of a patient's dangerous propensities depends in part on the number of foreseeable victims and the burden on the therapist in having to warn these victims. Furthermore, the impracticalities of warning foreseeable victims should not outweigh the fundamental principle of compensating victims of negligence. For these reasons, a number of courts have refused to accept the \textit{Thompson} limitation, and some have even extended the \textit{Tarasoff} duty to warn.

Because the duty to warn represents an extension of the traditional common-law duties owed by psychiatrists, it is not surprising that \textit{Tarasoff} and its

\footnotesize{93. See \textit{id.} at 761, 614 P.2d at 740, 167 Cal. Rptr. at 82 (Tobriner, J., dissenting).

94. The court emphasized that the class of people to whom a warning would have been given was so large that the warning would have been ineffective. \textit{id.} at 754-55, 614 P.2d at 735-36, 167 Cal. Rptr. at 77-78. The court refused to impose a general duty to warn unless the individual could be identified or the group of potential victims effectively warned. \textit{id.} at 758, 614 P.2d at 738, 167 Cal. Rptr. at 80.

95. \textit{id.}

96. See \textit{id.} at 750, 614 P.2d at 733, 167 Cal. Rptr. at 75.

97. The special relationship arose from the county's custody and control over James. \textit{id.} at 759, 614 P.2d at 738, 167 Cal. Rptr. at 80 (Tobriner, J., dissenting).

98. \textit{id.} at 761, 614 P.2d at 740, 167 Cal. Rptr. at 82 (Tobriner, J., dissenting).

99. In \textit{Thompson}, although a warning to the entire neighborhood or the public at large may have been impractical and ineffective, a warning to the delinquent's mother, who could have taken special care to control her son, would have been proper. \textit{id.} at 764, 614 P.2d at 741-42, 167 Cal. Rptr. at 83-84 (Tobriner, J., dissenting). Arguably the \textit{Thompson} court's limitation of the \textit{Tarasoff} duty to warn standard reflects the court's recognition that imposing this duty on therapists is a substantial expansion of traditional requirements of due care. See \textit{infra} note 101. By limiting a warning to "readily identifiable" victims, the court was able to limit the extent of a psychiatrist's liability while still upholding the duty to warn requirement.

100. See, e.g., Jablonski By Pahls v. United States, 712 F.2d 391 (9th Cir. 1983), in which the United States Court of Appeals for the Ninth Circuit held that even though a psychiatric patient made no specific threats toward his girlfriend, the patient's psychiatric profile was such that the victim was sufficiently "targeted" to be in need of a warning of the patient's violent propensities. \textit{id.} at 398. In Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980), the United States District Court for the District of Nebraska relied on the \textit{Tarasoff} rationale to find that reasonable care may include detaining a potentially dangerous individual. \textit{id.} at 193-94.

101. A psychiatrist's control over a dangerous patient forms the basis of liability when the patient escapes or is negligently released into the community and subsequently causes harm. In duty to}
progeny have generated enormous controversy over the practical effects of imposing a duty to warn on psychiatrists. Some commentators object to the “duty to warn on the ground that tort law provides no justification for the imposition of a duty... when the treatment is carried out on an outpatient basis.” They argue that “[o]nce the element of control is eliminated,” nothing in the therapist-patient relationship can override the no-duty rule.

Another persuasive argument against imposing the duty to warn has been the need to maintain confidentiality between psychiatrist and patient. Confidential communication is critical for effective treatment of mental disorders. Imposing a duty to warn on therapists destroys the patient’s expectation of privacy and undermines the therapist-patient privilege. Therefore, the duty arguably will make “treatment of dangerous patients more difficult, thereby increasing the risk of violence in our society.” To ensure confidentiality, North Carolina law mandates that a patient has a right to confidentiality. However, the Mental Health Act provides for several exceptions to the confidentiality requirement. The most important exception provides that a “responsible profes-
sional may disclose confidential information when in his opinion there is an imminent danger to the health or safety of the client or another individual or there is a likelihood of the commission of a felony or violent misdemeanor.\footnote{110} Although the statute imposes no absolute duty to warn of imminent danger, it may, when combined with an accepted practice standard,\footnote{111} support the imposition of a duty to warn in the treatment of psychiatric patients in North Carolina.\footnote{112} Moreover, the application of traditional negligence principles in duty to warn cases would allow the adoption of a "foreseeable victims" standard\footnote{113} and permit North Carolina courts to provide fair compensation to foreseeable victims while balancing the competing interests of patients, psychiatrists, and the public at large.

