Assignment J

Duty to Help or to Protect Others

We have seen that you generally have a duty to exercise reasonable care to avoid harming other people. That means you have a duty to refrain from doing unreasonably dangerous things that hurt others. But is that all? Do you ever have a duty to do something to help someone?

As the *Yania v. Bigan* case explains, the general answer is no. In other words, you generally cannot be held liable for mere "nonfeasance." You are not legally obligated to do anything to help or protect other people. This general rule has been uniformly accepted by courts in every state.

The difficult and complicated question is whether any exceptions to this general rule should be made, so that you would have a duty at least in some special circumstances to help other people. The *Tarasoff*, *Farwell*, *Iseberg*, and *Graves* cases illustrate the varying attitudes that courts have had toward creating such exceptions.

YANIA

v.

BIGAN

155 A.2d 343

Supreme Court of Pennsylvania

Nov. 9, 1959

Justice Jones.

A bizarre and most unusual circumstance provides the background of this appeal. The defendant John Bigan was engaged in a coal strip-mining operation. On the property being stripped were large cuts or trenches created by Bigan for the purpose of removing coal. One cut contained water 8 to 10 feet in depth with side walls or embankments 16 to 18 feet in height; at this cut Bigan had installed a pump to remove the water. One afternoon, Joseph Yania, the operator of another mining operation, and Boyd Ross went upon Bigan's property for the purpose of discussing a business matter with Bigan, and, while there, were asked by Bigan to aid him in starting the pump. Ross and Bigan stood at the point where the pump was located. Yania stood at the top of one of the cut's side walls and then jumped from the side wall into the water and drowned.

Yania's widow filed suit, contending that Bigan was responsible for Yania's death. Summarized, Bigan stands charged with negligently (1) urging, enticing, and taunting Yania to jump into the water; and (2) failing to go to Yania's rescue after he had jumped into the water. Our inquiry must be to ascertain whether the well-pleaded facts in the complaint, assumedly true, would, if shown, suffice to prove negligent conduct on the part of Bigan.

Plaintiff initially contends that Yania's descent from the high embankment into the water and his resulting death were caused by Bigan's words and blandishments. The complaint does not allege that Yania slipped or that he was pushed or that Bigan made any physical impact upon Yania. On the contrary, the complaint alleges that Bigan, by the employment of cajolery and inveiglement, caused such a mental impact on Yania that the latter was deprived of his volition and freedom of choice and placed under a compulsion to jump into the water. Had Yania been a child of tender years or a person mentally deficient, then it is conceivable that taunting and enticement could constitute actionable negligence if it resulted in harm. However, to contend that such conduct directed to an adult in full possession of all his mental faculties constitutes actionable negligence is not only without precedent but completely without merit.

It is urged that Bigan failed to take steps to rescue Yania from the water. The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position. The complaint does not aver any facts which impose upon Bigan legal responsibility for placing Yania in the dangerous position in the water and, absent such legal responsibility, the law imposes on Bigan no duty of rescue.

We can reach but one conclusion: that Yania, a reasonable and prudent adult in full possession of all his mental faculties, undertook to perform an act which he knew or should have known was attended with peril and it was the performance of that act and not any conduct upon Bigan's part which caused his unfortunate death.

NOTES

The terms "malfeasance," "misfeasance," and "nonfeasance" often come up in discussions of this issue. Malfeasance means an unlawful or intentionally wrongful act, misfeasance means a legitimate act done in a wrongful manner, and nonfeasance means a failure to act. *Prosser & Keeton on Torts* § 56, at 374 (5th ed. 1984) ("there arose very early a difference, still deeply rooted in the law of negligence, between 'misfeasance' and 'nonfeasance' – that is to say, between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm").

TARASOFF

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA

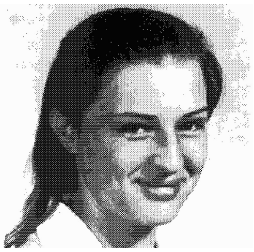
529 P.2d 553

Supreme Court of California

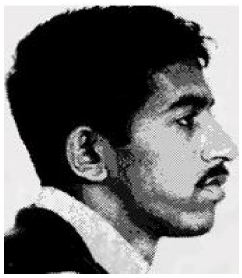
Dec. 23, 1974

Justice Tobriner.

Prosenjit Poddar was born into the Harijan ("untouchable") caste in India. He came to the University of California at Berkeley as a graduate student in September 1967. In the fall of 1968, he attended folk dancing classes, and it was there he met Tatiana Tarasoff. They saw each other weekly throughout the fall, and kissed on New Year's Eve. He interpreted the act to be a recognition of the existence of a serious relationship. This view was not shared by Tatiana who, upon learning of his feelings, told him that she was involved with other men and was not interested in entering into an intimate relationship with him.



Tatiana Tarasoff



Prosenjit Poddar

As a result of this rebuff, Poddar underwent a severe emotional crisis. He became depressed and neglected his appearance, studies and health. He remained by himself, speaking disjointedly and often weeping. This condition persisted, with steady deterioration, through the spring and into the summer of 1969. Poddar had occasional meetings with Tanya during this period and tape recorded their conversations in an attempt to ascertain why she did not love him.

