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TORT LIABILITY FOR CALIFORNIA PUBLIC PSYCHIATRIC FACILITIES: TIME FOR A CHANGE

I. INTRODUCTION

Under California law, a public health entity is not legally responsible for its decision to release a mental patient unless the court finds that an employee of the facility was negligent in securing the patient's release. In contrast, according to federal law, the United States Government is liable for such conduct to the same extent as a private party would be in similar circumstances. For example, federal courts often impose liability for violence committed by a released mental patient on the basis of an unreasonably dangerous activity, the existence of a special relationship between patient and institution, or foreseeability of harm. California courts, on the other hand,
have refused to find negligent conduct on the part of mental health employees, and thus have not imposed liability. The inconsistency between California and federal law necessitates a re-examination of the California position.

This comment will explore the differences in reasoning between California and federal decisions, focusing on the theory that the California Tort Claims Act, as currently interpreted by the judiciary, leaves victims of mental health patients inadequately compensated for their injuries. Section II of the comment will first discuss two California Supreme Court decisions that prompted the California Legislature to pass the California Tort Claims Act and will explain relevant portions of the Act. Then, section II will summarize a California case not directly on point but which contains reasoning that has been applied to decisions concerning public mental health facilities. That section will finally describe typical decisions involving the mental health field made by both California and federal courts. Section III of this comment will analyze the factual settings of California cases as they would have been decided under federal law. Section IV proposes a new standard for imposing liability on public mental health facilities in California.

II. BACKGROUND

A. Development of the Tort Claims Act

In 1963, in an attempt to codify existing California law, the California Legislature passed the Tort Claims Act (the Act). The Act arose in response to two California Supreme Court decisions that threatened to abrogate sovereign immunity, the primary doctrine relied upon by government entities to avoid legal liability. The Act prohibits any California mental health facility from being held liable for the release of a patient whose subsequent actions cause another to be harmed.

Prior to 1961, the dominant trend in California was towards a

175). See infra notes 147-229 and accompanying text.
4. CAL. GOV'T CODE §§ 810-996.6 (West 1980).
5. Id.
7. Sovereign immunity: “Doctrine [that] precludes litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless sovereign consents to suit.” BLACK'S LAW DICTIONARY 1252 (5th ed. 1979).
8. CAL. GOV'T CODE §§ 854-856.6 (West 1980).
departure from total adherence to the sovereign immunity doctrine. This was evidenced both legislatively and judicially. Two California cases in particular attracted the attention of government employees.

In *Muskopf v. Corning Hospital District*, the plaintiff was a patient at Corning Memorial Hospital. She brought suit against the hospital alleging that she re-injured her hip in a fall brought about by the hospital’s negligence. The hospital demurred, seeking immunity as a state agency exercising a governmental function. Using bold new language, the court stated that the rule of governmental immunity for tort is “an anachronism, without rational basis, and has existed only by the force of inertia. . . . None of the reasons for its continuance can withstand analysis.” However, the *Muskopf* court retained the well-settled rule that although government officials are themselves liable for the negligent performance of ministerial duties, they are immune from tort liability for discretionary acts within the scope of their authority. The court concluded, “in holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law we make no startling break from the past . . . trend.”

In *Lipman v. Brisbane Elementary School*, a superintendent of a school district brought suit against the district, three trustees, the county superintendent, and the district attorney for maliciously discrediting her reputation and forcing her out of her job. The court upheld the rule of discretionary immunity, stating that all defendants were immune from liability in view of the discretionary nature of their acts. One rationale behind the discretionary immunity doctrine is that the threat of trial and the danger of its outcome would impair workers’ performances on the job. The court decided that it is

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9. Justice Traynor pointed out: “For years the process of erosion of governmental immunity has gone on unabated. The Legislature has contributed mightily to that erosion.” *Muskopf*, 55 Cal. 2d at 221, 359 P.2d at 463, 11 Cal. Rptr. at 95.
12. *Id.* at 213, 359 P.2d at 458, 11 Cal. Rptr. at 90.
13. *Id.*
14. *Id.* at 213, 359 P.2d at 458, 11 Cal. Rptr. at 90.
15. *Id.* at 216, 359 P.2d at 460, 11 Cal. Rptr. at 92.
16. *Id.* at 220, 359 P.2d at 462, 11 Cal. Rptr. at 94 (emphasis added).
17. *Id.* at 221, 359 P.2d at 463, 11 Cal. Rptr. at 95.
19. *Id.* at 228, 359 P.2d at 466, 11 Cal. Rptr. at 98.
20. *Id.* at 230, 233-35, 359 P.2d at 468-70, 11 Cal. Rptr. at 100-02.
better to leave the injured party unredressed than to subject government employees to the constant threat of suit.\footnote{21}

The controversy that resulted from \textit{Lipman} was focused on its dicta. The dicta stated that it was unlikely that workers' individual performances would be adversely affected by the threat that their public entity, as opposed to themselves, might be held liable for damages.\footnote{22} Thus, a primary rationale behind sovereign liability was questioned. The court stated:

\begin{quote}
The community benefits from official action taken without fear of personal liability, and it would be unjust in some circumstances to require an individual injured by official wrongdoing to bear the burden of his loss rather than distribute it throughout the community. . . . [V]arious factors furnish a means of deciding whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages.\footnote{23}
\end{quote}

The decision in \textit{Muskopf} and the dicta of \textit{Lipman} evidently caused apprehension among officials in government-run agencies, who feared that public entities might become subject to a liability burden they could not bear financially.\footnote{24} In response, the California Legislature immediately enacted section 22.3 of the California Civil Code,\footnote{25} which delayed the effectiveness of the decisions until the close of the 1963 legislative session. In 1963, the Legislature formally enacted the Tort Claims Act.

\section*{B. The Tort Claims Act}

Senate Bill 42, commonly referred to as the Tort Claims Act, adopted the recommendations of the California Law Revision Commission regarding sovereign immunity.\footnote{26} The Act encompassed claims and actions against both public entities and public employees.
in the following areas: (1) dangerous conditions of public property; (2) fire protection; (3) medical, hospital, and public health activities; and (4) tort liability agreements between public entities.

