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Comment

When Does Parental Liability End?: Holding Parents Liable for the Acts of Their Adult Children

I. INTRODUCTION

On May 20, 1988, Laurie Wasserman Dann entered a Winnetka, Illinois school and opened fire on a second grade classroom. She killed one child, Nicky Corwin, and injured five others. Laurie Dann left many questions unanswered when she killed herself later that day. One unanswered question, which was before the court in the case of *Corwin v. Wasserman*,¹ is whether parents can be held liable for the acts of their adult child.

The Corwins contended that the Wassermans knew of their daughter's dangerous propensities. Specifically, it was alleged that the Wassermans knew that their daughter had made death threats, set fires, and was reported to have stabbed her ex-husband.² The Corwins also asserted that the Wassermans controlled every aspect of Laurie Dann's life.³ The Wassermans, it was alleged, decided where Dann lived, managed her finances, and controlled her contacts with the community.⁴ Despite this control and knowledge of her dangerousness, the Corwin's claimed that the Wassermans made no effort to protect society from their daughter.⁵ The Corwins further alleged that, under these circumstances, the Wassermans are liable for negligence.

The Wassermans argued that they are not liable for the acts of their adult, emancipated child. They contended that, legally, a parent can take control of their adult child only through a court order.⁶ The Wassermans state that, because they were not their daughter's court-appointed custodians, they are not liable for her

1. No. 88 L 16369 (Ill. Cir. Ct. filed Sept. 8, 1988).

2. Plaintiff's Response to Defendant's Motion to Dismiss at 17, *Corwin v. Wasserman* (Ill. Cir. Ct. filed Sept. 8, 1988) (No. 88 L 16369) [hereinafter Plaintiff's Response].

3. *Id.* at 2.

4. *Id.* at 19.

5. *Id.* at 1-2.

6. Defendant's Motion to Dismiss at 18, *Corwin v. Wasserman* (Ill. Cir. Ct. filed Sept. 8, 1988) (No. 88 L 16369).

acts.⁷

Parental liability for acts committed by their children is an evolving area of the law. This Comment focuses on whether parents of an adult child can be held liable for that child's acts. This Comment traces the history of parental liability, by examining legislative and judicial measures used to hold parents liable for the acts of their minor children: specifically, parental responsibility statutes and section 316 of the *Restatement (Second) of Torts*. The Comment also discusses how section 319 of the *Restatement*, which imposes liability on those taking charge of dangerous persons, may be expanded to apply to parents of a child beyond minority age. Finally, the Comment analyzes the moral and public policy problems of expanding parental liability by the use of section 319.

II. BACKGROUND

A. *The Common Law and Parental Liability Statutes*

At common law, the mere relationship of parent and child did not impose liability on parents for their child's torts.⁸ This rule came under attack, however, because children rarely have many assets. A rather serious problem of uncompensated juvenile torts resulted.⁹

Every state legislature has enacted, in some form, a parental liability statute.¹⁰ These statutes address the problem of uncompen-

7. *Id.* at 21. The court denied the Wassermans' motion to dismiss. *Corwin v. Wasserman*, No. 88 L 16369 (Ill. Cir. Ct. June 28, 1989) (denial of defendant's motion to dismiss); see *infra* text accompanying notes 110-20.

Judge Donald P. O'Connell of the Circuit Court of Cook County informed the author that the parties in *Corwin v. Wasserman* have reached a tentative settlement agreement. The settlement will not be subject to appellate review. Terms of the settlement were not disclosed. Interview with Judge Donald P. O'Connell, Circuit Court of Cook County, Illinois (Nov. 19, 1990).

8. 67A C.J.S. *Parent and Child* § 123 (1978).

9. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 123 (5th ed. 1984) [hereinafter *PROSSER AND KEETON ON TORTS*]. As one court stated:

One of the more inscrutable holdovers from the ancient establishments of the common law is the historically ubiquitous idea that a parent who has visited upon the world a tort-inflicting child ought not to be held financially responsible for the torts that the child has in turn visited upon those of us unfortunate enough to have gotten in the way.

Snow v. Nelson, 450 So. 2d 269, 271 (Fla. Dist. Ct. App. 1984).

10. See Scott, *Liability of Parents for Conduct of Their Child Under Section 33.01 of the Texas Family Code: Defining the Requisite Standards of "Culpability"*, 20 ST. MARY'S L. J. 69, 87-92 (1988) (appendix contains each state's parental liability statute).

sated juvenile torts by imposing a duty on parents to pay for the injuries caused by their minor child. Parental liability statutes were enacted primarily to compensate innocent victims and curtail juvenile delinquency.¹¹ To recover under a typical statute, the injured party must prove that the minor child committed a malicious or wilful tort.¹² The amount of damages recoverable under these statutes ranges from several hundred to several thousand dollars.¹³ In California, for example, the statute allows recovery up to \$10,000.¹⁴ Texas allows the plaintiff to recover up to \$15,000 plus court costs and attorney fees.¹⁵ Wyoming restricts recoverable damages to \$300,¹⁶ whereas Pennsylvania allows a \$300 recovery per person, with a maximum recovery of \$1000 regardless of the number of people injured.¹⁷

Initially, not every state accepted this expansion of liability. For example, in *Corley v. Lewless*,¹⁸ the Georgia parental liability statute successfully was challenged on state and federal constitutional grounds. The Georgia statute provided for parental liability without a limit on the amount of damages recoverable.¹⁹ The Georgia Supreme Court stated that to allow any recovery on the basis stated by the statute would deprive the defendant of property without due process of law, authorize a recovery without liability, and compel payment without fault.²⁰

Parental liability statutes are an abrogation of the common law because they impose liability on parents without regard to the parents' fault. As a result, many courts believe that the damages imposed by these statutes should be restricted to protect the parents

11. See Note, *The Iowa Parental Responsibility Act*, 55 IOWA L. REV. 1037, 1039 (1970).

12. *Id.* at 1040.

13. See Scott, *supra* note 10, at 87-92.

14. CAL. CIV. CODE § 1714.1 (Deering 1988).

15. TEX. FAM. CODE ANN. §§ 33.01-33.02 (Vernon 1986).

16. WYO. STAT. § 14-203 (1986).

17. PA. STAT. ANN. tit. 11, § 2002-4 (Purdon Supp. 1988); see also Scott, *supra* note 10, at 90.

18. 227 Ga. 745, 182 S.E.2d 766 (1971).

19. The Georgia statute that was overturned in *Corley* stated:

Every parent, or other person *in loco parentis*, having the custody and control over a minor child or children under the age of 17 shall be liable for the wilful and wanton acts of said minor child or children resulting in death, injury or damage to the person or property, or both, of another.

GA. CODE ANN. § 105-113 (1966).

20. *Corley v. Lewless*, 227 Ga. 745, 750-51, 182 S.E.2d 766, 770 (1971) (quoting *Lloyd Adams, Inc. v. Liberty Mut. Ins. Co.*, 190 Ga. 633, 641, 10 S.E.2d 46, 51 (1940)). Georgia subsequently revised its parental liability statute to include limits on the amounts recoverable. See GA. CODE ANN. § 105-113(a) (Harrison 1984).

from unlimited liability. Parental liability statutes nevertheless survive, as long as their purpose falls within the constitutional scope of legislative powers.²¹ A legislature, under its police power, may enact laws reasonably necessary to prevent manifest evil, or to preserve the public safety or general welfare.²² The legislative power to create statutory parental liability cannot be justified, however, if it allows unlimited recovery from the parents. Thus, parental liability statutes must strike a balance between the need to address the problem of uncompensated juvenile torts and the reality that these statutes impose liability without fault. Therefore, these statutes generally provide limited compensation for injuries caused by minor children, but do not impose strict liability on parents.²³

B. Section 316 of the Restatement (Second) of Torts

Parental responsibility statutes were the first step taken to impose liability on parents for the acts of their children. Although these statutes are useful to plaintiffs who seek recovery for damages due to vandalism or minor injuries, limits on the amount recoverable make them inadequate to address more serious torts.

In an effort to offer adequate compensation for serious injuries committed by minors, a second exception to the common law rule was created. Fourteen states expressly adopted section 316 of the *Restatement (Second) of Torts*.²⁴ Section 316 imposes a duty on a

21. See, e.g., *Alber v. Nolle*, 98 N.M. 100, 105, 645 P.2d 456, 461 (Ct. App. 1982) (New Mexico statute upheld because the limited liability imposed was within the legislative police powers).