During the summer of 1969, Tatiana went to Brazil. After her departure, at the suggestion of a friend, Poddar sought psychological assistance. According to plaintiffs' allegations, Poddar informed Dr. Lawrence Moore, a psychologist employed by the university, that he was going to kill Tatiana when she returned home. Moore decided that Poddar should be committed for observation in a mental hospital. Moore sent a letter to the campus police requesting their assistance in securing Poddar's confinement.

Campus police officers took Poddar into custody. They were satisfied, however, that Poddar was rational, and they released him on his promise to stay away from Tatiana. Dr. Harvey Powelson, director of the department of psychiatry at the university hospital, then asked the police to return Moore's letter, directed that all copies of the letter and notes that Moore had taken as therapist be destroyed, and ordered that no action be taken to place Poddar in a treatment and evaluation facility. No one warned Tatiana of her peril.

On October 27, 1969, shortly after her return from Brazil, Poddar went to Tatiana's home with a pellet gun and a kitchen knife. She refused to speak with him, and when he persisted, she screamed. At this point, Poddar shot her with the pellet gun. She ran from the house, but was pursued, caught, and repeatedly and fatally stabbed. Poddar then returned to Tatiana's home and called the police.

The plaintiffs, Tatiana's parents, brought this lawsuit against Dr. Moore, Dr. Powelson, and the Regents of the University of California as the employer of the therapists. Defendants contend that they owed no duty to Tatiana or her parents and that, in the absence of such a duty, they were free to act in careless disregard of Tatiana's safety. In analyzing this, we bear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed. Duty "is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Prosser & Keeton on Torts* § 53, at 358 (4th ed. 1971).

Under the common law, as a general rule, one person owed no duty to control the conduct of another, nor to warn those endangered by such conduct. But courts have imposed a duty in cases in which the defendant stands in some "special relationship" to the person whose conduct needs to be controlled or the foreseeable victim of that conduct. The no-duty rule derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter. Morally questionable, the rule owes its survival to "the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one." *Id.* § 56, at 341. Because of these practical difficulties, the courts have increased the number of instances in which affirmative duties are imposed not by direct rejection of the common-law rule, but by expanding the list of special relationships which will justify departure from that rule.

Turning to the special relationships present in this case, we note that Poddar and the defendant therapists had the special relation that arises between a patient and his doctor or therapist. Such a relationship may support affirmative duties for the benefit of third persons. Thus, for example, a hospital must exercise reasonable care to control the behavior of a patient who may endanger other persons. A doctor must also warn a patient if the patient's condition or medication renders certain conduct, such as driving a car, dangerous to others. As the present case illustrates, a patient with severe mental illness and dangerous proclivities may present a danger as serious and foreseeable as does the carrier of a contagious disease or the driver whose condition or medication affects his ability to drive safely. We conclude that a doctor or a psychotherapist treating a mentally ill patient bears a duty to use reasonable care to give threatened persons such warnings as are essential to avert foreseeable danger arising from his patient's condition or treatment.

A duty to warn may also arise from a voluntary act or undertaking by a defendant. Once the defendant has commenced to render service, he must employ reasonable care; if reasonable care requires the giving of warnings, he must do so. The record indicates that following Poddar's encounter with the police, Poddar broke off all contact with the hospital staff and discontinued psychotherapy. From those facts one could reasonably infer that defendants' actions led Poddar to halt treatment which, if carried through, might have led him to abandon his plan to kill Tatiana, and thus that defendants, having contributed to the danger, bear a duty to give a warning.

The defendants advance two policy considerations which, they suggest, justify refusal to impose a duty upon a psychotherapist to warn third parties of danger arising from the violent intentions of his patient.

First, defendants point out that although therapy patients often express thoughts of violence, they rarely carry out these ideas. Indeed the open and confidential character of psychotherapeutic dialogue encourages patients to voice such thoughts, not as a device to reveal hidden danger, but as part of the process of therapy. Certainly a therapist should not be encouraged routinely to reveal such threats to acquaintances of the patient; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened. In singling out those few patients whose threats of violence present a serious danger and in weighing against this danger the harm to the patient that might result from revelation, the psychotherapist renders a decision involving a high order of expertise and judgment. The judgment of the therapist, however, is no more delicate or demanding than the judgment which doctors and other professionals must regularly render. A professional person is required only to exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of his profession under similar circumstances." *Bardessono v. Michels*, 478 P.2d 480, 484 (Cal. 1970). Within the broad range in which professional opinions may differ, the psychotherapist is free to exercise his own best judgment free from liability. Proof, aided by hindsight, that he judged wrongly is insufficient to establish liability. Whatever difficulties the courts may encounter in evaluating expert

judgments, those difficulties cannot justify total exoneration from liability.