California courts have applied several different sections of the Act to determine whether liability exists for mental health facilities in those cases where released patients harm others. Section 856 of the California Government Code is applicable specifically to mental health workers.\(^\text{27}\) As originally drafted, this section of the Act recognized the immunity of public employees for their decisions to confine, parole, or release a patient from a mental institution.\(^\text{28}\) The section did not exonerate public employees for injuries caused by their negligent or wrongful acts or omissions.\(^\text{29}\) Many portions of the original statute have since been repealed or amended.\(^\text{30}\) Most importantly, the current statute now grants immunity to public employees for their discretionary acts\(^\text{31}\) and to public entities for any injury proximately caused by a mental health patient.\(^\text{32}\)

Section 820.2 of the Government Code was intended to restate the law that existed in California prior to \textit{Muskopf} and \textit{Lipman}.\(^\text{33}\) This section mandates that unless otherwise provided by statute, a public employee is not liable for any discretionary act or omission, regardless of whether the discretion was abused.\(^\text{34}\)

The immunity provided public entities by section 854.8 of the Government Code was intended to prevail over all other sections of the Act.\(^\text{35}\) According to this section, the public entity is immune from suit for injuries to persons committed or admitted to public mental institutions.\(^\text{36}\) Even more importantly, the public entity is immune from liability for injuries proximately caused by persons committed

\begin{footnotes}
\footnote{27. \textit{CAL. Gov'T CODE} § 856 (West 1980); \textit{see supra} note 1.}
\footnote{28. \textit{Id.} § 856. Law Revision Comm'n Comment, 1963 Addition.}
\footnote{30. \textit{CAL. Gov'T CODE} §§ 810-996.6 (West 1980).}
\footnote{31. \textit{Id.} § 820.2.}
\footnote{32. \textit{Id.} § 854.8.}
\footnote{33. Section 820.2 of the California Government Code provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." \textit{CAL. Gov'T CODE} § 820.2 (West 1980); \textit{see 4 CAL. LAW REVISION Comm'n, REPORTS, RECOMMENDATIONS \\& STUDIES} 843 (1963).}
\footnote{34. \textit{CAL. Gov'T CODE} § 820.2 (West 1980).}
\footnote{35. \textit{Id.} § 854.8. The code specifically states, "[n]otwithstanding any other provision of this part, . . . a public entity is not liable for: (1) An injury proximately caused by a patient of a mental institution. (2) An injury to an inpatient of a mental institution." \textit{Id.}}
\footnote{36. \textit{CAL. Gov'T CODE} § 854.8(a)(2) (West 1980).}
\end{footnotes}
to mental institutions. However, public entities may be required to pay judgments based on their public employees' malpractice.

C. Tarasoff v. Regents of University of California

Although it concerned the liability of an individual psychiatrist as opposed to a public mental health facility, the rationale behind Tarasoff v. Regents of University of California has been applied in subsequent decisions concerning malpractice committed by employees of public facilities. In Tarasoff, a mental health patient confided to his psychiatrist his intention to murder Tatiana Tarasoff. Subsequently, he did in fact kill her. Tatiana's parents brought suit against the university, alleging that the university's psychotherapist was under a duty to warn the victim of the impending danger. The defendants asserted they owed no duty to a third party.

The Tarasoff court acknowledged the general rule that no individual has a duty to control the conduct of another. However, the majority noted that such a duty can be created if the defendant is in a special relationship with either the person whose conduct requires control or with the foreseeable victim of the conduct. The Tarasoff court determined that a psychotherapist-patient relationship is sufficient to impose a duty to control the patient's conduct on the psychotherapist. This duty extends to both the patient and to the patient's foreseeable victims. The duty does not require for its fulfillment a

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37. Id. § 854.8(a)(1).
38. Id. § 854.8(d).
40. See, e.g., Buford v. State, 104 Cal. App. 3d 811, 164 Cal. Rptr. 264 (1980);
41. 17 Cal. 3d at 430, 551 P.2d at 339, 131 Cal. Rptr. at 19.
42. Id. at 433, 551 P.2d at 341, 131 Cal. Rptr. at 21.
43. Id.
44. Id. at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.
45. Id. at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.
46. Id. (emphasis added). Section 315 of the Restatement reads:

There is no duty to control the conduct of a third person as to prevent him from causing bodily harm to another unless, a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or b) a special relation exists between the actor and the other which gives to the other a right to protection.

RESTATEMENT (SECOND) OF TORTS § 315 (1965). Also relevant is section 319 of the Restatement, which provides: "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 as to prevent him from doing such harm." Id. § 319.

47. 17 Cal. 3d at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.
48. Id. at 438-39, 551 P.2d at 345, 131 Cal. Rptr. at 25.
“perfect performance” by the psychotherapist. Rather, the psychotherapist need only employ the reasonable degree of skill that others in the profession would utilize in similar circumstances.

D. California Law

California courts have not yet held a public mental health facility or an employee liable for injuries caused by the improvident release of a patient. They have based their conclusions on (1) the fact that the release of a patient is a discretionary function, and is therefore within the scope of a public employee’s duties, and (2) the lack of a special relationship between the patient and the facility. The following cases illustrate this position.

The plaintiffs in two California cases alleged that mental patients were improperly released due to the negligent maintenance of their treatment records. Plaintiffs in both cases were denied relief. The courts in those cases relied on the immunity granted by the Tort Claims Act. In *Kravitz v. State*, the appellate court held that the plaintiffs—parents of a child who had died as a result of an attack by a former mental patient—had failed to state a cause of action.

In *Kravitz*, Defendant Nicholas William Toce was committed to Atascadero State Hospital and subsequently transferred to Metropolitan State Hospital. Four years after the original commitment, Metropolitan’s superintendent informed the Los Angeles Superior Court that Toce was “no longer insane and has improved to such an extent that he is no longer a menace to the health and safety of others.” The superintendent recommended a release under section 1026(a) of the Welfare and Institutions Code. On the basis of both

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49. Id. at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.
50. Id.
55. Id. at 303, 87 Cal. Rptr. at 356.
56. Id. at 303, 87 Cal. Rptr. at 353-54.
57. Id. at 304, 87 Cal. Rptr. at 354. Section 6761 (now a part of section 7375) of the Welfare and Institutions Code provides for prior court approval of the release of a patient committed under section 1026 of the Penal Code. *Cal. Welf. & Inst. Code* § 7375 (West 1984).
59. *Cal. Penal Code* § 1026 (West 1984). Section 1026 (now section 1026.2) provides that either the committed individual or the director of the treatment facility may petition for
this report and a report from the patient's previous hospital, the
court ordered Toce released. Toce killed the plaintiffs' child.

Plaintiffs alleged that the state and hospital staff members
"negligently and carelessly provided incomplete and inaccurate information
concerning their testing, evaluation, [and] treatment" of
Toce, and that their daughter's death resulted from this negligence.
The Kravitz court discussed two ways in which a mental patient can
be released from a public mental health facility in California. First,
under California Penal Code section 1026(a), the court may order
the release of the patient if the patient or superintendent applies to
the court and the court finds that the patient's sanity has been re-
stored. Second, a person committed under chapter 6, title 10, part 2
of the Penal Code may be released by the superintendent with the
approval of the superior court from which the patient was
committed.

The Kravitz court held that no statutory duty requires the facility
to furnish reports on the condition of a person committed under
Penal Code section 1026 to the court. It also determined that under
Government Code section 855.6, the examining psychiatrists were
immune from liability because the superintendent's decision to re-
lease Toce was a discretionary function.

