

1990

Kathy Lynn Higgins, individually and as guardian
ad litem for Shaundra Higgins, her daughter, v.
SALT LAKE COUNTY, by and through SALT
LAKE COUNTY MENTAL HEALTH, DR.
WILLIAM KUENTZEL, SHERYL STEADMAN,
THE UNIVERSITY OF UTAH and THE
UNIVERSITY OF UTAH MEDICAL CENTER
: Amicus Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

KATHY LYNN HIGGINS, individually
and as guardian ad litem for
SHAUNDRA HIGGINS, her daughter,

Plaintiff-Appellant,

v.

SALT LAKE COUNTY, by and through
SALT LAKE COUNTY MENTAL HEALTH;
DR. WILLIAM KUENTZEL; SHERYL
STEADMAN; THE UNIVERSITY OF
UTAH and THE UNIVERSITY OF UTAH
MEDICAL CENTER,

Defendants-Appellees.

Case No. 90255

PRIORITY 16

BRIEF OF VALLEY MENTAL HEALTH, INC.
AS AMICUS CURIAE

On Appeal from the Judgment of the Third District Court
In and For Salt Lake County
Honorable James Sawaya, Judge

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and as guardian ad litem for
SHAUNDRA HIGGINS, her daughter,

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SALT LAKE COUNTY, by and through
SALT LAKE COUNTY MENTAL HEALTH;
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INTEREST OF AMICUS

Valley Mental Health, Inc., ("Valley") is a nonprofit corporation charged with the responsibility of providing mental health services to clients in Salt Lake and Summit Counties. It provides child and adolescent outpatient and acute and intensive care through thirty treatment and ten residential units. In 1989, Valley Mental Health provided services to more than 50,000 clients. By contract with Salt Lake County, Valley Mental Health provides the statutorily mandated mental health services required in Salt Lake County pursuant to Utah Code Ann. § 17-5-89.

The mission of Valley Mental Health is to improve, enhance, and promote the emotional well-being of individuals in Salt Lake and Summit Counties who experience life-disrupting problems due to mental illness and to strengthen the quality of their personal, family, and community life. Were this Court to hold that an entity, like Valley Mental Health, which provides mental health services to clients, is liable to unidentified victims of the violent acts of its clients it would substantially impair the ability of Valley Mental Health to realize its mission by increasing the likelihood that preventive detentions will occur at the expense of clinically based therapeutic client care.

STATEMENT OF ISSUES ADDRESSED BY AMICUS CURIAE

Valley Mental Health seek's this Court's affirmance of the trial court's summary judgment in favor of Salt Lake County, Salt Lake County Mental Health, Dr. William Kuentzel, Sheryl Steadman,

The University of Utah and the University of Utah Medical Center (the "Salt Lake County and University defendants"). The issue which Valley will address as amicus curiae is whether the appellees, all mental health providers, owed a duty to take precautions to protect Shaundra Higgins, an unidentified victim, from the violent acts of Carolyn Trujillo.

This issue, which concerns the existence and scope of a legal duty, is a matter of law which may be examined independently by this Court without deference to findings or conclusions entered below.

DETERMINATIVE STATUTES

Valley believes that the interpretation of the following statutes substantially bears on the existence and scope of mental health care providers to protect unidentified third parties from the violent acts of mental patients. The complete text of these statutes is set out in the addendum to this brief:

Utah Code Ann. § 17-5-89

Utah Code Ann. § 78-14a-101, et seq.

Utah Code Ann. § 64-7-1, et seq.

Utah Code Ann. § 68-3-1

Utah Code Ann. § 64-7-21

Utah Code Ann. § 64-7-34

Utah Code Ann. § 64-7-36

Utah Code Ann. § 78-14a-102(1)

Utah Code Ann. § 68-3-11

STATEMENT OF THE CASE

This is an appeal of a summary judgment entered by Third District Court Judge James Sawaya in favor of the appellees on the grounds that as mental health providers, the appellees owed no duty to protect Shaundra Higgins or her mother from Carolyn Trujillo, a mentally ill person who was receiving treatment as a voluntary patient from Salt Lake County Mental Health and who stabbed Shaundra Higgins.

STATEMENT OF FACTS

The following are facts which Valley believes to be relevant to the issue of duty addressed by it as amicus. Valley contends that neither the Salt Lake County nor University defendants owed a duty to Shaundra Higgins or her mother. For the purpose of assessing whether this duty existed, Valley assumes that each of the appellees treated the assailant, Carolyn Trujillo, in a manner inconsistent with the appropriate standard of care. Accordingly, Valley's Statement of Facts will not address the quality of care given Ms. Trujillo.