Second, defendants argue that free and open communication is essential to psychotherapy, because unless a patient is assured that information revealed by him will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment depends. We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy. Against this interest, however, we must weigh the public interest in safety from violent assault. The legislature has undertaken the difficult task of balancing the countervailing concerns. In California Evidence Code § 1014, it established a broad rule of privilege to protect confidential communications between patient and psychotherapist. In § 1024, however, the legislature created a specific and limited exception to the psychotherapist-patient privilege: "There is no privilege if the psychotherapist has reasonable cause to believe the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." The revelation of a communication under the above circumstances is not a breach of trust or a violation of professional ethics. We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield in instances in which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.

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

For the foregoing reasons, we find that plaintiffs' complaint states a cause of action against the defendants for breach of a duty to warn Tatiana.

Justice Clark, dissenting.

I do not agree with the majority's conclusion. Generally, one person owes no duty to control the conduct of another. Exceptions arise only in limited situations where (1) a special relationship exists between the defendant and the injured party giving the latter a right to protection, or (2) a special relationship exists between the defendant and the wrongdoer imposing a duty on the defendant to control the wrongdoer's conduct.

The imposition of a duty depends on policy considerations. The principal considerations include the burden on the defendant, the consequence to the community, the prevention of future violence, and the foreseeability of harm to the plaintiff. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968). The majority neglects to apply these considerations to our case. More specifically, the majority fails to realistically evaluate the devastating impact their new duty will have on the field of mental health – and the repercussions resulting to society.

The importance of psychiatric treatment is well-recognized. Successful psychotherapy demands confidentiality. The duty to warn imposed by the majority will cripple the use and effectiveness of psychiatry. Many people, potentially violent yet susceptible to treatment, will be deterred from seeking it. Those seeking aid will be inhibited from making the self-revelation necessary to effective treatment. Finally, requiring the psychiatrist to violate the patient's trust will destroy the interpersonal relationship by which treatment is effected. Given that only a relative few receiving psychiatric treatment will ever present a serious risk of violence, the newly imposed duty will likely result in a net increase in violence.

The psychiatric community recognizes that the process of determining potential violence in a patient is far from exact, being wrought with complexity and uncertainty. This predictive uncertainty is fatal to the majority's assumption that the number of disclosures will be small. Psychiatric patients are encouraged to discuss all

thoughts of violence. And, as the majority concedes, they often express such thoughts. However, unlike this court, the psychiatrist does not enjoy the benefit of hindsight in seeing which few, if any, of his patients will ultimately become violent. Now, operating under the majority's duty, the psychiatrist – with each patient and each visit – must instantaneously calculate potential violence. And, given the decision not to warn must always be made at the psychiatrist's civil peril, one can expect all doubts will be resolved in favor of warning.

Our sympathy for the victims of violent acts of the mentally ill should not blind us to the needs of the mentally ill or to the ultimate goal of reducing the level of violence. Because the majority's holding will severely impair the ability of doctors to treat effectively, resulting in a net increase in violence, I cannot concur in the majority's new rule.

NOTES

1. The *Second Restatement*. The *Tarasoff* case was decided about a decade after the completion of the *Second Restatement*. The *Second Restatement* had listed four types of "special relationships" giving rise to a duty to aid or protect another person:

- Common carriers have a duty to help or protect their passengers.
- Innkeepers have a duty to their guests.
- A possessor of land who holds it open to the public has a duty to those who enter.
- A person who takes custody of another person and thereby deprives that person of his normal opportunities for protection has a duty to help or protect that person.

Restatement (Second) of Torts § 314A. Other sections of the *Second Restatement* indicated that in some circumstances other relationships, such as employer/employee and parent/child relationships, could also give one person a duty to help, protect, or control another person. *See id.* §§ 314B, 316, 317, 318, 319.

2. The *Third Restatement*. The *Third Restatement*, which was finalized in 2012, contained somewhat longer lists of special relationships. It listed seven types of relationships giving one person a duty to help or protect others:

- A common carrier and passengers.
- An innkeeper and guests.
- A possessor of land held open to the public and those who lawfully enter the premises.
- An employer and its employees who, while at work, are (a) in imminent danger or (b) injured or ill and thereby rendered helpless.
- A school and its students.
- A landlord and its tenants.
- A custodian and a person in its custody, if the custodian has a superior ability to protect the person (such as a parent and a dependent child, a day-care center and the children there, a hospital and a patient, a nursing home and a resident, or a jail and an inmate).

Restatement (Third) of Torts § 40.

The new *Restatement* also listed four types of relationships that give one person a duty to control others:

- A parent and dependent children.
- A custodian and those in its custody (such as a jail and an inmate, a parole officer and a parolee, a mental hospital and a patient, or a hospital and a patient with contagious diseases).
- An employer and employees, when the employment facilitates the employee in causing harm to third parties.
- A mental-health professional and patients.

Id. § 41. That last item on the *Third Restatement*'s list of special "control" relationships was inspired by the *Tarasoff* decision. The *Restatement* says these lists are not exhaustive; in other words, the special relationships that create a duty include but are not limited to the things that are listed.

FARWELL

v.

KEATON

240 N.W.2d 217

Supreme Court of Michigan

Apr. 1, 1976

Justice Levin.