In a similar wrongful death case, Hernandez v. State, the
California Court of Appeals relied on section 856(a)(3) of the Tort
Claims Act to deny a claim of negligent maintenance of records.
The court determined that the statute created absolute immunity
release to the superior court of the county where the commitment was made based on the
ground that sanity has been restored. However, no release hearing will take place unless the
individual has been confined or on an outpatient status for at least ninety days. Id. § 1062.2

60. Kravitz, 8 Cal. App. 3d at 304, 87 Cal. Rptr. at 354.
61. Id. at 305, 87 Cal. Rptr. at 353.
62. Id. at 304, 87 Cal. Rptr. at 354.
63. Id. at 305, 87 Cal. Rptr. at 355.
64. Id. The court stated that although reports are required to be furnished in other
cases, no statutory duty exists under section 1026 of the Penal Code. Pursuant to a section
1026 proceeding, the court may "request or order the production of evidence, reports or infor-
mation." Id.
65. Id.
66. Id. at 306-07, 87 Cal. Rptr. at 355-56.
68. Section 856(a)(3) of the California Government Code provides: "Neither a public
entity nor a public employee acting within the scope of his employment is liable for any injury
resulting from determining in accordance with any applicable enactment: . . . Whether to
parole, grant a leave of absence to, or release a person confined for mental illness or addic-
from the charge of negligent maintenance of records brought against both the state and its employees. The court examined two primary policy considerations in reaching its decision that the facility must be immune from liability.

First, the court noted that the study of psychosis is relatively new and that the standards of diagnosis and treatment utilized in the field are not as clear as are those used in connection with physical illnesses. Second, the Hernandez court recognized that public mental hospitals must accommodate all patients committed to their care and that, unlike private hospitals, they do not enjoy the luxury of refusing treatment to mental patients. The majority acknowledged that supervision and treatment problems exist because of an excessive number of patients housed in the public facility. The court therefore held that there should be no tort liability for a public facility that decides to parole or release persons it deems rehabilitated.

In reaching its decision, the Hernandez court also looked to the legislative intent behind the Tort Claims Act. The court noted that the California Legislature intended to encourage “free release from confinement, unfettered by the possibility of charges of negligence against those who participate in the process leading to release.” The majority seemed concerned that liability for improper patient release would inhibit the speed and frequency with which some patients are released.

In Buford v. State, the plaintiffs alleged negligence against the County of Tulare and Atascadero State Hospital. The California Court of Appeals again held that the county was under no duty

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70. Webster’s Dictionary defines psychotic as “of, relating to, or marked by psychosis,” whereas psychosis is “profound disorganization of mind, personality, or behavior that results from an individual’s inability to tolerate the demands of his social environment whether because of the enormity of the imposed stress or because of primary inadequacy or acquired debility of his organism . . . .” Webster’s Third New International Dictionary 1833-34 (1967).
71. Id.
72. Id.
73. Id.
74. Id. at 899, 90 Cal. Rptr. at 207.
75. Id. at 901, 90 Cal. Rptr. at 209.
76. Id.
77. A negligence case generally involves five elements: (1) a defendant’s legal duty to exercise due care, (2) defendant’s breach of that duty, (3) the breach of duty as the actual cause of the plaintiff’s injury, (4) the breach as the proximate cause of the injury, and (5) damages to the plaintiff. W. Prosser, Law of Torts 143-44 (4th ed. 1971).
to control the actions of a former state mental patient. Additionally, the court determined that the state was immune from liability under the tort immunity statute.

The *Buford* case arose after Kenneth Daniels was released from Atascadero State Hospital in 1976. Approximately two years after his release, he kidnapped the three plaintiffs from a tavern and held them at knifepoint. In its decision, the *Buford* court reiterated the general rule that no person owes a duty to control the conduct of others. It noted, however, that exceptions to this rule have been created in cases where the defendant stands in some special relationship to either the person whose conduct requires control or to the foreseeable victim of the proposed conduct.

The *Buford* court examined the factually similar case of *McDowell v. County of Alameda*, where no such special relationship between the defendant and the victim had been found. *McDowell* involved a county hospital that had diagnosed an individual as dangerous to himself and others. Upon learning that the individual, Gregory Jones, was entitled to free medical services at Kaiser Hospital, doctors at the county hospital sent Jones to Kaiser in a taxi. Jones never arrived. Two days later, Jones shot and killed John McDowell. In finding that no special relationship existed between the county and the victim, the *McDowell* court reasoned:

There is no allegation that [the dangerous individual] was a

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79. *Id.*
80. *Id.* at 829, 164 Cal. Rptr. at 275.
81. *Id.* at 815, 164 Cal. Rptr. at 266. The patient’s release was originally an “indefinite leave of absence.” Seventeen months later, that status was changed to an “unauthorized leave of absence.” *Id.* The nature of the numerous offenses that led to the patient’s commitment were unknown at the time of the filing of the complaint. *Id.*
82. *Id.*
83. *Id.* at 820, 164 Cal. Rptr. at 268-69.
84. *Id.* (emphasis added).
85. 88 Cal. App. 3d 321, 151 Cal. Rptr. 779 (1979). In *McDowell*, the county hospital determined that unless the patient received treatment, he would be dangerous to himself and others. Although the patient was eligible for services under the Kaiser Hospital Health Plan, Kaiser refused to send an ambulance. The county hospital then sent the patient to Kaiser in a taxi, but he never arrived. *Id.* at 324, 151 Cal. Rptr. at 781. The court held that no “special relationship” existed between the county hospital and either their patient or the decedent. *Id.* at 325, 151 Cal. Rptr. at 781-82. The court applied section 856 to provide absolute immunity to the hospital. The majority also determined that the hospital had not been negligent: they had acted reasonably and with due care when they put the patient into a taxicab. *Id.* at 327, 151 Cal. Rptr. at 783.
86. *Id.* at 324, 151 Cal. Rptr. at 781.
87. *Id.*
88. *Id.*
threat to the decedent, nor is there any allegation that any particular person or group of people would be harmed by the release of [the dangerous individual]. Respondents do not owe a duty to society because [the dangerous individual's] behavior may constitute a danger to any person.89

The Buford court, while acknowledging the McDowell decision, analyzed whether the plaintiffs could state causes of action against the county and state. The majority first examined the relationship between the county and Daniels, distinguishing it from the special relationship found in Tarasoff90 by looking to the degree of dependence or mutual dependence in the relationship. The court held that Daniels had not depended in any way on county personnel.91 The county only “provided services to respond to Daniels’ drunk driving problem, rather than to cure his so-called psychotic criminal tendencies.”92 The majority determined that the county probation department had had no way to determine that Daniels was a foreseeable peril to the neighboring community.93 Since no special relationship existed, the county was under no duty to control Daniels’ actions.94

The Buford court next examined whether the state owed a duty of due care to the plaintiff based on a special relationship to the defendant. They noted that a duty to help or protect is increasingly being recognized in special, dependent relationships—*even in a relationship with a public entity.*95 The court determined that the nature of the relationship between Atascadero State Hospital and Daniels was a dependent one.96 Daniels was assigned to various personnel who were to aid in his rehabilitation during both his commitment and leave of absence.97 Therefore, the relationship in question was