22. Imposing statutory liability that is within the scope of legislative authority, and that accords with the statute's purpose, does not violate substantive due process. *Id.*

23. The New Mexico Court of Appeals, for example, distinguished its statute, which places a pecuniary limit on parental liability, from the Georgia statute at issue in *Corley*: "The Georgia statute was held unconstitutional because it 'seeks to provide compensation in full for property damage or for personal injury . . . solely on the basis of the parent-child relationship' even though 'the parent was entirely free from negligence or fault . . .'" *Id.* (citations omitted).

24. See *Britton v. Cann*, 682 F. Supp. 110 (D. N.H. 1988); *Doe v. United Social & Mental Health Servs., Inc.*, 670 F. Supp. 1121 (D. Conn. 1987); *Daggett v. County of Maricopa*, 160 Ariz. 77, 770 P.2d 381 (Ct. App. 1989); *Boyd v. Connell*, 293 Ark. 531, 739 S.W.2d 536 (1987); *Robertson v. Wentz*, 187 Cal. App. 3d 1281, 232 Cal. Rptr. 634 (1986); *Lahey v. Benjou*, 759 P.2d 855 (Colo. Ct. App. 1988); *Basler v. Webb*, 188 Ill. App. 3d 178, 544 N.E.2d 60 (1989); *Bowling v. Popp*, 536 N.E.2d 511 (Ind. Ct. App. 1989); *Smith v. Shaffer*, 395 N.W.2d 853 (Iowa 1986); *Reinert v. Dolezel*, 147 Mich. App. 149, 383 N.W.2d 148 (1985); *Cashman v. Reider's Stop-n-Shop Supermarket*, 29 Ohio App. 3d 142, 504 N.E.2d 487 (1986); *Vance v. Thomas*, 716 P.2d 710 (Okla. Ct. App. 1986); *Carey v. Reeve*, 56 Wash. App. 18, 781 P.2d 904 (1989).

Section 316 is entitled "Duty of Parent to Control Conduct of Child" and provides:

minor child's parents to use reasonable care in preventing their child from injuring others. Accordingly, this liability is based on the parents' negligence in controlling their minor child, who in turn injured the plaintiff.²⁵ Section 316 allows an injured party to sue for a greater amount of damages than under the original parental liability statutes. Since there is no limit to the monetary recovery under section 316, courts can award damages that are sufficient to compensate the plaintiff.

Section 316 liability attaches upon proof that the parents had: (1) notice of past harmful conduct by the child, and (2) an opportunity to control their child, but failed to do so.²⁶ Although one court insists that the imposition of section 316 liability, based on parental negligence, must come from the legislature,²⁷ no other court has followed its reasoning.

1. Defining "Notice of Harmful Conduct"

Although many states have adopted section 316, they disagree about its application. Under section 316, a complaint must allege specific instances of prior conduct that are sufficient to put the parents on notice that the act complained of was likely to occur.²⁸ The disagreement centers upon whether a parent needs prior notice of the specific conduct that caused the injury, or simply notice that the child's general misconduct could lead to an injury.

Some courts have held that the specific conduct that caused the injury must have been habitual,²⁹ or at least similar to the minor's

A parent is under a duty to exercise reasonable care so as to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent

(a) knows or has reason to know that he has the ability to control the child, and

(b) knows or should know of the necessity and opportunity for exercising such control.

RESTATEMENT (SECOND) OF TORTS § 316 (1965).

25. *Duncan v. Rzonca*, 133 Ill. App. 3d 184, 200, 478 N.E.2d 603, 613 (1985).

26. See PROSSER AND KEETON ON TORTS, *supra* note 9, § 123.

27. "We believe that a decision whether to adopt a doctrine of parental neglect is more properly left to the legislature because of the many societal and policy considerations which necessarily bear upon such a decision." *Bell v. Hudgins*, 232 Va. 491, 495, 352 S.E.2d 332, 334 (1987).

28. *Kosrow v. Smith*, 162 Ill. App. 3d 120, 124, 514 N.E.2d 1016, 1019 (1987) (quoting *Campbell v. Haiges*, 152 Ill. App. 3d 246, 504 N.E.2d 200 (1987)).

29. See *Gissen v. Goodwill*, 80 So. 2d 701 (Fla. 1955) (complaint dismissed because there was no allegation that the child had previously injured anyone by slamming a door on them); *Shaw v. Roth*, 54 Misc. 2d 418, 282 N.Y.S.2d 844 (Sup. Ct. 1967) (complaint must allege that parents had knowledge of the child's vicious and malicious disposition and a habit of assaulting).

prior misconduct.³⁰ This theory of parental liability is the most difficult to prove.

The Florida Supreme Court applied this theory in *Gissen v. Goodwill*.³¹ In *Gissen*, the court dismissed a complaint by a hotel employee who brought suit against the parents of an eight-year-old girl who severed the employee's finger when she slammed a door on it. The plaintiff alleged that the parents carelessly and negligently failed to restrain their child despite their full knowledge of previous acts committed by their daughter at the hotel, such as knocking down and damaging objects of furniture, and disturbing and harassing the guests and employees of the hotel.³² In dismissing the suit, the court stated that a cause of action against parents under section 316 must allege that the parents knew of their child's habitual harmful conduct and failed to guard against it.³³

The concern reflected by *Gissen* is that parents should be held liable only if the injury was foreseeable to the parent, thereby ensuring that there is "no general responsibility for rearing incorrigible children."³⁴ A parent's mere knowledge of the child's mischievous and reckless disposition, according to this theory, does not suffice to render a parent liable.³⁵

Other courts have held that a parent who knows of a child's vicious tendencies should be liable, even though the specific wrongful conduct was not known to be habitual.³⁶ This theory is the least stringent standard by which parental liability may be imposed. Courts using this theory are concerned with protecting victims, even if the parents have only a general knowledge of their child's propensity to injure.³⁷ These courts argue that excluding all

30. See *Pesek v. Discepolo*, 130 Ill. App. 3d 785, 787, 475 N.E.2d 3, 4 (1985) (no allegation that the parents had knowledge of any prior acts of violence committed by their son that would make a rape foreseeable); *Linder v. Bidner*, 50 Misc. 2d 320, 270 N.Y.S.2d 427 (Sup. Ct. 1966) (in order to hold that a parent had notice of a child's dangerous habit, the dangerous habit must be of a very specific kind).

31. 80 So. 2d 701 (Fla. 1955).

32. *Id.* at 702.

33. Specifically, the court stated:

Before a cause of action may be stated against the parents for the tort of a child there must be alleged a specific known course of conduct by the minor involving his habitual, intentional and specific wrongful acts against others and the parents' failure to take proper precautions to guard them against such acts.

Id. at 705.

34. *Linder v. Bidner*, 50 Misc. 2d 320, 322, 270 N.Y.S.2d 427, 430 (Sup. Ct. 1966).

35. See *Gissen*, 80 So. 2d at 704.

36. See, e.g., *Parsons v. Smithey*, 109 Ariz. 49, 53, 504 P.2d 1272, 1276 (1973); *Snow v. Nelson*, 450 So. 2d 269, 271 (Fla. Dist. Ct. App. 1984).

37. See, e.g., *Parsons*, 109 Ariz. at 53, 504 P.2d at 1276. In dismissing the argument that the case law involving parental liability demands that the parents have notice of a

but specific similar acts to prove knowledge leads to ironic results. As pointed out by one court, "parents of incorrigible children are lucky if their children are versatile in their wrongdoing. If their children lack ingenuity in their devilment, the parents may be held liable."³⁸

Some courts take an intermediate approach. These courts require evidence of past behavior that would lead reasonable parents to conclude that their child could injure another if not controlled.³⁹ Under this approach, allegations of prior misconduct are insufficient to put the parents on notice of a child's dangerousness if the misconduct is not related in any way to the conduct that caused the injury.⁴⁰

2. Ability to Control

The second element necessary to impose liability under section 316 is the parent's opportunity and subsequent failure to control the child.⁴¹ The absence of this ability to control is fatal to a claim of legal responsibility.⁴² Because a parent's ability to control may be inferred as to a very young child,⁴³ and usually is inferred as to a minor child,⁴⁴ it is not usually an issue in a section 316 case. If the child is not a minor, however, neither control nor the duty to impose that control is assumed under section 316. If the child is an adult, the imposition of parental liability must come from a different source.

child's habitual conduct, the Supreme Court of Arizona stated, "[w]e do not read these cases as mandating that knowledge can only be proved by prior acts of the same or similar type." *Id.*

38. *Snow*, 450 So. 2d at 274.