On the evening of August 26, 1966, David Siegrist and Richard Farwell drove to a trailer rental lot to return an automobile which Siegrist had borrowed from a friend who worked there. While waiting for the friend to finish work, Siegrist and Farwell consumed some beer. Two girls walked by the entrance to the lot. Siegrist and Farwell attempted to engage them in conversation; then they followed the girls to a drive-in restaurant down the street. The girls complained to their friends in the restaurant that they were being followed. These friends (defendants Donald and Daniel Keaton and at least four others) chased Siegrist and Farwell back to the lot. Siegrist escaped unharmed, but Farwell was severely beaten. Siegrist found Farwell underneath his automobile in the lot. Ice was applied to Farwell's head. Siegrist then drove Farwell around for approximately two hours, stopping at a number of drive-in restaurants. Farwell went to sleep in the back seat of his car. Around midnight, Siegrist drove the car to the home of Farwell's grandparents, parked it in the driveway, unsuccessfully attempted to rouse Farwell, and left. Farwell's grandparents discovered him in the car the next morning and took him to the hospital. He died three days later of an epidural hematoma.

The plaintiff, Farwell's father and administrator of his estate, contended that had Siegrist taken Farwell to the hospital or notified someone of Farwell's condition, Farwell would not have died. A neurosurgeon testified that if a person in Farwell's condition is taken to a doctor before or within half an hour after consciousness is lost, there is a high chance of survival.

The jury returned a verdict for plaintiff in the suit against Siegrist and awarded $15,000 in damages. The Court of Appeals reversed, finding that Siegrist had not assumed the duty of obtaining aid for Farwell.

Without regard to whether there is a general duty to aid a person in distress, there is a clearly recognized legal duty of every person to avoid any affirmative acts which may make a situation worse. "If the defendant attempts to aid, and takes charge of the situation, he is regarded as entering voluntarily into a relation which is attended with responsibility. Such a defendant will then be liable for a failure to use reasonable care for the protection of the plaintiff's interests." *Prosser on Torts* § 56, at 343-44 (4th ed. 1971).

Siegrist knew that Farwell had been in a fight, and he attempted to relieve Farwell's pain by applying an ice pack to his head. While Farwell and Siegrist were riding around, Farwell crawled into the back seat and laid down. The testimony showed that Siegrist attempted to rouse Farwell after driving him home but was unable to do so. In addition, Farwell's father testified to admissions made to him by Siegrist:

> "Q: Did you have any conversation with Mr. Siegrist after this event occurred?
>
> A: Yes, the day after. I asked him why he left Ricky in the driveway of his grandfather's home.
>
> Q: What did he say?
>
> A: He said, 'Ricky was hurt bad, I was scared.' I said, 'Why didn't you tell somebody, tell his grandparents?' He said, 'I know I should have, I don't know.'"

Siegrist contends that he is not liable for failure to obtain medical assistance for Farwell because he had no duty to do so. Courts have been slow to recognize a duty to render aid to a person in peril. "There is no legal obligation to be a Good Samaritan." Harper & James, *The Law of Torts*, § 18.6, at 1046 (1956); *Prosser on Torts* § 56, at 340-41 ("The law has persistently refused to recognize the moral obligation of common decency and humanity, to come to the aid of another human being who is in danger.

The remedy in such cases is left to the 'higher law' and the 'voice of conscience,' which, in a wicked world, would seem to be singularly ineffective either to prevent the harm or to compensate the victim.").

Where such a duty has been found, it has been predicated upon the existence of a special relationship between the parties. In such a case, if defendant knew or should have known of the other person's peril, he is required to render reasonable care under all the circumstances. For example, carriers have a duty to aid passengers who are known to be in peril, *Yu v. N.Y., New Haven & Hartford Ry. Co.*, 144 A.2d 56 (Conn. 1958), employers similarly are required to render aid to employees, *Anderson v. Atchison, T. & S.F. R. Co.*, 333 U.S. 821 (1948), innkeepers to their guests, *West v. Spratling*, 86 So. 32 (Ala. 1920), a jailer to his prisoner, *Farmer v. State*, 79 So.2d 528 (Miss. 1955).

The Sixth Circuit Court of Appeals, in *Hutchinson v. Dickie*, 162 F.2d 103 (6th Cir. 1947), said that a host had an affirmative duty to attempt to rescue a guest who had fallen off his yacht. The host controlled the only instrumentality of rescue. The Court declared that to ask of the host anything less than that he attempt to rescue his guest would be "shocking to humanitarian considerations and the commonly accepted code of social conduct." *Id.* at 106.

Farwell and Siegrist were companions on a social venture. Implicit in such a common undertaking is the understanding that one will render assistance to the other when he is in peril if he can do so without endangering himself. Siegrist knew or should have known when he left Farwell, who was badly beaten and unconscious, in the back seat of his car that no one would find him before morning. Under these circumstances, to say that Siegrist had no duty to obtain medical assistance or at least to notify someone of Farwell's condition and whereabouts would be shocking. Farwell and Siegrist were companions engaged in a common undertaking; there was a special relationship between them. Because Siegrist knew or should have known of the peril Farwell was in and could render assistance without endangering himself, he had an affirmative duty to come to Farwell's aid.