Because this case was decided on summary judgment, those facts which are relevant to the issue of the appellees' legal duty are considered in the light most favorable to Shaundra and Kathy Lynn Higgins. (Hill v. State Farm Mut. Auto. Ins. Co., 765 P.2d 864, 866 (Utah 1988).)

1. On February 25, 1984, Salt Lake County Mental Health admitted Carolyn Trujillo to its Adult Residential Treatment Unit

("ARTU"). ARTU was a group home providing a structured residential environment supervised by an on-site staff which administered medications and conducted behavior modification and group programs for patients. (R. 2375, Depo. Whittaker, pp. 10-12.)

2. In mid-March 1984, Ms. Trujillo was discharged from ARTU and returned home. She agreed to attend Tuesday and Thursday evening therapy through ARTU's "evening-weekend" program. (Depo. Romero, Vol. II P. 48, Romero Vol. 1, pp. 80, 83, 87.)

3. Despite its structured setting, ARTU was less restrictive and did not compromise the civil liberties of patients to the degree typically experienced as an inpatient in a hospital. (R. 2373, Depo. Whittaker, pp. 84-85; R. 2371, Depo. Steadman, p. 79; R. 2376, Depo. Ely, p. 89).

4. Carolyn Trujillo attacked and stabbed Shaundra Higgins on April 10, 1984. At the time of the stabbing, Ms. Trujillo was a voluntary patient of Salt Lake County Mental Health. (R. 2371, Depo. Steadman, pp. 177-182.)

5. Prior to the attack Carolyn Trujillo did not manifest to the Salt Lake County or University defendants, or to its therapists, any threat of violence against Shaundra Higgins. According to her written statement describing the attack, Carolyn Trujillo was stimulated to attack Shaundra Higgins by "voices" which she heard immediately before the attack and which instructed her to "hurt someone."

6. Carolyn Trujillo was found guilty and mentally ill to attempted criminal homicide, manslaughter, a third-degree felony, and sentenced to the Utah State Prison for 0-5 years. (R. 1233, Exhibit 1.)

SUMMARY OF ARGUMENT

Consistent with traditional principles of common law, Utah does not require that a person control the conduct of another or warn potential victims of his acts. Owens v. Garfield, 784 P.2d 1187 (Utah 1989). The "special relationship" exception to this principle is limited to situations in which a defendant has a "legal right to control" the acts of the third party.

None of the appellees had the legal right to control the conduct of Carolyn Trujillo and therefore owed no duty to Shaundra Higgins.

Utah statutes governing the admission and discharge of patients to mental health facilities underscore the limited scope of a mental health professional's duty to the victims of the violent acts of patients. The enactment in 1988 of Utah Code Ann. § 78-14a-101, et seq. codified Utah's common law and public policy by recognizing that therapists have no duty to take precautions to protect unidentified potential victims of patients and by limiting the therapist's duty to that of the duty to warn potential victims who have been reasonably identified in threats of physical violence made by patients.

This scope of duty of consistent with the Legislature's concern that the liberty interests and right to treatment of the mentally ill be compromised only in the face of compelling evidence of immediate dangerousness when the result would be preventative detention.

In addition to the statutory constraints, clinical considerations, particularly the unsparing commitment to treatment and well-recognized difficulties in making accurate predictions of long-term future dangerousness, properly motivate therapists to be wary of exercising "control" over patients. Were the expansive duty urged by the appellants to hold sway, the result would be an inevitable increase in nontherapeutic confinements of the mentally ill, an outcome directly at odds with the Constitution, law, and public policy of this state.

ARGUMENT

1. THE EXISTENCE AND SCOPE OF A MENTAL HEALTH CARE PROVIDER'S DUTY TO THE UNIDENTIFIED POTENTIAL VICTIMS OF THE VIOLENT ACTS OF PATIENTS IS A LEGAL ISSUE SUBJECT TO THIS COURT'S ANALYSIS AND DECISION FREE OF FACTUAL CONSIDERATIONS CONCERNING THE QUALITY OF MEDICAL CARE PROVIDED THE ASSAILANT.