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89. Id. at 325, 151 Cal. Rptr. at 781-82.
90. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); see supra notes 39-50 and accompanying text.
92. Id.
93. Id.
94. Id.
95. Id. at 823, 164 Cal. Rptr. at 271 (emphasis added). See, e.g., Harland v. State, 75 Cal. App. 3d 475, 142 Cal. Rptr. 201 (1977). In Harland the appellate court held that a special relationship did exist between the California Veteran’s Home (the Home) and a resident of that Home, Edgmon, who killed two individuals in an auto accident. Id. at 481, 142 Cal. Rptr. at 204. After finding the existence of a special relationship, the court determined that a jury could reasonably have found that the Home knew that Edgmon was dangerous to others when driving. However, the court held that liability against the Home could not be sustained since they had no valid legal reason for restraining Edgmon’s right to drive. Id. at 482, 142 Cal. Rptr. at 205.
96. Buford, 104 Cal. App. 3d at 824, 164 Cal. Rptr. at 272.
97. Id.
the type for which other cases had found a duty as a matter of law.\textsuperscript{88} Warning foreseeable victims about Daniels' release was part of the duty imposed in other cases.\textsuperscript{99}

The \textit{Buford} court next discussed state immunity statutes. The state contended that it was immune from liability under either section 856.2\textsuperscript{100} or section 8561\textsuperscript{01} of the California Government Code.\textsuperscript{102} The majority held that neither section granted immunity because the case involved the negligent supervision of the defendant \textit{after} his release for a leave of absence, and section 856 covered only the discretionary decision to \textit{grant} the leave.\textsuperscript{103} No portion of the statute regarded the ministerial actions that followed release.\textsuperscript{104} Section 856.2 was deemed inapplicable because Daniels was not an escapee.\textsuperscript{105}

The \textit{Buford} court then raised the possibility of immunity under section 854.8.\textsuperscript{106} The court cited the Legislative Committee's Comment on this section: "the section provides public entities with immunity from liability for injuries proximately caused by persons committed or admitted to mental institutions."\textsuperscript{107} Following the statutory interpretation in a factually similar case,\textsuperscript{108} the \textit{Buford} court determined that the state was immunized from liability for the follow-up


\textsuperscript{99} \textit{Buford}, 104 Cal. App. 3d at 824, 164 Cal. Rptr. at 272. "Although there are substantial questions about the foreseeability of potential victims and the reasonableness of making a public warning about Daniels' release, these are questions for the trier of fact and should not be resolved against plaintiffs at the complaint stage." \textit{Id.}

\textsuperscript{100} California Government Code section 856.2 states, in pertinent part: "(a) Neither a public entity nor a public employee is liable for:(1) an injury caused by an escaping or escaped person who has been confined for mental illness or addiction." \textit{CAL. GOV'T CODE} § 856.2 (West 1980).

\textsuperscript{101} \textit{Id.} at 825, 164 Cal. Rptr. at 272.

\textsuperscript{102} \textit{Id.} at 827, 164 Cal. Rptr. at 273. \textit{CAL. GOV'T CODE} § 854.8 (West 1980). \textit{See supra} note 35.

\textsuperscript{103} \textit{Buford}, 104 Cal. App. 3d at 827, 164 Cal. Rptr. at 274 (quoting \textit{VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY} 628 (CEB) (1964)).

\textsuperscript{104} \textit{Buford}, 104 Cal. App. 3d at 827, 164 Cal. Rptr. at 274 (quoting \textit{VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY} 628 (CEB) (1964)).

\textsuperscript{105} Guess v. State, 96 Cal. App. 3d 111, 157 Cal. Rptr. 618 (1979). In \textit{Guess}, a mental health patient was conditionally released to his mother's care with the stipulation that she adhere to strict conditions. The patient was required to enter a follow-up program at a nearby hospital, and that mental health center was required to notify the court if the patient regressed. Six months after his release, the patient attempted to rob a bank and severely wounded the plaintiff, an employee. The court interpreted section 854.8 as shielding public entities from \textit{"all direct and vicarious liability for injury proximately caused by a patient of a mental institution, except for specific 'malpractice' situations."} \textit{Id.} at 119, 157 Cal. Rptr. at 623.
actions of its employees.¹⁰⁹

In a related case, the California Court of Appeals held that a private rehabilitation center owed no duty to a person who was shot by an escapee.¹¹⁰ The superior court admitted the defendant, Lynn Bentley, to probation on the condition that he enter Synanon, a private rehabilitation program, and not leave the program without court approval.¹¹¹ Five days after entering the program, Bentley escaped and went on a “crime spree” that included the harming or killing of several people.¹¹² Thirteen days after leaving the program, the defendant shot the plaintiff in the arm.¹¹³

The plaintiff in this case argued that the facility was under a duty to exercise due care in accepting convicted persons to the program and to prevent dangerous patients from leaving the center. He based his argument on two theories. First, plaintiff cited section 449 of the Restatement (Second) of Torts, which provides that if the likelihood that a third party will act in a certain way is the hazard that makes the actor negligent, commission of that act by a third party does not shield the actor from liability.¹¹⁴ Second, the plaintiff argued that a special relationship existed between Bentley and the defendants: because the facility accepted Bentley as a patient, it had a duty to prevent him from leaving the program without authorization.¹¹⁵

The court rejected both theories. It explained that as a general rule, a person owes no duty to control the conduct of another.¹¹⁶ Exceptions are realized in instances of special relationships.¹¹⁷ The court looked to policy considerations in determining whether such a duty existed in the instant case.¹¹⁸ It recognized two conflicting pol-

¹¹¹. Id. at 345, 151 Cal. Rptr. at 797.
¹¹². Id.
¹¹³. Id.
¹¹⁴. RESTATEMENT (SECOND) OF TORTS (1965).
¹¹⁶. Id. at 347, 151 Cal. Rptr. at 798.
¹¹⁷. Id.
¹¹⁸. Id.

Principal policy considerations in deciding whether a duty exists include “the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance
icy goals: the public interest in safety from violent assault and the public policy favoring innovative criminal offender release and rehabilitation programs. The court concluded: "[o]f paramount concern is the detrimental effect a finding of liability would have on prisoner release and rehabilitation programs."[120]

Applying Government Code section 845.8,[121] the court conceded that the private facility was not a "public entity or public employee" within the meaning of the section. However, it rationalized that the same policy considerations that apply to public release programs should no doubt be applied to private programs.[122]

In another closely related case, Thompson v. County of Alameda,[123] the Supreme Court of California held that the county was either statutorily immunized from liability for releasing a juvenile who subsequently committed a murder or, alternatively, bore no affirmative duty that it failed to perform.[124] Within 24 hours of being released to the custody of his mother, James, the juvenile offender, sexually assaulted and murdered the plaintiffs' five-year-old son.[125] Plaintiffs alleged that the county was aware James had indicated he would kill a young child in his neighborhood.[126] The plaintiffs also argued that the county was "reckless, wanton, and grossly negligent" in not advising or warning the juvenile's mother, local police, or local parents of his dangerous propensities.[127]

The Thompson court examined sections 820.2 and 845.8 of the Government Code to determine whether immunity should be extended to the county for the allegedly tortious acts. In its discussion, the court cited Johnson v. State,[128] where the state Youth Authority placed a sixteen-year-old youth with known homicidal tendencies into a foster home without notifying the parents of his dangerous

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120. Id. at 348, 151 Cal. Rptr. at 799 (quoting Whitcombe v. County of Yolo, 73 Cal. App. 3d 698, 716, 141 Cal. Rptr. 189, 199 (1977)).
121. The code states, in pertinent part: "Neither a public entity nor a public employee is liable for: (a) any injury resulting from determining whether to parole or release a prisoner." CAL. GOV'T CODE § 845.8 (West 1980).
123. 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).
124. Id. at 758, 614 P.2d at 738, 167 Cal. Rptr. at 80.
125. Id. at 746, 614 P.2d at 730, 167 Cal. Rptr. at 72.
126. Id.
127. Id.
tendencies.