The Court of Appeals is reversed and the verdict of the jury reinstated.

Justice Fitzgerald, dissenting.

Siegrist did not voluntarily assume the duty of caring for Farwell's safety. Nor did the circumstances impose such a duty. Testimony revealed that only a qualified physician would have reason to suspect that Farwell had suffered an injury which required immediate medical attention. Farwell never complained of pain and, in fact, had expressed a desire to retaliate against his attackers. Siegrist's inability to arouse Farwell upon arriving at his grandparents' home does not permit us to infer that Siegrist knew or should have known that Farwell was seriously injured. While it might have been more prudent for Siegrist to insure that Farwell was safely in the house prior to leaving, we cannot say that Siegrist acted unreasonably in permitting Farwell to spend the night asleep in the back seat of his car.

The close relationship between Siegrist and Farwell is said to establish a legal duty upon Siegrist to obtain assistance for Farwell. No authority is cited for this proposition other than the public policy observation that the interest of society would be benefited if its members were required to assist one another. This is not the appropriate case to establish a standard of conduct requiring one to legally assume the duty of insuring the safety of another. Recognizing that some have expressed moral outrage at those decisions which permit one to refuse aid to another whose life may be in peril, we cannot say that, considering the relationship between these two parties and the existing circumstances, Siegrist acted in an unreasonable manner.

Plaintiff believes that a legal duty to aid others should exist where such assistance greatly benefits society and only a reasonable burden is imposed upon those in a position to help. We must reject plaintiff's proposition which elevates a moral obligation to the level of a legal duty.

The Court of Appeals properly decided as a matter of law that defendant owed no duty to the deceased.

ISEBERG

v.

GROSS

879 N.E.2d 278

Supreme Court of Illinois

Sept. 20, 2007

Justice Burke.

Edward Slavin, Mitchell Iseberg, and Sheldon Gross were involved in a business venture. It was a failure, and Slavin blamed this on Iseberg. Slavin spoke to Gross on several occasions about wanting to harm Iseberg. In the beginning, Slavin talked about punching Iseberg in the face with brass knuckles. But as time passed and Slavin became more agitated, he talked about wanting to find a "hit man" and he later outlined a plan for killing Iseberg and then committing suicide. Slavin told Gross that, once the suicide exemption clause in his life insurance policy was no longer in effect, he would go to Iseberg's home, ring the doorbell, shoot Iseberg, and then kill himself so his family could collect his insurance. Slavin also told Gross that he had purchased a gun and asked Gross whether the caliber was large enough to kill someone.

Gross contacted Slavin's brother, Earl, to express his concerns. Gross suggested, more than once, that Earl obtain psychiatric help for his brother. Earl always demurred, assuring Gross that Slavin would never act on his threats. Gross never told Iseberg about the threats.

Gross spoke to Slavin on only three occasions over the next year. Slavin voiced no more threats during this time, but on one occasion asked if Gross knew Iseberg's new address. Gross said he did not know and would not give it to him if he did. On January 24, 2000, Slavin rang the doorbell at Iseberg's residence. When Iseberg answered the door, Slavin shot him four times. Iseberg was not killed, but was rendered a paraplegic.

Iseberg brought a negligence action against Gross. The complaint alleged that Gross knew that Slavin had threatened to kill Iseberg and that he had purchased a gun. Based on this knowledge, Gross was in a unique position to prevent the harm by either communicating the threats to Iseberg or contacting the police. Plaintiff then asserted that, because of this knowledge, Gross owed a duty to warn and protect Iseberg. The trial court dismissed the claims, and the appellate court affirmed.

To state a legally sufficient claim of negligence, the complaint must allege facts establishing the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. The issue before us is whether a legal duty existed. Plaintiff does not allege that defendant owed him a duty by virtue of any contract or statute. Rather, he seeks to hold defendant liable for negligence under common law principles. What we must decide is whether plaintiff and defendants stood in such a relationship to one another that the law imposed on defendant an obligation of reasonable conduct for the benefit of plaintiff.

Under common law, the universally accepted rule is that a private person has no duty to act affirmatively to protect another from criminal attack by a third person absent a "special relationship" between the parties. *Restatement (Second) of Torts* § 314A. Historically, there have been four "special relationships" which this and other courts have recognized, namely, common carrier-passenger, innkeeper-guest, business invitor-invitee, and voluntary custodian-protectee. *Id.* The existence of one of these four "special relationships" has typically been the basis for imposing an affirmative duty to act where one would not ordinarily exist.

Here, plaintiff does not allege that one of the "special relationships" existed. Instead, plaintiff contends that the "special relationship" doctrine should no longer be the sine qua non for determining whether to impose an affirmative duty to protect against acts of a third party. Rather, plaintiff contends that in situations where some type of relationship exists between the parties (*i.e.*, they are not mere strangers), whether an affirmative duty exists should be based upon consideration of factors such as foreseeability of risk, likelihood of injury, and

the magnitude and consequences of the burden that the duty would put on the defendants.