39. *See, e.g., Parsons*, 109 Ariz. at 54, 504 P.2d at 1277.

40. *See, e.g., Robertson v. Wentz*, 187 Cal. App. 3d 1281, 232 Cal. Rptr. 634 (1986) (knowledge of son's drug use and disciplinary problems at school did not make shooting foreseeable); *Pesek v. Discepolo*, 130 Ill. App. 3d 785, 475 N.E.2d 3 (1985) (knowledge of son's truancy, drinking, and criminal acts did not make rape foreseeable); *Shaw v. Roth*, 54 Misc. 2d 418, 282 N.Y.S.2d 844 (Sup. Ct. 1967) (knowledge of son's drinking problem did not make assault foreseeable); *Moore v. Crumpton*, 55 N.C. App. 398, 285 S.E.2d 842 (1982) (knowledge of drug use, truancy, and rebellious behavior did not make rape foreseeable).

41. "The ability to control the child, rather than the relationship as such, is the basis for a finding of liability on the part of a parent." *Robertson*, 187 Cal. App. 3d at 1290, 232 Cal. Rptr. at 638.

42. *Id.*

43. *See, e.g., Duncan v. Rzonca*, 133 Ill. App. 3d 184, 199, 478 N.E.2d 603, 612 (1985) (mother's control over her three-year-old son was inferred).

44. *See, e.g., Robertson*, 187 Cal. App. 3d at 1290, 232 Cal. Rptr. at 638 (ability to control minor may be disproved by particular circumstances, such as the mother having legal custody but not physical custody prior to the misconduct).

Because Laurie Dann was beyond minority age at the time of her violent acts, the Corwins could not rely on section 316. The Corwins relied, instead, on section 319 of the *Restatement*.⁴⁵ This novel use of section 319 attempts to expand upon the common law exceptions developed under parental liability statutes and section 316. Parental liability statutes create a cause of action against parents that was prohibited under common law. Section 316 increases the amount of damages recoverable from parents who fail to control their violent minor children. Now, by using section 319, the scope of parental liability may be expanded to hold parents liable for the acts of their adult children.

III. DISCUSSION

A. Historical Use of Section 319

An essential element in any negligence action is the defendant's legal duty to the plaintiff. Under common law, a person has no legal duty to prevent a third party from causing physical injury to another.⁴⁶ Section 319 of the *Restatement (Second) of Torts* is an exception to this general rule.

Section 319 imposes a duty on one who takes charge of a person whom he knows or should know is likely to cause bodily harm to others if not controlled. This exception primarily has been used to impose liability on government agencies,⁴⁷ such as the police⁴⁸ and parole boards,⁴⁹ and against private institutions, such as rehabilita-

45. Plaintiff's Response, *supra* note 2, at 15-26. Section 319 is entitled "Duty of Those In Charge of Persons Having Dangerous Propensities" and states: "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." RESTATEMENT (SECOND) OF TORTS § 319 (1965). The Corwins' complaint also relied on § 324A, which imposes a duty to use reasonable care on one who undertakes a service to protect others from his charge. *See id.* § 324A.

46. *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 188 (D. Neb. 1980).

47. *See, e.g., Abernathy v. United States*, 773 F.2d 184 (8th Cir. 1985) (suit against the Bureau of Indian Affairs and Indian Health Services for negligent release of patient who killed a third person); *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185 (D. Neb. 1980) (Veterans hospital named as third-party defendant after former patient shot two people, killing one); *Ryan v. State*, 150 Ariz. 549, 724 P.2d 1218 (1986) (suit against the Arizona Youth Center for a killing committed by an escapee).

48. *See, e.g., Crider v. United States*, 885 F.2d 294 (5th Cir. 1989); *Phillips v. City of Billings*, 758 P.2d 772 (Mont. 1988) (both suits against park rangers for failure to restrain an intoxicated driver who subsequently injured others).

49. *See, e.g., Payton v. United States*, 636 F.2d 132 (5th Cir. 1981) (parole board held liable due to negligent failure to read records that would have shown parolee's dangerous propensity); *Semler v. Psychiatric Inst.*, 538 F.2d 121 (4th Cir. 1976) (third-party complaint against probation officer granting indemnification). *But see, e.g., Fitzpatrick v.*

tion centers,⁵⁰ hospitals,⁵¹ and psychiatric centers.⁵² The only private individuals on whom section 319 liability has been imposed are psychotherapists.⁵³ Using section 319 to impose liability on families for the acts of their adult members is a new, unproven extension of this common law exception.⁵⁴

Because the use of section 319 to impose a duty on families is so limited, one must look at the rationale that courts have used in applying section 319 in cases against psychotherapists. Furthermore, it must be examined whether that rationale is appropriate when parents, not psychotherapists, are the defendants.

State, 439 N.W.2d 663 (Iowa 1989) (absent a special relationship, parole officers not liable to victim); *Small v. McKennan Hosp.*, 403 N.W.2d 410 (S.D. 1987) (section 319 does not apply to members of pardon and parole boards or parole officers); *Fox v. Custis*, 236 Va. 69, 372 S.E.2d 373 (1988) (no duty absent a special relationship).

50. *See, e.g., Nova Univ., Inc. v. Wagner*, 491 So. 2d 1116 (Fla. 1986) (child care institution for children with emotional and behavioral problems has a duty to exercise reasonable care in controlling the children); *Bradley Center, Inc. v. Wessner*, 250 Ga. 199, 296 S.E.2d 693 (1982) (negligent failure to exercise proper control over patient).

51. *But see, e.g., Estate of Johnson v. Condell Memorial Hosp.*, 119 Ill. 2d 496, 520 N.E.2d 37 (1988) (no duty to restrain an informally admitted patient who threatened hospital personnel with a knife, and fled the hospital and killed another person in a high speed chase with police); *Kirk v. Michael Reese Hosp. and Medical Center*, 117 Ill. 2d 507, 513 N.E.2d 387 (1987) (duty to warn of drug's effects is owed only to the patient, not to the public at large); *Littleton v. Good Samaritan Hosp.*, 39 Ohio St. 3d 86, 529 N.E.2d 449 (1988) (psychiatrist will be held liable only if he did not act in good faith in discharging a patient).

52. *See, e.g., Semler v. Psychiatric Inst.*, 538 F.2d 121 (4th Cir. 1976) (court order suspending sentence on condition that probationer remain confined in the institute imposed a duty on institute to protect public by maintaining custody of probationer). *But see, e.g., Perreira v. State*, 768 P.2d 1198 (Colo. 1989) (no duty to control conduct toward unforeseeable victim).

53. *See Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (psychiatrist held liable for failure to warn the potential victim of his patient after patient told the therapist that he would kill her); *see also infra* notes 55-61 and accompanying text. *But see Brady v. Hopper*, 570 F. Supp. 1333 (D. Colo. 1983) (no duty to warn if patient made no specific threat against a specific victim); *see also infra* notes 90-93 and accompanying text.

54. *See Megeff v. Doland*, 123 Cal. App. 3d 251, 176 Cal. Rptr. 467 (1981) (suit against wife and daughter for their husband/father's attack dismissed due to lack of prior dangerous conduct by him); *Alva v. Cook*, 49 Cal. App. 3d 899, 123 Cal. Rptr. 166 (1975) (suit against sisters who cared for mentally ill brother who killed a third person was dismissed due to lack of foreseeability); *Sego v. Mains*, 41 Colo. App. 1, 578 P.2d 1069 (1978) (suit against son who had custody of mentally ill mother was dismissed because son had no notice that mother could be dangerous); *Clark v. McKerley*, 126 N.H. 778, 497 A.2d 846 (1985) (parents not liable for son's act of setting a fire when there was no evidence that parents should have known of child's dangerous propensity). *But see Estate of Mathes v. Ireland*, 419 N.E.2d 782 (Ind. App. 1981) (claim against custodial mother and grandparents for killing committed by adult son was a valid cause of action).