The Johnson court initially found that a special relationship existed between the state's Youth Authority and its selected foster parents "such that its duty extended to warning of latent, dangerous qualities suggested by the parolee's history or character."\textsuperscript{129} It then turned to the issue of whether the state was immune under sections 820.2 and 845.8 of the Government Code. The majority stated that the Youth Authority's power to warn was neither "a discretionary function" nor "the type of basic policy decision that the Government Code seeks to insulate from liability in section 820.2."\textsuperscript{130} In examining section 845.8, it also held that immunity extended to decisions to release or parole, but no further—"subsequent negligent actions, such as the failure to give reasonable warnings to the foster parents . . . are subject to legal redress."\textsuperscript{131}

Although the Thompson plaintiffs relied heavily on both Johnson and Tarasoff,\textsuperscript{132} the court distinguished both cases.\textsuperscript{133} The Thompson court concluded that, unlike Johnson and Tarasoff, the plaintiffs in Thompson failed to allege that a relationship existed between the decedent and the county.\textsuperscript{134} The plaintiffs also failed to claim that the deceased was a foreseeable victim.\textsuperscript{135} The majority did, however, note the county's obligation to exercise reasonable care to protect all of its citizens.\textsuperscript{136} But it refused to impose liability for a failure to warn the plaintiffs, neighborhood parents, or the police.\textsuperscript{137}

In a dissenting opinion, Justice Tobriner argued that the majority had misinterpreted the Government Code and created an immunity the Legislature did not intend.\textsuperscript{138} He contended that the county was in a special relationship with the juvenile and that thus statutory immunity should not be applied.\textsuperscript{139}

Justice Tobriner interpreted Johnson and Tarasoff to state that a special relationship establishes a duty to use reasonable care to

\begin{itemize}
\item \textsuperscript{129} Id. at 785, 447 P.2d at 355, 73 Cal. Rptr. at 243.
\item \textsuperscript{130} Id. at 786-87, 793, 447 P.2d at 355-56, 360, 73 Cal. Rptr. at 243-44, 248.
\item \textsuperscript{131} Id. at 798-99, 447 P.2d at 364, 73 Cal. Rptr. at 252.
\item \textsuperscript{132} Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). See supra notes 39-50 and accompanying text.
\item \textsuperscript{133} Thompson v. County of Alameda, 27 Cal. 3d 741, 750-51, 614 P.2d 728, 733, 167 Cal. Rptr. 70, 75 (1980).
\item \textsuperscript{134} Id. at 753, 614 P.2d at 734, 167 Cal. Rptr. at 76.
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Id. at 759, 614 P.2d at 738, 167 Cal. Rptr. at 80.
\item \textsuperscript{139} Id.
\end{itemize}
The juvenile in Thompson had threatened to “take the life of a young child in the neighborhood.”
Justice Tobriner also argued that even if the victim were not specifically identifiable, a duty of reasonable care still existed. Justice Tobriner also argued that even if warning an entire neighborhood were not feasible, a warning to the juvenile’s mother would be both practical and effective. Since the juvenile’s mother was his legal guardian, she could attempt to control his behavior and at least ensure that her son was not left alone with young children.

Apart from Justice Tobriner’s views, the decision in Thompson exemplifies each case involving mental health patients that has been decided in California since the passing of the California Tort Claims Act. No California court has found a public entity liable for the release of a mental health patient who subsequently harms another individual. However, the trend in federal cases has been quite different.

D. Federal Law

Federal cases, in contrast to California cases, have often held public or government-run mental health facilities liable for negligence in the release or leave of absence of patients. Suits are frequently brought under the Federal Tort Claims Act. Federal courts have assigned liability on the basis of (1) a failure to warn, (2) a statutory duty to protect the public, and (3) foreseeability of harm. The following cases illustrate the rationale of the federal courts.

In an early case, Fair v. United States, an Air Force officer was released after a cursory and inadequate psychiatric examination. The officer, Captain Haywood, had previously threatened to

140. Id. at 760, 614 P.2d at 739, 167 Cal. Rptr. at 81.
141. Id. at 759, 614 P.2d at 738, 167 Cal. Rptr. at 80.
142. Id. at 760, 614 P.2d at 739, 167 Cal. Rptr. at 81.
143. Id. at 764, 614 P.2d at 741, 167 Cal. Rptr. at 83.
144. Id.
147. Fair, 234 F.2d at 288; Williams, 450 F. Supp. at 1040; Hicks, 551 F.2d at 407.
149. 234 F.2d 288 (5th Cir. 1956).
150. Id.
kill a nurse, a base commander, and the provost marshal. The Captain’s homicidal tendencies were known to the staff of the Air Force hospital who treated him. Upon release, the patient shot a nurse, two guards, and then himself. The *Fair* court held that the government could be liable because the provost marshal, who had promised to warn the nurse of the patient’s release, failed to fulfill his promise. The court stated further that the United States Government had waived immunity under the Federal Tort Claims Act. Specifically, when the government undertakes an action, it must do so with due care.

In *Williams v. United States*, also brought under the Federal Tort Claims Act, the United States District Court of South Dakota assigned liability for failure to warn of the release of a patient the defendants knew to be dangerous. Alonzo Bush had a history of violence—officials at the Veterans Administration Hospital in Fort Meade where he was committed considered him “fairly dangerous.” Nonetheless, on the basis of two meetings and a fifteen minute scan of his past records, doctors at Fort Meade released him without notifying officials, although they had promised to do so. On the day following his release, Bush, intoxicated, shot in the head a man he thought was trying to kill him.

The *Williams* court stated that although mental disorders are “elusive,” and that imposing liability on a hospital might prove burdensome, hospitals that treat patients with behavioral disorders are not shielded from liability in all instances for the improvident release of patients. The court phrased the standard of reasonable care as follows:

> When the risk becomes a serious one, either because the threatened harm is great or because there is an especial likelihood that it will occur, reasonable care may demand precautions against ‘that occasional negligence which is one of the ordinary

151. *Id.* at 290.
152. *Id.*
153. *Id.*
154. *Id.* at 296.
155. *Id.* at 294.
156. *Id.*
158. *Id.* at 1046.
159. *Id.* at 1042.
160. *Id.* at 1043.
161. *Id.* at 1044.
162. *Id.*
incidents of human life and therefore to be anticipated.  