Plaintiff contends that the no-affirmative-duty rule and "special relationship" exceptions are antiquated and out of step with today's morality. While it is true that these doctrines have been criticized by a number of legal scholars, this criticism is not new. Legal pundits have long assailed this area of tort law, citing its lack of social conscience.

Contrary to plaintiff's assertions, the no-affirmative-duty rule has been retained in every jurisdiction. Some states have legislatively created narrow exceptions to the rule, imposing criminal sanctions if a person who is present when certain violent crimes are taking place fails to notify police or, in some instances, fails to render assistance to the victim.[*] However, none of these statutes provide for a civil cause of action. Thus, given the wide acceptance of the no-duty rule and the "special relationship" doctrine, it cannot be said that they are antiquated or outmoded.

Moreover, abandonment of the no-duty rule would create a number of practical difficulties – defining the parameters of an affirmative obligation and enforcement, to name just two. As noted by Prosser and Keeton:

> "The difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one, has limited any tendency to depart from the rule to cases where some special relation between the parties has afforded a justification for the creation of a duty."

Prosser & Keeton on Torts § 56, at 376 (5th ed.1984).

We may not depart from stare decisis without special justification. Where a rule of law has been settled and does not contravene any statute or constitutional principle, it may be disregarded only for compelling reasons. In the case at bar, plaintiffs have not provided compelling reasons to judicially abandon the "special relationship" doctrine for finding an exception to the no-affirmative-duty rule. We will continue to adhere to its principles. For these reasons, we affirm the judgment of the appellate court.

NOTES

1. **Missouri.** Missouri courts adhere to the general rule that one does not owe a duty to help, protect, or control others, but they recognize exceptions where a "special relationship" or "special facts and circumstances" are present. While the "special relationship" test creates a duty based solely on the positions of and connections between the parties, the "special facts and circumstances" test looks more broadly at factors like the foreseeability of danger based on past incidents or the extent to which the defendant had means to prevent the injury from occurring. *M.C. v. Yeargin*, 11 S.W.3d 604 (Mo. 1999); *Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718 (Mo. Ct. App. 1983).

2. Kansas. Kansas courts seem reluctant to expand the list of special relationships beyond those already established, but that doesn't absolutely rule out the possibility that additional special relationships could be recognized. *See, e.g.*, *Klose v. Wood Valley Racquet Club, Inc.*, 975 P.2d 1218 (Kan. 1999) (finding that no special relationship existed between tennis associations and child playing in tennis tournament, because the relationship was not analogous to any of the special relationships recognized in the *Second Restatement*).

[*] Some states have enacted laws imposing criminal sanctions if a person, present at the scene, fails to notify police that a sexual assault (Florida, Massachusetts, Rhode Island) or other violent crime (Vermont, Minnesota, Ohio, Washington, and Wisconsin) is taking place. Two states (Rhode Island and Vermont) require one who is present at the scene of a violent crime to render "reasonable assistance" to persons known to be exposed to grave physical harm, when the provision of such aid can be accomplished without danger to oneself or others.

GRAVES

v.

WARNER BROS.

656 N.W.2d 195

Michigan Court of Appeals

Oct. 22, 2002

Judge Griffin.

This case arises from Jonathan Schmitz's killing of Scott Amedure with a shotgun on March 9, 1995. Three days before the shooting, Schmitz appeared with Amedure in Chicago for a taping of an episode of the Jenny Jones talk show, during which Schmitz was surprised by Amedure's revelation that he had a secret crush on him. After the taping, Schmitz told many friends and acquaintances that he was quite embarrassed by the experience and began a drinking binge.

On the morning of the shooting, Schmitz found a sexually suggestive note from Amedure on his front door. Schmitz drove to a local bank, withdrew money from his savings account, and purchased a shotgun and ammunition. He then drove to Amedure's trailer, where he confronted Amedure about the note. When Amedure just smiled at him, Schmitz retrieved the shotgun from his car and returned to the trailer. Standing at the front door, Schmitz fired two shots into Amedure's chest, leaving him with no chance for survival. Schmitz left the scene and telephoned 911 to confess to the shooting. He was found guilty of second-degree murder and sentenced to 25 to 50 years' imprisonment.

In the wrongful death action now before us, plaintiffs Patricia Graves and Frank Amedure, as personal representatives of the estate of Scott Amedure, allege that Schmitz killed Amedure as a result of the actions of the companies that own and produce the Jenny Jones Show. (Jonathan Schmitz was also sued but was dismissed as a result of a settlement agreement.) Plaintiffs essentially contend that defendants "ambushed" Schmitz when they taped the episode of the show in question (the segment was never broadcast), intentionally withholding from Schmitz that the true topic of the show was same-sex crushes and never attempting to determine, before the show, the effect the ambush might have on Schmitz. Plaintiffs allege that defendants knew or should have known their actions would incite violence, and that defendants had a duty to refrain from placing Amedure in a position that would unreasonably expose him to the risk of harm, albeit the criminal conduct of a third person.