B. Use of Section 319 Against Psychotherapists

In the 1976 landmark case of *Tarasoff v. Regents of the University of California*,⁵⁵ the California Supreme Court ruled that a psychotherapist incurs a legal obligation to warn an intended victim if that warning is essential to avert danger.⁵⁶ The plaintiffs in *Tarasoff* were the parents of Tatiana Tarasoff, who was killed by Prosenjit Poddar. The Tarasoffs sued the university regents, doctors, and campus police for the murder of their daughter by Poddar, who was a patient of the psychologists employed by the university hospital.

Two months before the murder, Poddar had told his therapists that he intended to kill an unnamed girl when she returned home from her summer in Brazil.⁵⁷ The girl was readily identifiable as Tatiana. The doctors notified campus police and requested their assistance in locating Poddar.⁵⁸ The campus police took Poddar into custody, but, satisfied that he was rational, released him on his promise to avoid Tatiana. The director of psychiatry then ordered that no action be taken to place Poddar in the evaluation facility. No one warned Tatiana of her peril, and shortly after her return from Brazil, Poddar went to her residence and killed her.⁵⁹

The California Supreme Court analogized a psychotherapist's duty to warn to the recognized duty of a physician to warn the carrier of a contagious disease, or a driver whose condition or medication affects his ability to drive safely.⁶⁰ The court concluded that a psychotherapist also has a duty to warn if he knows that his patient's behavior may threaten the safety of others.⁶¹

Although a number of courts have followed *Tarasoff's* reasoning,⁶² many courts have limited the circumstances in which a duty

55. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

56. *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

57. *Id.* at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21.

58. *Id.*

59. *Id.* at 433, 551 P.2d at 341, 131 Cal. Rptr. at 21.

60. *Id.* at 436-37, 551 P.2d at 343-44, 131 Cal. Rptr. at 23-24.

61. *Id.* at 437, 551 P.2d at 344, 131 Cal. Rptr. at 24.

62. *See, e.g.,* Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980) (the relationship between the patient and therapist is sufficient to support the imposition of an affirmative duty on the defendant for the benefit of a third person); Williams v. United States, 450 F. Supp. 1040 (D.S.D. 1978) (failure of Veterans Hospital to notify county authorities of patient's discharge was negligent); Perreira v. State, 768 P.2d 1198 (Colo. 1988) (imposing a duty on a psychotherapist to foresee potential dangerousness before releasing patient from involuntary commitment); Bradley Center, Inc. v. Wessner, 250 Ga. 199, 200, 296 S.E.2d 693, 695 (1982) (independent duty falls upon physician to exercise that control with such reasonable care as to prevent harm to others at the hands of the patient); *see also*, Cooke v. Berlin, 153 Ariz. 220, 228, 735 P.2d 830, 838 (Ct. App.

to warn will be imposed on a psychotherapist.⁶³ Courts traditionally have struggled to define the type of conduct needed to bring the therapist within the standards of section 319. The plaintiffs in *Corwin v. Wasserman* needed to prove that the Wassermans took charge of their daughter, and that harm to others was foreseeable.

1. Proving that the Defendant Took Charge

To impose on a person a duty to control a third person's acts, one must show that a special relation exists between the two people.⁶⁴ Recognized special relations include: the duty of a parent to control his minor child;⁶⁵ the duty of a master to control his servants;⁶⁶ the duty of a landowner to control his licensee;⁶⁷ and the duty of those in charge of persons having dangerous propensities.⁶⁸ The cases that impose liability for failure to control the conduct of a third party exhibit similar factors that support the imposition of a duty. Each of these cases involves a person in need of special supervision or protection and someone in a superior position who is able to provide it.⁶⁹

Dependency, however, is only half of the special relation; the other half is the right to intervene or to control the actions of the third party.⁷⁰ In *Tarasoff*, the court found that a right to control existed even though the patient was being treated as an outpatient.⁷¹ Many courts, however, have been unwilling to find this element of the special relation unless the patient was committed

1987) (Corcoran, J., dissenting in part and concurring in part) ("view[ing] the duty owed to others by a psychotherapist as a duty to take reasonable precautions to protect anyone who might reasonably be endangered by their patient").

63. See, e.g., *Currie v. United States*, 836 F.2d 209 (4th Cir. 1987) (duty to warn runs only to identifiable persons in recognizable zone of danger); *Brady v. Hopper*, 570 F. Supp. 1333 (D. Colo. 1983) (no duty to warn if patient made only nonspecific threats of harm directed at nonspecific victims); *Cooke v. Berlin*, 153 Ariz. 220, 735 P.2d 830 (Ct. App. 1987) (duty to warn is not imposed based solely on psychotherapist-patient relationship).

64. *Littleton v. Good Samaritan Hosp.*, 39 Ohio St. 3d 86, 92, 529 N.E.2d 449, 455 (1988) (there is no duty to control the conduct of another unless a special relation exists between the actor and that person).

65. RESTATEMENT (SECOND) OF TORTS § 316 (1965).

66. *Id.* § 317.

67. *Id.* § 318.

68. *Id.* § 319.

69. *Bowling v. Popp*, 536 N.E.2d 511, 515 (Ind. Ct. App. 1989) (citation omitted).

70. *Id.* (parents of party hosts had no right to intervene and control intoxicated guest).

71. *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 436, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976); see also *supra* text accompanying notes 55-61.

involuntarily.⁷² These courts found that the control element of section 319 is satisfied only when a psychotherapist or a hospital had complete control over the patient by confinement.

Gradually, more courts are approaching *Tarasoff's* broad reasoning and imposing a duty on psychotherapists, even if the control of the patient is not by involuntary commitment.⁷³ In *Lipari v. Sears, Roebuck & Co.*,⁷⁴ the duties imposed on a psychiatrist were expanded beyond those stated in *Tarasoff*. The United States was named as a third-party defendant in *Lipari* because the patient, who injured the plaintiff and killed her husband, had been receiving psychiatric care through the Veterans Administration. *Lipari* stated that, although *Tarasoff* concerned only the issue of a therapist's duty to warn, *Tarasoff's* language made it clear that the nature of the precautions to be taken depends on the circumstances.⁷⁵ *Lipari* found that if a psychiatrist determines that his patient presents a serious danger of violence to another, the psychiatrist incurs an obligation to use reasonable care to protect potential victims against such danger.⁷⁶ In *Lipari*, the court held that the Vet-

72. See, e.g., *Perreira v. State*, 768 P.2d 1198, 1216 (Colo. 1989). In *Perreira*, the court found that a psychiatrist's control over an involuntarily committed patient's freedom and length of commitment was sufficient to impose a corresponding duty on the doctor. The court also stated, however, that involuntary commitment creates a "special relationship substantially different in kind from the relationship existing between a treating psychiatrist and a voluntary patient." *Id.*; see also *Beck v. Kansas Univ. Psychiatry Found.*, 580 F. Supp. 527, 534 (D. Kan. 1984) (since psychiatrist had control over patient's release, imposition of duty was proper); *Estate of Johnson v. Condell Memorial Hosp.*, 119 Ill. 2d 496, 508, 520 N.E.2d 37, 42 (1988) (to impose a duty to protect third parties, an institution must have custody of a dangerous person through a court order or adjudication that gives them actual control over the individual). Cf. *Brady v. Hopper*, 570 F. Supp. 1333, 1335 (D. Colo. 1983) (therapist-outpatient relationship lacks sufficient elements of control, and therefore is not a special relationship); *Kosrow v. Smith*, 162 Ill. App. 3d 120, 125-26, 514 N.E.2d 1016, 1020 (1987) (voluntarily giving shelter to houseguest is not a special relationship, therefore no recognized duty to protect public from him exists); *Bowling v. Popp*, 536 N.E.2d 511, 516 (Ind. Ct. App. 1989) (parents had no right to arrest or means to control party guest, so no duty imposed); *Krejci v. Akron Pediatric Neurology, Inc.*, 31 Ohio App. 3d 273, 274, 511 N.E.2d 129, 131 (1987) (physician has no control over patient who is not institutionalized).