The majority held that a duty was imposed upon the Fort Meade V.A. Hospital to exercise reasonable care to see that the promised notification was provided. Since the hospital failed to notify, it was negligent. The court reasoned that it was entirely foreseeable, given Bush’s history of violence, that he might make a violent attack upon another.

The court in *Semler v. Psychiatric Institute of Washington* relied upon section 319 Restatement (Second) of Torts in holding that a psychiatric institute was under a duty to protect the public from the reasonably foreseeable risk of harm from a patient with a history of molestation. The patient had been sentenced to 20 years’ imprisonment for the abduction of a young girl. A judge suspended the sentence on the condition that Gilreath, the defendant, continue his treatment at a psychiatric institute where he had spent time pending trial. Gilreath was subsequently transferred to outpatient status without the court’s notification. Approximately one month later, Gilreath killed the plaintiff’s daughter. The court of appeals held that the lower court order had imposed a duty on the mental health facility to protect the public by retaining custody over Gilreath. It also held that the facility breached this duty and that the breach proximately resulted in the death of the decedent. The psychiatric facility and the probation officer thus both owed damages to the plaintiff for the death of the girl.

In *Hicks v. United States*, the United States Court of Appeals affirmed a finding of negligence against St. Elizabeths Hospital (St. Elizabeths). The plaintiffs, relatives of the deceased, brought the action under the Federal Tort Claims Act. The *Hicks* case presented the following factual basis. Joseph Morgan had been con-
fined to St. Elizabeths for severe mental impairment caused by excessive drinking. He repeatedly assaulted his wife and had threatened to murder her. After being arrested on assault charges, Morgan was found incompetent to stand trial and was committed to St. Elizabeths. Two months after he was committed, the senior psychiatric resident recommended his discharge. The report stated that the patient had recovered from the mental disorder that had been caused by alcohol intake and was competent to stand trial. Three months later, the patient was released.

Shortly before Morgan’s discharge, his family visited him at St. Elizabeths. At that time, Morgan threatened to kill his wife. He blamed her for his commitment. Two months after his release, he shot and killed her at their family home.

The *Hicks* court made no decision as to whether St. Elizabeths owed a duty of care to Mrs. Morgan. It did determine, however, that St. Elizabeths owed a duty to the Court of General Sessions. The standard applied by the majority was the degree of care a reasonably prudent person would have employed in like circumstances. Although the court took into account that psychiatric analyses contain a degree of uncertainty, they determined that the mistake in this instance was a quite serious error.

The court held that under a local rule, 24 D.C. Code 301(b), St. Elizabeths had a legal duty to inform the court if, in its opinion, a patient accused of a crime is competent to stand trial. Because

178. Id.
179. Id.
180. Id. at 409-10.
181. Id. at 411.
182. Id.
183. Id.
184. Id.
185. Id.
186. Id.
187. Id. at 412.
188. Id. at 415. The District of Columbia Court of General Sessions received the letter from St. Elizabeths Hospital. The letter stated that Morgan had “recovered” from his mental disorder. *Id.* at 415-16.
189. Id. at 416.
190. Id. at 417.
191. Id. at 415 (emphasis added). 24 D.C. Code 301(b) states:
Whenever an accused person confined to a hospital for the mentally ill is restored to mental competency in the opinion of the superintendent of said hospital, the superintendent shall certify such fact to the clerk of the court in which the indictment, information, or charge against the accused is pending and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating him to be competent to stand trial . . . .
the hospital stated, without reservation, that the patient had recovered, the court determined that the hospital had exceeded its authority. The opinion also stated that St. Elizabeths had failed to give the court enough information to make its own informed decision.

The *Hicks* court determined that the hospital's negligence was a substantial factor in the release of Mr. Morgan. It also concluded that Mrs. Morgan's death was foreseeable under the circumstances.

In *Underwood v. United States*, the plaintiff brought an action under the Federal Tort Claims Act. The plaintiff alleged that a mentally ill individual had negligently been discharged from Air Force hospitalization and had returned to duty without having any restrictions placed upon him. In this case, the mentally ill individual, Mr. Dunn, was hospitalized after assaulting his wife. The doctor in charge determined that Mr. Dunn had the potential for violent behavior. The head doctor was transferred, however, and the new psychiatrist never received the prior diagnosis of the patient. The new psychiatrist returned Dunn to duty, where he had access to weapons. Three weeks later, Dunn shot his wife with a gun that he had taken from the weapons room.

The *Underwood* court held that the United States owed a duty to Mrs. Dunn to not act negligently. Discharging Dunn from the psychiatric clinic and returning him to duty without recommendations to restrain his access to firearms was negligent because the therapists failed to adequately explore Dunn's psychiatric history.

The court also held that Dunn's return to duty was not a discretionary function on the part of the officers of the United States Air Force and thus did not fall within the exception to the Federal Tort

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24 D.C. CODE § 301(b) (1973).
192. *Hicks*, 511 F.2d at 415-16.
193. *Id.* at 419.
194. *Id.* at 421.
195. *Id.* at 421-22.
196. 356 F.2d 92 (5th Cir. 1966).
197. *Id.* at 94.
198. *Id.*
199. *Id.* at 95.
200. *Id.* at 95-96.
201. *Id.*
202. *Id.*
203. *Id.* at 94.
204. *Id.* at 99.
205. *Id.* at 98.
Claims Act. \(^{206}\)

In *Lipari v. Sears, Roebuck & Co.*,\(^{207}\) suit was brought against Sears for allegedly selling a shotgun to a mentally defective individual. When Sears sought contribution from the United States, plaintiffs\(^ {208}\) sued the United States, as well as Sears.\(^ {209}\) The plaintiffs alleged that the Veteran’s Administration Hospital (the V.A. Hospital) was negligent in failing to detain or begin civil commitment proceedings against the mental health patient, Ulysses L. Cribbs.\(^ {210}\)

Mr. Cribbs purchased a gun in 1977.\(^ {211}\) Prior to that time, he had been receiving treatment at the V.A. Hospital.\(^ {212}\) After obtaining the gun, he resumed psychiatric day care treatment at the V.A. Hospital.\(^ {213}\) One month later, he voluntarily removed himself from treatment, against the wishes of his physicians.\(^ {214}\) Shortly thereafter, he entered a crowded nightclub and fired into the crowd, killing Dennis Lipari and wounding Ruth Ann Lipari.\(^ {215}\)

Plaintiffs alleged that the V.A. Hospital’s treatment of Mr. Cribbs was negligent because the hospital knew or should have known that Mr. Cribbs was dangerous.\(^ {216}\) The plaintiffs argued that the hospital failed to take measures that a reasonable mental health practitioner would have taken.\(^ {217}\)

First, the *Lipari* court looked to whether a cause of action could be stated under the Federal Tort Claims Act.\(^ {218}\) The court acknowledged the common law rule that a person owes no duty to prevent a

\(^{206}\) *Id.* at 94. 28 U.S.C. 2680(a) (1982) states, as exceptions to instances of liability for the United States:

> The provisions of this chapter . . . shall not apply to—(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.