Defendants' motions for summary disposition and a directed verdict were denied by the trial court. Following extensive trial proceedings, a jury returned a verdict in plaintiffs' favor, and a judgment was entered awarding plaintiffs $29,332,686 in damages. Defendants now appeal.

The cornerstone issue of this case is whether defendants owed a duty to Scott Amedure to protect him from harm caused by the criminal acts of a third party, Jonathan Schmitz. Questions about whether a duty exists are for the court to decide as a matter of law. *Murdock v. Higgins*, 559 N.W.2d 639 (Mich. 1997). In determining whether a duty exists, courts examine different variables, including:

> "foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct and the injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach."

Krass v. Tri-County Security, Inc., 593 N.W.2d 578, 582 (Mich. Ct. App. 1999).

Of particular import here is the principle that, in general, there is no legal duty obligating one person to aid or protect another. *Id*. Moreover, an individual has no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party. *Murdock*, 559 N.W.2d at 643. The rationale underlying this general rule is the fact that criminal activity is normally unforeseeable.

"Under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law." *Prosser & Keeton on Torts* § 33 (5th ed. 1984).

As further explained by our Supreme Court in *Williams v. Cunningham Drug*, 418 N.W.2d 381, 382-83 (Mich. 1988):

> "In determining standards of conduct in the area of negligence, the courts have made a distinction between misfeasance, or active misconduct causing personal injury, and nonfeasance, which is passive inaction or the failure to actively protect others from harm. The common law has been slow in recognizing liability for nonfeasance because the courts are reluctant to force persons to help one another and because such conduct does not create a new risk of harm to a potential plaintiff. Thus, as a general rule, there is no duty that obligates one person to aid or protect another. Social policy, however, has led courts to recognize an exception to this general rule where a special relationship exists between a plaintiff and a defendant. The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation, one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety."


Scott Amedure

Such a special relationship must be sufficiently strong to require a defendant to take action to benefit the injured party. Examples of the requisite "special relationship" recognized under Michigan law include a common carrier that may be obligated to protect its passengers, an innkeeper his guests, an employer his employees, a doctor his patient, and business invitors or merchants their business invitees. *Restatement (Second) of Torts* § 315. In this context, our courts have established a duty of reasonable care toward only those parties who are "readily identifiable as being foreseeably endangered." *Mason v. Royal Dequindre, Inc.*, 566 N.W.2d 199, 203 (Mich. 1997).

Logic compels the conclusion that defendants in this case had no duty to anticipate and prevent the murder committed by Schmitz three days after leaving defendants' studio and hundreds of miles away. Here, the only special relationship, if any, that ever existed between defendants and Amedure, or between defendants and Schmitz, ended three days before the murder, when Schmitz and Amedure peacefully left the Chicago studio following the taping of the episode. Because the evidence, even when viewed from a perspective most favorable to plaintiffs, revealed no ongoing special relationship at the time of the murder, defendants owed no duty to protect Amedure from Schmitz's violent attack. The present situation simply cannot, under any reasonable interpretation of the circumstances, be construed as involving an existing special relationship that required defendants to respond to a risk of imminent and foreseeable harm to an identifiable person.


Jonathan Schmitz

This case presents no exceptional circumstances warranting departure from the general rule that criminal conduct is unforeseeable. Schmitz gave every appearance of being a normal, well-adjusted adult who consented to being surprised on the show by a secret admirer of unknown sex and identity. The evidence indicates that nothing in Schmitz's demeanor, or in any of his interactions with the show, put defendants on notice that he posed a risk of violence to others. To impose a duty

under the circumstances at hand would expand the concept of duty to limitless proportions.

While defendants' actions in creating and producing this episode of the show may be regarded by many as the epitome of bad taste and sensationalism, such actions are insufficient to impute the requisite relationship between the parties that would give rise to a legally cognizable duty. Accordingly, we reverse the judgment and remand to the trial court with directions that it enter a judgment in favor of defendants.

Judge Murphy, dissenting.

I respectfully dissent. Viewing the evidence in a light most favorable to plaintiffs, I believe that the issue of foreseeability was properly left to the jury. The evidence indicated that Jonathan Schmitz was humiliated on a show, scheduled to be broadcast on national television, through the revelation of a homosexual crush and lurid sexual fantasy by Scott Amedure, after Schmitz told defendants that he did not want the crush to be that of another man, and where defendants nonetheless proceeded with the production of the show, using deceit, sensationalism, and outrageous behavior. I reach my conclusion taking into consideration Schmitz's personal history, which included mental illness, alcohol and drug abuse, suicide attempts, anger management problems, and sexual identity concerns. Certainly, reasonable men and women could differ on whether Schmitz's violent act foreseeably resulted from defendants' actions in manipulating and exploiting the lives, emotions, and sexual identities of individuals for the purpose of producing their television talk show.

The existence of a legal duty in a negligence action is a question of law. However, where there are factual circumstances that give rise to a legal duty, the existence or nonexistence of those facts must be decided by a jury. *Aisner v. Lafayette Towers*, 341 N.W.2d 852 (Mich. Ct. App. 1983). Thus, although the question of duty is ordinarily one of law to be decided by the court, where a determination of duty depends on factual findings, those findings must be found by the jury.