73. See, e.g., *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 196-97 (D. Neb. 1980) (Veterans Hospital negligent in failing to detain dangerous patient); *Littleton v. Good Samaritan Hosp.*, 39 Ohio St. 3d 86, 92, 529 N.E.2d 449, 455 (1988) (psychiatrist found to have special relation with voluntarily hospitalized patient, but the court did not decide whether a psychiatrist's duty extends to the outpatient setting); see also *Cooke v. Berlin*, 153 Ariz. 220, 227-28, 735 P.2d 830, 837-38 (Ct. App. 1987) (Corcoran, J., dissenting) (imposition of duty appropriate because psychotherapist takes charge of patients by accepting them as outpatients and undertaking their treatment).

74. 497 F. Supp. 185 (D. Neb. 1980).

75. *Id.* at 193.

76. *Id.*

erans Administration was negligent for failing to detain the patient, and that its negligence contributed to the plaintiff's injuries and her husband's death.⁷⁷ As a result, the psychiatrist incurred a duty to detain his patient because injury to another was foreseeable.⁷⁸

Tarasoff and *Lipari* have expanded section 319 to include individual defendants under an exception historically used solely against the government or other institutions.⁷⁹ Now, in cases such as *Corwin v. Wasserman*,⁸⁰ plaintiffs are seeking to expand section 319 by imposing on parents a duty to control their adult children who are likely to harm others. Since section 319 liability is not based on a familial relationship, the basis for finding liability must be the parents' ability to control their adult child.⁸¹

The Illinois Supreme Court, in *Estate of Johnson v. Condell Memorial Hospital*,⁸² limited the situations in which control may be inferred under section 319. *Johnson* emphasized the necessity of court-appointed physical custody before section 319 appropriately can be applied.⁸³

The plaintiff in *Johnson* was the estate of a woman killed when her car was struck by police who were chasing a violent hospital patient.⁸⁴ The estate alleged that the hospital knew of the patient's violent propensity and negligently failed to provide adequate security to control the patient.⁸⁵ The Illinois Supreme Court affirmed the lower court's dismissal of the complaint because there were no allegations that the hospital had the required court order or adjudication that gave them actual control.⁸⁶

77. *Id.* at 196-97.

78. *Id.* at 193.

79. *See supra* text accompanying notes 46-52.

80. No. 88 L 16369 (Ill. Cir. Ct. filed Sept. 8, 1988); *see also supra* text accompanying notes 1-7; *infra* 122-24, 137-40.

81. *See Megeff v. Doland*, 123 Cal. App. 3d 251, 261, 176 Cal. Rptr. 467, 472-73 (1981) (natural relationship between father and daughter creates no inference of an ability to control; actual custodial ability must be shown). *But see Mathes v. Ireland*, 419 N.E.2d 782, 788 (Ind. Ct. App. 1981) (Hoffman, J., concurring in part and dissenting in part) (parent cannot take control of an adult child without a court determination).

82. 119 Ill. 2d 496, 520 N.E.2d 37 (1988).

83. *Id.* at 506, 520 N.E.2d at 41 (a patient who is in the hospital's custody only through involuntary admission is free to leave upon her request); *see also Kirk v. Michael Reese Hosp. and Medical Center*, 117 Ill. 2d 507, 530, 513 N.E.2d 387, 398 (1987) (duty imposed on physician having physical custody).

84. *Johnson*, 119 Ill. 2d at 499, 520 N.E.2d at 37-38.

85. *Id.* at 500-01, 520 N.E.2d at 38.

86. *Id.* at 508, 520 N.E.2d at 42.

2. Foreseeability of Harm

Beyond proving that the defendant had the requisite control, section 319 also requires that the defendant had sufficient notice of the dangerous propensities of his charge. The probable harm to others must be foreseeable. Thus, one who takes charge of another person must control that person if he knows that bodily harm to others is likely. Similar to the problems encountered in defining foreseeability under section 316,⁸⁷ courts have struggled in defining "one who is likely to harm."⁸⁸

Predicting who has dangerous propensities and is likely to harm another person has proven very difficult. Many courts have stated that, because psychiatrists are unable to predict their patient's potential for violence with any degree of accuracy, a therapist's liability must be limited to specific threats against identifiable people.⁸⁹

The issue of foreseeability was discussed in *Brady v. Hopper*.⁹⁰ The three plaintiffs in *Brady* were injured by John Hinckley's attempted assassination of President Reagan in 1981. The defendant was Hinckley's former psychiatrist who had recommended that Hinckley not be hospitalized.⁹¹ The plaintiffs argued that the psychiatrist had a duty to warn Hinckley's parents because it was foreseeable that Hinckley would be violent. The court ruled that, because Hinckley lacked a history of violence, it was not foreseeable that he would injure the plaintiffs. Hinckley's psychiatrist, therefore, had no legal obligation to protect the plaintiffs.⁹² The

87. See *supra* text accompanying notes 28-40.

88. See *Ryan v. State*, 150 Ariz. 549, 552, 724 P.2d 1218, 1221 (Ct. App. 1986) (distinguishing the phrase "likely to cause harm" from mere "potential for harming").

89. See *Brady v. Hopper*, 570 F. Supp. 1333, 1339 (D. Colo. 1983) ("[h]uman behavior is simply too unpredictable, and the field of psychotherapy presently too inexact, to so greatly expand the scope of therapists' liability"); *Littleton v. Good Samaritan Hosp.*, 39 Ohio St. 3d 86, 93-94 n.4, 529 N.E.2d 449, 456 n.4 (1988) (psychiatrists cannot predict patients' potential for violence); *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 461, 551 P.2d 334, 361, 131 Cal. Rptr. 14, 41 (Clark, J., dissenting) ("psychiatrist does not enjoy the benefit of overwhelming hindsight in seeing which few, if any, of his patients will ultimately become violent").

90. 570 F. Supp. 1333 (D. Colo. 1983).

91. *Id.* at 1334-35.

92. *Id.* at 1338-39. The court stated:

[T]he existence of a special relationship does not necessarily mean that the duties created by that relationship are owed to the world at large. It is fundamental that the duty owed be measured by the foreseeability of the risk and whether the danger created is sufficiently large to embrace the specific harm. It is this requirement of foreseeability which has led numerous courts to conclude that a therapist or others cannot be held liable for injuries inflicted upon third persons absent specific threats to a readily identifiable victim.

Id. at 1338.

court accordingly granted the defendant's motion to dismiss.⁹³

The issue of foreseeability arose in the context of family liability in *Megeff v. Doland*.⁹⁴ The defendants in *Megeff* were the wife and daughter of a man named Stevens who had stabbed the plaintiff. The wife and daughter were sued for negligently failing to exercise control over Stevens.⁹⁵ The court did not discuss directly the issue of taking control, but implied that section 319 was applicable if the incident was foreseeable.⁹⁶

The court affirmed the grant of summary judgment for the defendants because the wife and daughter did not know Stevens to be a violent man.⁹⁷ His only prior aggressive behavior was directed toward an intern and a nurse as they attempted to confine him to the hospital.⁹⁸ The court reasoned that such an incident may have created a foreseeable risk that Stevens might attack a person trying to confine him to a place other than his home, but it was not foreseeable that he would attack anyone else.⁹⁹

Megeff alluded to the fact that section 319 may impose a duty to control a family member, but only if the injury is foreseeable. Some decisions, however, interpret foreseeability very narrowly as a pretext for refusing to find liability.

In *Alva v. Cook*,¹⁰⁰ for example, the California Court of Appeals refused to impose liability on family members, because the injury allegedly resulting from their failure to control a dangerous relative was not foreseeable.¹⁰¹ The plaintiffs sued on behalf of Edward Alva, who was shot and killed by sixty-year-old Malcolm Pinkston, when Alva drove into the defendants' driveway in an attempt to turn his car around. The defendants were Pinkston's sisters, who had provided a home for Pinkston for a number of years.¹⁰² Pinkston was unable to provide for himself because he was psychotic.¹⁰³ Nevertheless, the defendants allowed their brother to

93. *Id.* at 1339.

94. 123 Cal. App. 3d 251, 176 Cal. Rptr. 467 (1981).

95. *Id.* at 256, 176 Cal. Rptr. at 469.

96. *Id.* at 257, 176 Cal. Rptr. at 470.

97. *Id.* at 258, 176 Cal. Rptr. at 471.

98. *Id.* at 255, 176 Cal. Rptr. at 469.