\(^{208}\) *Id.* at 185 (D. Neb. 1980).

\(^{209}\) Plaintiffs are Ruth Ann Lipari and the estate of Dennis Lipari, deceased. *Id.* at 187.

\(^{210}\) *Id.* at 187.

\(^{211}\) *Id.* at 186.

\(^{212}\) *Id.* at 187.

\(^{213}\) *Id.*

\(^{214}\) *Id.*

\(^{215}\) *Id.*

\(^{216}\) *Id.*

\(^{217}\) *Id.* at 186.

\(^{218}\) *Id.* at 188. *See supra* note 2 and accompanying text.
third party from harming another. However, the court cited Restatement (Second) of Torts section 315 and recognized that a special relationship between a psychotherapist and his patient could justify imposing an affirmative duty on the therapist to control his patient’s behavior.

The majority analogized the psychiatrist’s duty to act to a situation where an affirmative duty is placed on a doctor to disclose his patient’s contagious disease. In the latter case, a duty would be imposed even though it destroyed the confidentiality of the doctor-patient relationship. The United States argued that it should not be liable under such a theory because mental illnesses are more difficult to diagnose than physical illnesses. Dangerousness is especially difficult to predict.

Although the Lipari court acknowledged that predictions of dangerousness are difficult, it declined to use that consideration to justify denying the injured party relief regardless of the circumstances. A therapist is not liable for any harm committed by his patient; liability only occurs when the therapist’s negligence causes the injury in question.

The majority limited the therapist’s liability to persons foreseeably endangered by the hospital’s negligent conduct. For the hospital to be liable, plaintiffs must prove that the hospital could have “reasonably foreseen an unreasonable risk of harm to the Liparis or a class of persons of which the Liparis were members.” The Lipari court concluded that Sears could seek contribution from the United States since the negligent acts of the two defendants combined to cause the same injury.

These cases provide an overview of federal law. To summarize the content of this section, according to existing California law, public health entities will not be held liable for the tortious acts of the patients they release unless the court finds that the injury was prox-

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219. Id.
221. Id. at 191.
222. Id. at 191.
223. Id.
224. Id.
225. Id. at 192.
226. Id.
227. Id. at 194.
228. Id. at 194-95.
229. Id. at 196-97.
mately caused by an employee’s negligence. No California public mental health facility has been found liable under this theory since the passing of the California Tort Claims Act. Injuries to innocent parties that continue unredressed are the result of this position.

In contrast, federal law consistently holds public mental health facilities liable for their patients’ actions. Under the Federal Tort Claims Act, the United States Government is subject to liability to the same extent as are private parties. As a result of this stance, determinations of whether negligence cause the injury in question are made and any damage sustained by the complaining party is compensated.

The problem is that California law does not recognize liability on the part of public mental health facilities or employees for imprudent decisions to release mental health employees. However, according to Government Code section 856(d), a public employee is not to be exonerated if it is determined that an injury was proximately caused by his negligent conduct or wrongful act or omission. California cases, unlike federal cases, have been reluctant to find negligence on the part of the public hospital employee. This result has often been based on both the lack of a special relationship between the patient and employee or hospital and the ensuing determination that the acts of the patient were not foreseeable to the hospital.

III. Analysis

According to existing California law, a public mental health facility is immune from liability for harm caused by a released mental patient—the injury will be redressed only if the actions of a public employee are found to have been negligent. California cases rarely, if ever, have found negligence on the part of those employees. If the same factual settings were analyzed under federal law, it is much more likely that a finding of negligence and thus liability would be made. One court noted, “[i]n analyzing this issue, we bear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done.” Through its immunity

230. See supra note 1 and accompanying text.
statute, California decided that public mental health facilities owe no duty to either foreseeable victims or to society as a whole. But duty is a legal concept that must change and grow to meet the needs and expectations of society.

The same rationale that led to the Muskopf and Lipman decisions is valid today. The Muskopf court pointed out that the rule of governmental immunity for tort has no "rational basis, and has existed only by the force of inertia." In dicta, the Lipman court indicated that it would be "unjust in some circumstances to require an individual injured by official wrongdoing to bear the burden of his loss rather than distribute it throughout the community." These cases affirm the policy that if negligence is found, damages should be paid to the injured party.

In Hernandez v. State, the court held that the public health facility was immune from liability. It based its decision on California Government Code section 856(a)(3), but was strongly influenced by both the fact that diagnosing psychoses is difficult and that public hospitals must accept all patients committed to their care. Under federal law, it is clear that this case would have resulted in liability for the facility, since the federal rule states that if an employee’s negligent act results in another person’s subsequent injury, the public facility will be held liable. The Hernandez court stated: "the immunity granted by Section 856 is absolute and not subject to qualification by the negligence of [subordinates]." However, the court consciously disregarded the fact that liability could be imposed under section 856 for the failure to use reasonable care or if the act or omission is a departure from a defined standard of care. The result was an erroneous conclusion that no liability existed on the part of the state or its employees.

In Buford v. State, it was determined that a special relationship existed between the mentally ill individual, Kenneth Daniels, and Atascadero State Hospital. The court, however, declined to

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233. 55 Cal. 2d at 216, 359 P.2d at 460, 11 Cal. Rptr. at 92.
234. 55 Cal. 2d at 230, 359 P.2d at 467, 11 Cal. Rptr. at 99.
238. 11 Cal. App. 3d at 898, 90 Cal. Rptr. at 207.
240. Hernandez, 11 Cal. App. 3d at 899, 90 Cal. Rptr. at 207.
reach the issue of foreseeability, stating that the issue is a question of fact that should not be resolved against plaintiffs at the complaint stage. However, before resolving the foreseeability issue, the court determined that the hospital was immune under section 854.8. If a finding of foreseeability had been made, the hospital would have been negligent by failing to warn foreseeable victims of the patient’s release.

The hospital’s actions in *Buford* would have been deemed negligent in a federal court. According to federal cases, the hospital owed the plaintiff the duty to prevent harm to foreseeable victims because a special relationship existed between Atascadero State Hospital and their mentally ill patient. There was a breach of that duty when the hospital failed to notify authorities or take other reasonable actions to apprehend Daniels. Further, the hospital’s actions were the proximate cause of the plaintiff’s injury and the plaintiff suffered actual damages.

The situation in *Buford* is similar to situations in federal cases where the government has been held liable for a failure to warn. For example, in both the *Fair* and *Williams* cases, liability was found because the hospital knew of a patient’s dangerous tendencies yet failed to notify foreseeably threatened parties. Likewise in *Buford*, the hospital knew that the status of their patient was an “unauthorized leave of absence,” yet failed to warn authorities who could have aided them in the matter.