The first matter that needs to be addressed in properly analyzing the duty issue is whether plaintiffs' action is premised on nonfeasance or misfeasance. I disagree with that portion of the majority's opinion that implicitly focuses on the concept of nonfeasance and the related principles concerning the duty to protect and the necessity of a special relationship. Such an analysis is inapplicable here because the essence of plaintiffs' case is misfeasance, or active misconduct, as opposed to nonfeasance or passive inaction, which would require a special relationship. Plaintiffs challenged defendants' actions in producing the same-sex crush show. Plaintiffs were not asserting liability based on defendants' failure to properly respond to Schmitz's pointing a shotgun at Amedure or failure to actively protect Amedure from Schmitz's actions, nor, on close inspection, is plaintiffs' action premised on defendants' failure to anticipate or prevent Schmitz's criminal act. Rather, plaintiffs' action focuses on defendants' active misconduct that allegedly created a risk of foreseeable harm to Amedure, which conduct included lies, deceit, and outrageous behavior. Although it is true that certain aspects of plaintiffs' claims involved inaction, such as the failure to check into Schmitz's background, the claims are all in the context of the manner in which the show was produced, which is a matter of active misconduct.

Should Schmitz's personal history, which included depression, alcohol and drug abuse, suicide attempts, anger management problems, and sexual identity concerns, be taken into account in determining whether a violent response was foreseeable, where there was no evidence that defendants knew about Schmitz's personal or psychiatric history? The majority states that "Schmitz gave every appearance of being a normal, well-adjusted adult who consented to being surprised on the show by a secret admirer of unknown sex and identity." For the most part, I agree with this statement.[*] But the matter presents a unique situation in the law regarding the foreseeability of third-party

[*] There was some testimony that one of the show's producers was so annoyed by Schmitz's constant telephone calls before the show that if Schmitz called one more time, the producer would smack him.

criminal acts because ordinarily one would not have the opportunity to look into the personal history of the criminal actor's life or even know who the criminal actor was going to be before the negligent act occurred; however, here the show knew that it was going to surprise Schmitz and cause some type of emotional reaction. I would hold that as a matter of public policy, if defendants, for their own benefit, wish to produce "ambush" shows that can conceivably create a volatile situation, they should bear the risk if a guest is psychologically unstable or criminally dangerous by being charged with that knowledge in the context of any foreseeability analysis. To rule otherwise would allow television, radio, or other media outlets to undertake similar actions as occurred here without limit and claim lack of foreseeability because they lacked knowledge concerning the history of a person they set up for ridicule.

Considering the evidence in a light most favorable to plaintiffs, the show used lies, deceit, sensationalism, and outrageous behavior, while playing with human emotions, in order to orchestrate a grand surprise for the benefit of its audience and ratings, which caused Schmitz to suffer deep embarrassment, humiliation, and extreme anger. Taking into consideration Schmitz's personal mental frailties and dangerous inclinations, those circumstances could lead reasonable jurors to draw different conclusions regarding whether it was foreseeable that Schmitz would commit an act of violence against Amedure. Therefore, resolution by the jury was appropriate.

NOTES

While the "special relationships" get a lot of attention in the case law, they are not the only exceptions to the general rule that you do not have a duty to help, protect, or control others.

1. Creating a risk. "When an actor's prior conduct, even though not tortious, creates a continuing risk of physical harm of a type characteristic of the conduct, the actor has a duty to exercise reasonable care to prevent or minimize the harm." *Restatement (Third) of Torts* § 39; *Restatement (Second) of Torts* §§ 321-22; *see, e.g.*, *Allen v. United States*, 370 F. Supp. 992 (E.D. Mo. 1973) (where air traffic controller's instruction to pilot created an unreasonable risk of a collision, the controller had a duty to exercise reasonable care to prevent the risk from taking effect, even if the controller was not negligent at the moment the instruction was originally made).

2. Voluntarily assuming a duty. Even if you otherwise would not have a duty to someone, you can voluntarily assume or undertake such a duty. At that point, you owe a duty to exercise reasonable care in your efforts. *Restatement (Third) of Torts* §§ 42-44; *Restatement (Second) of Torts* §§ 323-24; *see, e.g.*, *Strickland v. Taco Bell Corp.*, 849 S.W.2d 127, 132 (Mo. Ct. App. 1993) ("one who acts gratuitously or otherwise is liable for the negligent performance of an act, even though there was no duty to act originally").

3. Preventing others from assisting. Even if you otherwise would not have a duty to someone, you can be liable if you intentionally or negligently interfere with or prevent assistance from being provided by others. *Restatement (Second) of Torts* §§ 326-27. *But see Keesee v. Freeman*, 772 S.W.2d 663, 668 (Mo. Ct. App. 1989) (stating that no reported cases in Missouri have applied this exception and therefore it is unclear whether it is recognized in Missouri law).

4. Statutes. "When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and to determine the scope of the duty." *Restatement (Third) of Torts* § 38.