99. "One incident of physical aggression while hospitalized (a stressful situation) precipitated by the staff insistence that he remain, hardly clothes Charles Stevens with a propensity for violence likely to be directed against plaintiffs." *Id.* at 260, 176 Cal. Rptr. at 472.

100. 49 Cal. App. 3d 899, 123 Cal. Rptr. 166 (1975).

101. *Id.* at 904-05, 123 Cal. Rptr. at 168.

102. *Id.* at 902, 123 Cal. Rptr. at 166.

103. *Id.* at 903-04, 123 Cal. Rptr. at 167.

keep a high-powered rifle, which, the plaintiffs alleged, constituted negligence.¹⁰⁴ The plaintiffs presented evidence of Pinkston's history of hospitalization for mental illness and his arrest twelve years earlier for assault with intent to kill his brother.¹⁰⁵

The court dismissed this evidence as insufficient notice of Pinkston's dangerous propensity. Specifically, the court found nothing to suggest that a firearm had been used in the prior assault.¹⁰⁶ Pinkston had attacked his brother with an intent to kill, but because he did not use a rifle in the assault, the court felt that the sisters could not reasonably have foreseen his attack on Alva. Accordingly, the court dismissed the plaintiffs' suit.

The *Alva* court expressed its concern over the societal and moral implications that would result if families were liable for the acts of their adult relatives.¹⁰⁷ Instead of relying on the public policy issues and the impact that accompanies the imposition of liability on families, however, the *Alva* court based its decision on a tortured interpretation of foreseeability.

C. Taking Charge of an Adult Child

Using section 319 to impose a duty on parents is complicated by the demand of proving that the parents took charge of their adult child. It is difficult to distinguish between a parent taking charge of an adult child, and a parent simply caring for his child. This complication was the basic issue in *Corwin v. Wasserman*. The Corwins argued that parents can take charge by their control over the adult child's life. They argued that parents have the duty to take affirmative actions if they know that their adult child, of whom they have taken charge, is likely to injure others. The Was-

104. *Id.* at 904, 123 Cal. Rptr. at 168.

105. *Id.* at 909, 123 Cal. Rptr. at 171.

106. Specifically, the court stated:

Nothing is alleged by way of probative or ultimate fact which impels or suggests . . . that Pinkston had been or was dangerous to himself or others. No attempt is made to allege that Pinkston ever used a rifle as a means of assault or attempted assault . . . on any occasion.

Id. at 904-05, 123 Cal. Rptr. at 168.

107. The court responded:

Certainly no moral blame can be attached to the conduct of the sisters because they accepted the burden and responsibility of caring for a brother who legally possessed a rifle with no history of its use or abuse

On the record before us we are satisfied that it would be unjust and morally wrong and against public policy to discourage humane and natural relationships between members of a family who are sensitive to and generous in the treatment of less fortunate members of their family.

Id. at 907, 123 Cal. Rptr. at 170.

sermans argued that, before section 319 liability can be imposed, the parents must be the court-appointed legal custodians of their child.¹⁰⁸

The Corwins' complaint alleged that the Wassermans had the duty to control their daughter under section 319.¹⁰⁹ The Wassermans moved to dismiss based on the holding in *Estate of Johnson*.¹¹⁰ The Wassermans maintained that they acted as concerned parents for a confused daughter; therefore, their actions did not constitute custodianship sufficient to impose a duty under section 319.¹¹¹ This argument adopts the reasoning of court decisions that impose a duty on a psychotherapist only when his patient is committed involuntarily.¹¹² These cases recognize the difficulty of proving control based solely on a relationship without a legal determination assigning control.

The Corwins argued that the Wassermans' control over their daughter is evidenced by the control that they exercised over every aspect of her life.¹¹³ The Corwins pointed to the fact that the Wassermans provided their daughter's residence, controlled her personal assets, provided her financial support, directed her psychiatric treatment, and negotiated with victims of her theft and vandalism to avoid criminal prosecution.¹¹⁴ Furthermore, the Corwins argued, the Wassermans convinced the police that they had sufficient control over their daughter to control her use of her gun.¹¹⁵ The Corwins contended that this conduct shows the Wassermans' control over Dann; therefore, a legal determination of control is not required to impose a duty under section 319.¹¹⁶

The Corwins' reasoning is supported by cases such as *Tarasoff* and *Lipari*, which find that a special relationship can exist absent legal or physical custody.¹¹⁷ Duty is imposed, these cases reason, based on the dependency of the dangerous person and the foreseeability of harm, not on physical control. The psychotherapist, in turn, incurs an obligation to initiate whatever precautions reason-

108. Defendant's Motion to Dismiss, *supra* note 6, at 18.

109. Plaintiff's Response, *supra* note 2, at 14-26.

110. Defendant's Motion to Dismiss, *supra* note 6, at 18; *see also* *Estate of Johnson v. Condell Memorial Hosp.*, 119 Ill. 2d 496, 520 N.E.2d 37 (1988); *supra* text accompanying notes 82-86.

111. Defendant's Motion to Dismiss, *supra* note 6, at 22.

112. *See supra* notes 72-73 and accompanying text.

113. Plaintiff's Response, *supra* note 2, at 19.

114. *Id.*

115. *Id.*

116. *Id.*

117. *See supra* text accompanying notes 71-78.

ably are necessary to protect potential victims of his patient.¹¹⁸ The Corwins argued that a similar duty should be imposed on parents who have taken charge of their adult child's life and who are aware that their child's dangerous propensities present an unreasonable risk of harm to others. The Circuit Court of Cook County agreed with the Corwins and denied the Wassermans' motion to dismiss.¹¹⁹

In the prior cases holding a family liable under section 319, the courts have based their decisions on the foreseeability of injury.¹²⁰ It seems, therefore, that courts are more willing to base their decisions on foreseeability than on the parents' duty or ability to control their adult child.¹²¹ A possible explanation for the courts' refusal to base family liability on lack of control is the public policy issues inherent in that decision. If section 319 is to be used successfully to hold parents liable for the acts of their dependent adult children, the courts must address whether a parent can take charge of an adult child. The courts must discuss and decide whether the moral and societal prohibitions are outweighed by the need for parental liability.

IV. ANALYSIS

A. Public Policy and Psychotherapist Liability

In denying the Wassermans' motion to dismiss, Judge Donald P. O'Connell of the Circuit Court of Cook County ruled that Illinois

118. *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 193 (D. Neb. 1980).

119. *Corwin v. Wasserman*, No. 88 L 16369 (Ill. Cir. Ct. June 28, 1989) (denial of defendant's motion to dismiss).

The court found particularly disturbing the allegation that the Wassermans both "knew of [Laurie Dann's] possession of firearms and ammunition" and "fostered that possession by providing money for the purchase of firearms and ammunition." Record of Proceedings at 29-30, *Corwin v. Wasserman* (Ill. Cir. Ct. Nov. 8, 1989) (hearing on denial of defendant's motion to dismiss). Further, the Wassermans allegedly ignored a psychiatrist's advice that Dann be involuntarily committed despite her habitually violent behavior. *Id.* at 30. The court found compelling the Corwins' argument that the Wassermans' "continuous, ongoing course of conduct . . . fostered and promoted known propensities for aberrant, violent conduct on the part of Laurie Dann." *Id.* at 32.

120. See *supra* note 54 and text accompanying notes 87-107.

121. See, e.g., *Clark v. McKerley*, 126 N.H. 778, 497 A.2d 846 (1985). In *Clark*, the court granted summary judgment to the parents of an eighteen-year-old boy because the parents had no knowledge of his propensity for starting fires. The court stated:

We decline to rest our decision on the son's age. The law of parental liability to third persons for negligent supervision of a child is undeveloped in this jurisdiction, and we will not take up such a significant issue of first impression in a case submitted on briefs, when the record reveals an alternative basis for decision.

Id. at 780, 497 A.2d 847 (citation omitted).

recognizes a cause of action against parents who fail to act reasonably when caring for their dangerous adult child.¹²²

Determining whether the Wassermans ultimately are held liable, however, would entail the careful weighing of many public policy factors.¹²³ These factors include: (1) the existence of a special relation and the resulting degree of control that the Wassermans exercised over Laurie Dann; (2) the foreseeability of harm to others from the Wassermans' failure to take protective actions for the benefit of others; (3) the extent of the burden on the Wassermans; (4) the consequences to the community; (5) the moral blame attached to the Wassermans' conduct; and (6) the policy of preventing future harm.¹²⁴

These factors were analyzed when the courts first applied section 319 to psychotherapists. In considering the arguments for and against parental liability, future cases like *Corwin* must be decided on whether the duties of a psychotherapist can be analogized to the duties of a parent.