The dispositive issue in this appeal, and the issue most charged with potential clinical repercussions for Valley, is whether the University or Salt Lake County defendants owed a legal duty to Shaundra and Mary Lynn Higgins. Whether this duty existed is "entirely a question of law to be determined by the court." Ferree v. State, 784 P.2d 149, 151 (Utah 1989), citing Weber v. Springville City, 725 P.2d 1360, 1363 (Utah 1986).

Of course, this Court's analysis of the existence and scope of the alleged duty may draw on many sources in aid of reaching a principled decision, including precedential authorities and social policy. (See, Brady v. Hopper, 570 F.Supp. 1333 (D.Colo. 1983), citing Prosser, Law of Torts § 43, 257 (4th ed. 1971), with approval for proposition that the question of whether a legal duty should be imposed necessarily involves social policy considerations.) The central focus of any duty analysis bears on the characteristics of the relationship among the parties. In this case the two critical facts that define relationships are unambiguous and uncontroverted. Carolyn Trujillo was a voluntary patient, and she made no threat of harm against anyone. The University of Utah Hospital emergency room treated Ms. Trujillo as a voluntary patient on February 25, 1984. Salt Lake County Mental Health provided voluntary treatment to Ms. Trujillo through programs offered by its ARTU unit. Ms. Trujillo attacked Ms. Higgins at the direction of "voices" which she heard immediately before the assault, which took place more than three weeks after her discharge from ARTU.

The appellants devote nineteen pages of their brief (pages 7-26) to a recitation of "facts" relating to Ms. Trujillo's history of mental illness and alleged substandard care provided by the University and Salt Lake County defendants. Neither these "facts"

nor the arguments built around them relate to the existence or scope of duty that might have been owed by the University and Salt Lake County defendants to the Higgenses. Opinion testimony challenging as insufficient the degree of "control" exercised by the University and Salt Lake County defendants and offering up the opinion that these defendants should have established a closer or more "special" relationship with Ms. Trujillo should not deflect this Court from considering the issue of duty based on the relationships among the parties as they actually existed.

2. THE CONTOURS OF THE DUTY TO TAKE PRECAUTIONS AGAINST THE HARM CAUSED BY THE ACTS OF THIRD PERSONS AS FASHIONED BY THIS COURT IN SETTINGS OTHER THAN THOSE INVOLVING MENTALLY ILL PERSONS DO NOT ENCOMPASS THESE FACTS.

Utah law conforms to the traditional common law principle that places a defendant under no duty to take precautions to avoid harm when to do so would require exercising control over the conduct of another or warning others of their peril. Our law has adopted, however, the two exceptions to this rule recognized in Section 315 of the Restatement (Second) of Torts which arise if:

(a) a special relation exists between the [defendant] and the third person which imposes a duty upon the [defendant] to control the third person's conduct, or

(b) a special relation exists between the [defendant] and the other which gives to the other a right to protection from the third person.

Hale v. Allstate Ins. Co., 639 P.2d 203, 205 (Utah 1981) (Quoting Restatement (Second) of Torts § 315 (1964)).

This Court has analyzed the scope of the "special relation" exception in the contexts where peace officers who stopped but did not arrest an intoxicated motorcyclist prior to a fatal accident (Christenson v. Hayward, 694 P.2d 612 (Utah 1984); where corrections officers who authorized weekend release for a resident of a halfway house who bludgeoned his victim to death (Ferree v. State, 784 P.2d 149 (Utah 1989); and where Division of Family Services officials who had received accusations of abuse against babysitter who severely battered a child (Owens v. Garfield, 784 P.2d 1187 (Utah 1989)). In each instance, this Court held that no duty was owed the plaintiff to control or warn. Two of these decisions, Owens and Ferree, affirmed summary judgments.

No Utah appellate decision has confronted the issue of third-party duty in a mental health setting. Each of the cases cited above, however, contributes compellingly to the conclusion that no duty was owed by the University and Salt Lake County defendants to Ms. Higgins. In Christenson, the Court declined to impose a duty of due care toward the decedent, an intoxicated motorist. The sheriff's deputies who encountered the decedent clearly had the right to exercise control over him had they so desired. Certainly, in an era in which drunk driving has become

particularly opprobrious, the deputies were under no obligation to be sensitive to the deceased's liberty interests. This situation is markedly different from that of the mental health worker whose inclinations to restrain, detain, and confine must, as the discussion below develops, be constantly weighed against the liberty interests of his patient.