The California case of *McDowell v. County of Alameda* involved a county hospital that would have been held negligent for its actions under the federal criteria. In *McDowell*, the county hospital diagnosed an individual as constituting a danger to himself and others, yet sent the patient to a private hospital in a taxicab. Although the patient was never admitted to the county hospital, that hospital did make a diagnosis regarding the individual’s state of mind. In this case, under the federal standard, a determination of liability would be based on whether the court found the existence of a special relationship. Since the hospital *did* make a diagnosis and

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242. *Id.* at 824, 164 Cal. Rptr. at 272.
244. 234 F.2d 288 (5th Cir. 1956).
246. 104 Cal. App. 3d at 815, 164 Cal. Rptr. at 266.
because the patient’s dangerousness was determined, the hospital established a relationship with the individual. Once a special relationship is created, the mental health facility has a responsibility to act as a reasonable practitioner would have acted in similar circumstances. Placing a confirmed mentally ill, dangerous individual in a taxi to be sent across town for further medical treatment is not reasonable conduct because it is foreseeable that the unsupervised individual will escape and cause subsequent harm.

In Beauchene, a California court refused to recognize the existence of a special relationship, even though the private facility involved had assumed care of the individual, because the court found that the respondent owed no duty to the appellant. However, the existence of a special relationship should be determined without reference to whether any general duty is present. A special relationship creates an exception to the general rule that no duty exists for one party to control the conduct of another party. Since a special relationship did exist between Synanon and its patient, and because the facility voluntarily assumed control of a known criminal, the facility owed a duty to prevent their inmate from leaving the program.

The Beauchene decision balanced two conflicting policy goals: (1) the interest in public safety, and (2) the interest in rehabilitative programs for criminals and those with character disorders. The court determined that rehabilitative programs are so vital that each member of society must accept the risk presented by a released patient. It held that the same policy goals that led the Legislature to enact section 845.8 of the California Government Code to protect public facilities must also be extended to private facilities. This view is unsound.

Certainly, rehabilitative programs are important. But public safety should be given greater priority. The Tort Claims Act was never meant to allow facilities to release patients negligently and remain free from liability. Society should not be subjected to a risk

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248. See also Williams, 450 F. Supp. 1040 (D.S.D. 1978); Fair, 234 F.2d 288 (5th Cir. 1956).
250. Id. at 347, 151 Cal. Rptr. at 798.
251. See supra note 46 and accompanying text.
253. CAL. GOV'T CODE § 845.8 (West 1980).
255. “The 1963 Tort Claims Act did not alter the basic teaching of [Muskopf]: ‘when there is negligence, the rule is liability, immunity is the exception.’” Johnson v. California, 69 Cal. 2d 782, 798, 447 P.2d 352, 363, 73 Cal. Rptr. 240, 251 (1968).
of harm over which it has no control. Many public health facility inmates have committed crimes. Society should not be put at risk for the benefit of those who may have broken the law in the past.

The factual situation in Johnson was very similar to cases where a mental health patient is released and causes subsequent harm. Yet in Johnson, liability was assigned, whereas in past California mental health cases, damages have not been awarded to a plaintiff injured by a released patient. The Johnson court determined that a special relationship existed between the juvenile delinquent and the state Youth Authority. Because of this special relationship, the court held that the Youth Authority had a duty to warn foreseeable victims of Johnson's violent tendencies. This relationship is virtually identical to the relationship between county or state mental facilities and their patients. The Youth Authority had important information about the juvenile's violent background. Because of their contact with and study of mental health patients, employees of mental health facilities obtain the same type of information as the Youth Authority. Both relationships study the individuals in their care and work to rehabilitate them so that they may become productive members of society.

Because of the existence of a special relationship between a public mental health facility and its patients, the facility should maintain a duty to protect society from potentially violent acts committed by the patients. The facility should be held to a reasonable standard of care. As the Johnson court stated:

[A]lthough a basic policy decision (such as standards for parole) may be discretionary and hence warrant governmental immunity, subsequent ministerial actions in the implementation of that basic decision still must face case-by-case adjudication on the question of negligence. Indeed, most of these cases, like the instant situation, involve failure to warn of foreseeable, latent

See also CAL. GOV'T CODE § 856, Law Revision Comm'n Comment, 1963 Addition (West 1980):

The section also declares an immunity from liability for carrying out with due care the discretionary determinations that are made. Liability may be imposed, however, for failure to use reasonable care in carrying out whatever determination has been made, for the act or omission causing injury in this case would be a departure from a defined standard of care.

256. 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).
258. Johnson, 69 Cal. 2d at 786, 447 P.2d at 355, 73 Cal. Rptr. at 243.
dangers flowing from the basic, immune decision.259

The Johnson court’s analysis was correct and logical—it points out many of the flaws inherent in extending immunity to California facilities through the California Tort Claims Act.

IV. PROPOSAL

The inconsistency between California and federal law has created a need for a re-examination of the application of existing California law. Although liability could be assigned under California law if a public employee were found to be negligent in releasing a mental health patient, such a finding has not been made since the California Tort Claims Act was passed.

In order to win a damages award for a client harmed by an improvidently released mental patient, an attorney must prove that a public employee’s acts were negligent. An attorney could compare federal and California decisions and argue that the federal position should be followed, even though California public mental health employees have not been found negligent in the past. Further, the attorney could explain that Government Code section 856 causes judges to avoid finding negligence on the part of the facility itself and on the part of the employee, a result that certainly was not the purpose of the code section. The purpose of the code section was to immunize public entities from liability. As originally drafted, however, the code section specifically provided instances where liability for employee negligence would occur.260 The code section stated that a failure to use reasonable care in carrying out an action would result in liability.261 Therefore, the code section was not intended to protect employees who act negligently.

California courts should follow federal courts’ reasoning and be more willing to find public employees negligent in the release of mental health patients. Such a policy would produce more equitable results for individuals injured by improperly released mental patients. Under the rationale of Johnson, because the entire population of California benefits from the existence of mental health facilities, it should also share equally the burden of injuries negligently inflicted on individual citizens. As Johnson points out, suits against the state

259. 69 Cal. 2d at 797, 447 P.2d at 362, 73 Cal. Rptr. at 250.
261. Id.
provide a fair and efficient means of distributing losses.\textsuperscript{282}

V. CONCLUSION

In 1963, California passed the California Tort Claims Act, giving mental health facilities and other public entities immunity from suit for the improvident release of patients. Under federal law, hospitals are held to the same standard of care for such conduct as are private individuals. Federal mental health care entities have been held liable for their negligent acts. No California mental health facility has been held negligent for the release of a patient since the Tort Claims Act was passed.

This comment proposes that the results of the California Tort Claims Act as presently applied are unfair and unintended. The Act was not meant to shield public health facilities from all liability for all injuries caused by an improvidently released patient. Yet this has been its unfortunate result. Judges should be more willing to recognize negligence on the part of a mental health employee if such negligence actually exists. These findings would lead to a more just and equitable outcome for all parties involved.

\textit{Juliet Virtue}

\footnotesize{\textsuperscript{262} 69 Cal. 2d at 797-98, 447 P.2d at 363, 73 Cal. Rptr. at 251.}