1. Public Policy Objections to Psychotherapist Liability

Beginning with the *Tarasoff* dissent, opponents of psychiatrist liability have argued that the imposition of a duty on psychiatrists would have detrimental effects on society.¹²⁵ They argue that it is impossible for a psychiatrist to predict which of his patients, if any,

122. "When rendering care and providing services as well as protection to others, individuals such as the Wassermans must do so in a reasonable manner. The public policy of the State of Illinois must recognize a cause of action against defendants who fail to act reasonably when rendering such care." *Corwin v. Wasserman*, No. 88 L 16369, court order at 50-51 (Ill. Cir. Ct. June 28, 1989) (denial of defendant's motion to dismiss).

123. See *Perreira v. State*, 768 P.2d 1198 (Colo. 1989). In a suit against a psychiatrist for negligent release of an involuntarily committed patient who killed a police officer, the Supreme Court of Colorado stated:

[T]he question of legal duty is a multifaceted issue, the resolution of which ultimately turns on the careful weighing of various factors in the evidentiary context of the case at hand. Although the weighing process, by its very nature, is hardly calculated to yield categorical and unchanging answers to a problem, it nonetheless does provide the fairest way we know to deal with the many-faceted aspects of legal duty.

Id. at 1214.

124. See *id.* at 1214-15 (list of factors considered in finding a psychiatrist liable for the acts of an involuntarily committed mental patient); *Alva v. Cook*, 49 Cal. App. 3d 899, 906-07, 123 Cal. Rptr. 166, 169 (1975) (list of the major considerations when imposing liability on family members).

125. "[T]he majority impedes medical treatment, resulting in increased violence from — and deprivation of liberty to — the mentally ill." *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 463, 551 P.2d 334, 362, 131 Cal. Rptr. 14, 42 (1976) (Clark, J., dissenting).

will become violent.¹²⁶ Since the process of determining potential violence in a patient is far from exact, opponents allege that holding a psychiatrist liable under section 319 borders on strict liability.¹²⁷

A second argument against imposing a duty on psychiatrists is that it will lead to massive confinements of all patients who display even a remote possibility of violent behavior.¹²⁸ The concern is that psychiatrists, afraid of possible liability, will confine patients at the expense of their patients' best interests. This contravenes the current trend in mental health treatment, which encourages deinstitutionalization and placing the mentally ill in the "least restrictive environment."¹²⁹

2. Proponents of Psychotherapist Liability

Proponents of psychotherapist liability, however, do not believe that the difficulty in predicting dangerousness can justify a psychotherapist's total exoneration from liability.¹³⁰ Proponents empha-

126. See *supra* note 89 and accompanying text.

127. "Now, confronted by the majority's new duty, the psychiatrist must instantaneously calculate potential violence from each patient on each visit." *Tarasoff*, 17 Cal. 3d. at 462, 551 P.2d at 361, 131 Cal. Rptr. at 41 (Clark, J., dissenting); see also *Littleton v. Good Samaritan Hosp.*, 39 Ohio St. 3d 86, 93, 529 N.E.2d 449, 456 (1988) (extensive list of citations to support the contention that psychiatrists cannot predict a patient's potential for violence); *Brady v. Hopper*, 570 F. Supp. 1333, 1339 (D. Colo. 1983) (restricting the duty imposed by *Tarasoff* because the subjective nature of a psychiatrist's decisions demands only a very limited duty to control).

128. "If a psychiatrist knows that he will face liability for failing to foresee a patient's future violent behavior, the predictable result will be a court-mandated end to out-patient treatment." *Littleton v. Good Samaritan Hosp.*, 39 Ohio St. 3d 86, 94, 529 N.E.2d 449, 456-57 (1988); see also *Nova Univ., Inc. v. Wagner*, 491 So. 2d 1116 (Fla. 1986). The majority in *Nova* held a private residential rehabilitation center liable for a death caused by two of its residents who left the premises without permission. In his dissent, Chief Justice McDonald argued:

The majority opinion imposes an unrealistic duty on and expects too much of persons and institutions striving to fulfill one of society's great needs. . . . Exposing those willing to furnish child care services to liability for the actions of their wards against third parties will further curtail the number and quality of those willing to participate.

Id. at 1118-19 (McDonald, C.J., dissenting).

129. See, e.g., *Perreira v. State*, 768 P.2d 1198, 1218 (Colo. 1989) ("[o]ne of the express goals of Colorado's statutory program for the care and treatment of the mentally ill is to restrict the deprivation of the mentally ill person's liberty interests to those situations where 'less restrictive alternatives are unavailable'").

130. "The court is not persuaded that the inherent difficulties in predicting dangerousness justifies denying the injured party relief regardless of the circumstances. The standard of care for health professionals adequately takes into account the difficult nature of the problem." *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 191-92 (D. Neb. 1980).

size that, like other professionals, a psychotherapist is held liable only if his conduct differs from the standard of learning and skill normally possessed by other psychotherapists in the same or similar locality under the same or similar circumstances.¹³¹ This standard of care, proponents argue, accounts for the difficulty of the circumstances; therefore, the imposition of a duty is proper.

This argument prevailed in the case of *Perreira v. State*.¹³² In *Perreira*, a psychiatrist was sued for negligence after he released an involuntarily committed patient who later killed a police officer. The Supreme Court of Colorado found the imposition of liability proper despite the difficulty in predicting a patient's violent propensities. It stated that if a psychiatrist can diagnose and recommend the need for involuntary commitment, he also should be able to diagnose dangerousness in the patient.¹³³

Proponents of psychotherapist liability also reject the argument that liability will lead to massive confinements.¹³⁴ The decision to place a mentally ill patient in the least restrictive environment can-

I recognize the reluctance of courts to impose a duty upon psychotherapists to prevent a patient from doing harm to an unknown third party. Much of this concern stems from the inherent difficulty, some contend impossibility, in predicting dangerousness under such circumstances. It is also grounded in the recognition of the inexactness of diagnosing mental illness as compared with physical ailments. However, this difficulty alone does not justify barring recovery in all situations.

Cooke v. Berlin, 153 Ariz. 220, 228, 735 P.2d 830, 838 (Ct. App. 1987) (Corcoran, J., dissenting).

131. "Within the broad range of reasonable practice and treatment in which professional opinion and judgment may differ, the therapist is free to exercise his or her own best judgment without liability; proof, aided by hindsight, that he or she judged wrongly is insufficient to establish negligence." *Tarasoff*, 17 Cal. 3d at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.

132. 768 P.2d 1198 (Colo. 1989).

133. The court further stated:

If we are to accept the argument that it is simply unfair to expect psychiatrists to foresee whether the release of an involuntarily committed patient will create an unreasonable risk of serious bodily harm to others, then we inevitably would be casting serious doubt on the reliability of virtually all phases of the confinement process.

Id. at 1217 (citation omitted).

134. The court in *Lipari v. Sears, Roebuck & Co.* stated:

The [defendant] contends that imposing liability on a psychotherapist would conflict with this goal [of placing mental patients in the least restrictive environment] because therapists would attempt to protect themselves from liability by placing their patients in a restrictive environment. This argument misinterprets the nature of the duty imposed upon the therapist. The recognition of this duty does not make the psychotherapist liable for any harm caused by his patient, but rather makes him liable only when his negligent treatment of the patient caused the injury in question.

Lipari, 497 F. Supp. 185, 192 (D. Neb. 1980).

not be made without regard to the safety of others. A psychiatrist is expected to balance the various therapeutic considerations concerning the patient's condition against the public dangers that reasonably are apparent.¹³⁵ Every decision that a psychiatrist makes about the control of a patient must consider the effect that it will have on the public. The court in *Tarasoff* concluded that public policy favoring patient confidentiality must yield when disclosure will avert danger to others. "The protective privilege ends where the public peril begins."¹³⁶

B. Public Policy and Parental Liability

The Wassermans, like the opponents of psychotherapist liability, argued that the imposition of a duty on the parents of an adult child would have devastating effects.¹³⁷ For example, parental liability under section 319 would undermine the current trend away from confinement of the mentally ill.¹³⁸ The concern is that courts will force families of mentally unstable persons to choose between institutionalization of family members and potentially unlimited liability for that family member's acts. Ultimately, society at large would be forced to build, staff, and finance more institutions.