Owens is instructive for its determination that no duty was owed to the unidentified potential victim of the babysitter's conduct as long as the Division of Family Services had no legal right to control her. The University and Salt Lake County defendants likewise had no legal right to control Ms. Trujillo. The Owens plaintiffs also sought unsuccessfully to invoke state and federal child abuse prevention statutes, claiming that they created independent statutory duties and that they lent support to their common law duty assertions. Although the state Child Abuse Prevention Act clearly mandated aggressive DFS response to allegations of abuse in an effort to protect children generally, the Court found that no relationship giving rise to a cognizable duty under the statute arose unless a specific victim is identified.^{1/} As discussed below, at the time of this incident,

^{1/} Justice Zimmerman wrote separately to distance himself from the majority opinion's apparent holding that statute would support the creation of a legal duty when a specific victim is identified. 784 P.2d 1187, 1193.

Utah had adopted an expansive body of law dealing with the voluntary and involuntary treatment of mentally ill persons. See Utah Code Ann. § 64-7-1, et seq. These statutes, unlike the Child Abuse Prevention Act, did not have as their primary purpose the protection of unidentified victims of the acts of mentally ill persons.

In dictum, the Owens court suggested that because the statute was enacted for the purpose of protecting children, DFS may owe a duty to children who are identified as needing protection. The statute does not, however, concern itself with the liberty interests of the perpetrators of abuse. Once the potential victim is identified, DFS may be expected to secure legal control over the perpetrator with reasonable zeal. By contrast, even if the mental health statutes were enacted for the purpose of protecting the victims of the acts of mentally ill persons, the explicit statutory safeguards of the liberties of the mentally ill render the duty even more tenuous here than in the child abuse setting.

The Ferree court addressed a situation in which legal control was present--the assailant was a halfway house resident in the custody of the Department of Corrections--but nevertheless held that no duty existed because the defendant did not know the identity of the assailant's victim. As in both Christenson and Owens, no concern for treatment or liberty interests was present to mitigate the right or ability to exercise control.

In sum, the relevant Supreme Court authority supports the trial court's finding that the University and Salt Lake County defendants owed no duty to Ms. Trujillo's unidentified victim.

3. SOCIAL POLICY AND CLINICAL CONSIDERATIONS, INCLUDING THE OBJECTIVE OF PROVIDING TREATMENT TO MENTALLY ILL PERSONS IN THE LEAST RESTRICTIVE SETTING POSSIBLE, THE IMPRECISION WITH WHICH DANGEROUSNESS MAY BE PREDICTED, AND THE AVOIDANCE OF UNNECESSARY PREVENTIVE DETENTION COMPEL THE REJECTION OF THE DUTY SOUGHT BY THE PLAINTIFFS.

A thorough assessment of the social and clinical policy considerations is relevant, even critical, to the analysis of the propriety of imposing a duty to control mentally ill persons who have made no threat against an identifiable victim. The traditional common law limitations on a person's duty should not give way to the "special relation" exception and the resulting expansion of affirmative duties without "a careful consideration of the consequences for the parties and society at large." Beach v. University of Utah, 726 P.2d 413, 418 (Utah 1986).

The Beach court further justified its wariness of the "special relation" exception with an observation of particular relevance to this case. The Court stated: "If the duty is realistically incapable of performance, or if it is fundamentally at odds with the nature of the parties' relationship, we should be loath to term that relationship 'special' and to impose a resulting duty, . . ." Id. That exercise of "control" over a mentally ill person may be in fundamental conflict with the

objectives of the psychotherapist-patient relationship is a concept that lies at the heart of the duty analysis in this case and is an issue which finds expression in judicial opinions, psychiatric literature, and Utah statutes. Illustrative of the majority view rejecting the "special relation" duty in a voluntary treatment setting is this commentary on the psychotherapist-patient "control" dilemma:

The typical relationship between a psychiatrist and a voluntary outpatient would seem to lack sufficient elements of control necessary to bring such relationship within the rule of Section 315. Indeed, lack of control by the therapist and maximum freedom for the patient is oft times the end sought by both the psychiatric profession and the law.

Hasenei v. United States, 541 F.Supp. 999, 1009 (D.Md. 1982).

Recent articles in the psychiatric literature have addressed the increased control and compromised freedom that has accompanied the application of the "special relation" duty exception to psychotherapists since Tarasoff v. Regents of the University of California, 131 Cal.Rptr. 14, 551 P.2d 334 (Cal 1976).