As compared to the confidentiality interest in duty to warn cases, the recognition of liability in wrongful release cases necessarily involves a balancing of competing public policy interests. The goal behind deinstitutionalization is to rehabilitate psychiatric patients through their integration back into society.\footnote{114} The Mental Health Act's policy is to implement "a service delivery system designed to meet the needs of clients in the least restrictive available setting, if the least restrictive setting is therapeutically most appropriate, and to maximize [the patient's] quality of life."\footnote{115} Consistent with modern forms of therapy, North Carolina's "open door"\footnote{116} policy provides patients with freedoms not allowed under the traditional custodial approach.\footnote{117} These freedoms may include unlocked wards, home visits, community work programs, and a greater incentive for outpatient treatment.\footnote{118} Although proven to be an effective means of therapy,\footnote{119} the open door approach has been hampered by community fears\footnote{120}

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\footnote{10} Information, id. § 122C-53, or if a court issues an order compelling disclosure. \textit{Id.} § 122C-54. Area or state facilities may share confidential information regarding clients. \textit{Id.} § 122C-55. The Secretary of the Department may require disclosure of information that does not identify clients for purposes of preparing statistical data reports. \textit{Id.} § 122C-56.

\footnote{11} \textit{Id.} § 122C-55(d).

\footnote{12} See supra notes 56-58 and accompanying text.

\footnote{13} In certain situations confidentiality must give way to the public interest. For example, in McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (1979), the court recognized that a psychiatrist has a duty to warn. In reaching its decision, the court relied on several New Jersey statutes that require physicians to report various contagious diseases, \textit{id.} at 509-10 (citing N.J. STAT. ANN. § 26:4-15 (West 1939)); and require persons with knowledge of crimes to report them. \textit{Id.} (citing N.J. STAT. ANN. § 2A:97-2 (West 1939)). The court emphasized that confidentiality must give way to the interest of protecting the public welfare. \textit{McIntosh}, 168 N.J. Super. at 489, 403 A.2d at 511-12.

\footnote{14} See supra notes 77-84 & 97-100 and accompanying text. North Carolina courts have always considered foreseeability to be an essential element in negligence actions. See \textit{9 STRONG'S N.C. INDEX 3D, Negligence} § 9 (1976).


\footnote{16} N.C. GEN. STAT. § 122C-2 (Supp. 1985).

\footnote{17} "The "open door" approach is implemented through programs designed to place the patient in the least restrictive environment possible. For an excellent discussion of the development of the "open door" policy and its nationwide impact, see Note, \textit{Liability of Mental Hospitals For Acts of Their Patients Under the Open Door Policy}, 57 VA. L. REV. 156 (1971).

\footnote{18} See Note, supra note 116, at 156.

and increased judicial scrutiny.\textsuperscript{121}

Arguably, the imposition of liability on psychiatrists in wrongful release cases will impede the treatment of patients. Some commentators assert that the threat of civil liability, combined with the tendency to over-predict dangerousness, will result in the over-commitment of patients and lead to a drastic reduction in release programs.\textsuperscript{122} As noted by one court, "The effect would be fairly predictable. The treating physician would indulge in every presumption in favor of further restraint, out of fear of being sued. Such a climate is not in the public interest."\textsuperscript{123}

Although a psychiatrist's liability to third parties may cause therapists to err on the side of caution, North Carolina's recognition of wrongful release reflects the more important policy interest of public safety. The role of a psychiatrist is multi-dimensional. Therapists not only owe a duty to provide effective treatment to their patients, but they also owe a duty to protect society from potentially dangerous individuals.\textsuperscript{124} The adoption of a negligence standard will allow the proper balancing of these competing policy interests. Moreover, North Carolina's imposition of liability for wrongful release is consistent with the fundamental principle of tort law to provide aggrieved parties with an adequate remedy. A psychiatrist is not asked to be an insurer of the public welfare. All that is required is that he or she, as a member of the mental health profession, exercise reasonable care when deciding to release a patient. Like other professionals, a therapist must follow accepted practices and standards in treating the mentally ill. North Carolina courts, however, should remain cognizant of the subjective nature of psychiatry and the inherent unreliability in predicting human behavior. The recognition of an objective standard of care will permit courts to weigh these delicate factors in negligent release situations.

Likewise, the adoption of an objective standard in duty to warn cases would allow courts to balance patients' rights to confidentiality against society's need for protection from dangerous persons. In addition, the application of a "foreseeable victims" test would prevent unjust denial of compensation to those persons who fail to qualify as readily identifiable victims. The protective measures imposed on psychiatrists in duty to warn situations would necessarily be influenced by the particular facts of each individual case. Whether North Carolina courts will define reasonable care to include warning of a patient's violent propensities remains unanswered.

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\textsuperscript{120} See Note, supra note 116, at 167. The author points out that whenever a death or injury occurs due to the release of a psychiatric patient, communities often demand stricter therapeutic techniques. This community criticism, coupled with legislative pressure, results in the constriction of the open door approach. \textit{Id.}
\textsuperscript{121} Note, supra note 116, at 162-65.
\textsuperscript{123} \textit{Sherrill}, 653 S.W.2d at 664.
\textsuperscript{124} See J. Tinsley, supra note 3, at 596-98.