Beyond these economic factors, society would be affected by this intrusion into personal family decisions. Families would lose the option of choosing how and where their mentally ill or troubled adult child will be cared for, unless they are willing to risk full liability for their child's actions. The danger of imposing liability on these parents is the possibility that society will punish parents who are trying to care for their troubled adult children.

Another problem of equating the special relation of psychotherapist-patient with that of parent-child is the difference in professional training and skill. A psychotherapist is better educated than

135. "[T]he commendable goal of restoring mentally ill persons to an active and productive life . . . does not serve to relieve a treating psychiatrist of the concomitant responsibility to adequately consider the public interest." *Perreira*, 768 P.2d at 1218.

136. *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 442, 551 P.2d 334, 347, 131 Cal. Rptr. 14, 27 (1976).

137. Specifically, the Wassermans contended:

If such actions [of concerned parents for a confused daughter] can now be construed after the fact as constituting a custodianship [sic] sufficient to impose a duty under section 319, the effect upon not only tort law in general, but also, intra-family relationships could be devastating. Such a decision would send a message to the parents of all disturbed children that attempts to render aid or assistance may result in the imposition of civil liability. The law cannot be so insensitive.

Defendant's Motion to Dismiss, *supra* note 6, at 22.

138. See *supra* text accompanying notes 128-29.

an ordinary parent in spotting and diagnosing possible dangerous propensities in a person.

The Corwins, seeking to impose parental liability, argue that public policy is not served by immunizing parents who allow their dangerous adult child to go unsupervised.¹³⁹ They argue that family decisions, like those of a psychiatrist, must be balanced against the effects that those decisions will have on society. The family, the Corwins asserted, has a general duty not to subject the public to an unreasonable risk of harm.

Proponents of parental liability also argue that the imposition of a duty serves the policy of preventing future harm. They feel that lawsuits such as *Corwin v. Wasserman* will notify parents that they will be held liable if they are negligent in the care and control of their dangerous adult child. In his ruling denying the Wassermans' motion to dismiss, Judge O'Connell stated that the Wassermans made a "conscious decision to foster known dangerous aberrant behavior." Judge O'Connell reasoned that "to hold otherwise encourages irresponsible, negligent conduct."¹⁴⁰

C. A Good Faith Standard

Court intervention into family relationships is not new. Courts have stated their concern with parental accountability for the acts of juveniles¹⁴¹ and the duties that parents have to their child who has reached majority.¹⁴² There also has been a strong public demand recently that parents be held responsible for their children's misconduct.¹⁴³

139. Specifically, the Corwins contend:

One must wonder what policy reasons would require that society stand idly and impotently by while parents allow a dangerous and mentally disturbed child to arm herself and commit crime upon crime with impunity while these same parents busily sweep all traces under the carpet. What public policy is served by permitting parents to defeat efforts to disarm a child when the obvious result of allowing her to remain armed can only be the ultimate use of those weapons?

Plaintiff's Response, *supra* note 2, at 25.

140. *Corwin v. Wasserman*, No. 88 L 16369, court order at 50-51 (Ill. Cir. Ct. June 28, 1989) (denial of defendant's motion to dismiss).

141. "We are certainly concerned about the serious problem of juvenile delinquency and agreed as to the importance of generating a sense of responsibility on the part of the parents with respect to the behavior of their children." *Parsons v. Smithey*, 109 Ariz. 49, 54, 504 P.2d 1272, 1277 (1973).

142. See 2 J. ATKINSON, MODERN CHILD CARE CUSTODY PRACTICE §§ 10.18-10.21 (1986) (discussing court-required support for disabled children who reach majority and court orders requiring parents to pay for a child's college education).

143. See, e.g., *City Targets Parents in Truancy Crackdown*, Chicago Tribune, June 11, 1990, § 2, at 1, col. 2. The article outlines a plan by Chicago schools and the Cook County State's Attorney's Office to fine or imprison parents if their children chronically

Against this cry for parental liability there remains the problem of the social repercussions of holding parents liable. Although the imposition of liability may be proper in a psychotherapist-patient relationship, there are vast differences between that relationship and a parent-child relationship. The imposition of liability against a psychiatrist can be justified because a psychiatrist holds himself out as an expert and receives a salary for his opinions and care. A parent, on the other hand, lacks professional training in parenting. Therefore, if liability is to be imposed on parents for the acts of their adult children, courts must consider the difficulty in labeling parental conduct as negligent. The standard used to evaluate parental conduct must be very broad. Parents who honestly attempt to care for their dependent adult children should not be punished for failing. Proponents of psychotherapist liability argue that the imposition of liability is proper because the standard of care for health professionals accounts for the difficult nature of the problem.¹⁴⁴ Parents, however, do not have the luxury of a professional standard of care, yet the evaluation of their performance is just as difficult.

To protect parents from unlimited liability, parents should be found negligent only if they failed to make a good faith effort to deal with their adult child's conduct prior to the injury.¹⁴⁵ Good faith is an objective standard under which the court would decide whether the parents' attempts to help their adult child were reasonable under the circumstances. A good faith effort on the part of a parent should include the balancing of the needs of the child against the dangerous child's possible effects on the community. A parent must control and care for an adult child in a manner that does not jeopardize the public's safety.

For example, consider the case of parents of an emotionally dis-

miss school. When former Cook County State's Attorney Cecil Partee announced the program, he acknowledged the unlikelihood that any parent would serve a significant jail term due to a child's truancy, but called the effort a way to "put a little weight on the parents." *Id.*; see also Safran, *Is It a Crime to Be a Bad Parent?*, *Woman's Day*, May 1, 1990, at 64. The article discusses cases in which parents were held criminally liable for their children's acts. According to a recent poll, Americans cite "lack of parental supervision" as the primary cause of today's rising teenage violence. Almost half of those polled felt that parents should be held liable for the crimes of their children. *Id.* at 66.

144. See *supra* note 132 and accompanying text.

145. The good faith standard was used in the psychiatrist liability case of *Littleton v. Good Samaritan Hosp.*, 39 Ohio St. 3d 86, 529 N.E.2d 449 (1988). The Ohio Supreme Court was concerned that the usual malpractice standard was not appropriate due to the subjective nature of the psychiatrist's decisions. Instead, it adopted the professional judgement standard. Under this standard, a psychiatrist is held liable only if his decision was not made in good faith. *Id.* at 100, 529 N.E.2d at 461.

turbed adult child who has a fascination with fire and a history of setting fires. The parents, aware of this problem, may elect to care for the child in their home or institutionalize the child if they feel that they cannot control him. If the parents decide to keep the child at home, they must take preventive measures to protect others from the possibility of a fire. A good faith effort by the parents would include locking away matches or other items that could be used by the child to start a fire. This would show that the parents tried to protect others from the obvious danger that their child presents. The good faith standard does not demand that every possible precaution be taken; rather, a parent would be liable only if reasonable precautions were not taken.

Earlier court decisions imposed liability on parents of minors when the parents refused to address a serious behavioral problem brought to their attention by others, or when that child's act could not have been achieved but for the parent's assistance or inaction. When imposing liability for the acts of an adult child, the standard must consider the difficulty that the child's age presents. The good faith standard would hold parents liable who were negligent in the care of their child, without punishing parents who tried to help their child, but failed.

When parents of a dangerous adult child take charge of that child, they accept the responsibility to protect society from that child's harmful conduct. Failure to impose this duty would subject society to an unacceptable risk of harm. In judging a parent's conduct, however, the courts must not impose liability when the parent made a good faith effort to control the child. Failure to adopt this standard of care would subject parents and society to an unreasonable burden.

V. CONCLUSION

In order to hold parents liable for the acts of their adult children there must be proof that the parents: (1) knew that their child had dangerous propensities; (2) took charge of their child; and (3) failed to make a good faith effort to protect others from their child. The relationship of parent and child is too personal and susceptible to abuse to allow a more stringent standard.

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