Paul S. Appelbaum, M.D., likely the most respected commentator on the issues surrounding the duty to protect, has noted that "concern about potential liability is leading some clinicians to participate in the creation of a system of preventive detention for persons thought likely to commit violent acts." Appelbaum PS: "The New Preventive Detention: Psychiatry's Problematic

Responsibility for the Control of Violence." Am J Psychiatry 1988; 145:779-785. Although nontherapeutic preventive detention may reduce the risk of liability and offer society an added measure of safety, Dr. Appelbaum presents a "negative side of the ledger . . . crowded with more easily demonstrable factors." Id., 783. The darker side of preventive detention includes hospitalizations of persons unlikely to benefit from inpatient treatment, misallocation of scarce resources, disruption of treatment programs, and impairment of staff morale and competence.

Empirical support for the conclusion that nontherapeutic hospitalizations are commonplace appears in a study comparing the frequency of civil commitments jurisdictions using a dangerousness-oriented commitment standard with those which have enacted commitment criteria which abandon the dangerousness element. The findings revealed that significantly more patients were committed under the dangerousness criteria, a result attributed to tendencies to overpredict dangerousness, i.e., to hospitalize patients who are not dangerous. Hoge SK, et al: "Limitations on Psychiatrists' Discretionary Civil Commitment Authority by the Stone and Dangerousness Criteria"; Arch Gen Psychiatry 1988;45:764-769.

The long recognized imprecision in predicting a mental patient's "dangerousness" compounds the likelihood of preventative

detention and magnifies its invidious social and constitutional consequences.

The results of research published over the last two decades support the conclusion that little headway has been achieved in the quest to predict dangerousness. The most recent psychiatric literature continues to suggest that even attempts to predict immediate dangerousness are largely exercises in speculation.^{2/}

^{2/} See American Psychiatric Association Task Force Report, Clinical Aspects of the Violent Individual 28 (1974) (90% error rate "unfortunately . . . is the state of the art"); Steadman, Predicting Dangerousness Among the Mentally Ill, 6 Int'l. J. L. & Psychiatry 381-90 (1983). See generally Wettstein, The Prediction of Violent Behavior And The Duty To Protect Third Parties, 2 Beh. Sci. L. 291 (1984); Scott, Violence in Prisoners and Patients, Medical Care of Prisoners and Detainees, 123 U. Pa. L. Rev. 439 (1975); Rector, Who Are the Dangerous? Bull. Am. Acad. Psych. & L. 186 (July 1973); Justice & Birkman, An Effort to Distinguish the Violent from the Nonviolent, 65 S. Med. J. 703 (1972); Kozol, Boucher & Garofalo, The Diagnosis and Treatment of Dangerousness, 18 Crime & Delinquency 371 (1972); Rubin, Prediction of Dangerousness in Mentally Ill Criminals, 27 Arch. Gen. Psychiatry 397 (1972); Monahan, The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy, 141 Am. J. Psychiatry 10, 11 (1984); Monahan, Social Policy Implications of the Inability to Predict Violence, 31 J. Soc. Issues, 153, 157 (1975); Kirk, Allen, MD: The Prediction of Violent Behavior During Short-Term Civil Commitment, Bull. Am. Acad. Psychiatry Law, Vol. 17, No. 4 (1989); Cocozza, J, Steadman, H., The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence, Rutgers L. Rev. 27:1084-1101 (1976).

Clearly, the reliability of any dangerousness prediction diminishes substantially as the forecast moves beyond the immediate to a more remote future. The daunting obstacles to making a "scientific" prediction of dangerousness beyond the immediate future have a direct bearing on the imposition of a duty on a psycho-therapist to make such a forecast. As a practical matter, if a duty were found to exist, the difficulties inherent in making a prediction of long term dangerousness would likely be overshadowed by the retrospective bias which would be the inevitable product of a patient's violent conduct. Knowing that the lens of hindsight is far clearer than that available to the forecaster, even the most liberty conscious psychotherapist may succumb to the temptation to impose preventive detention.

Utah's statutory sensitivity to the liberty interests and need for treatment of the mentally ill reflects legislative rejection of preventive detention and a common law duty to control. The common law of duties owed by psychotherapists to third parties cannot be evaluated without considering the implications of Utah's comprehensive mental health statutes, Utah Code Ann. § 64-7-1, et seq. Principles of common law must yield when in conflict with the Constitution and laws of this state. Utah Code Ann. § 68-3-1. Utah's mental health statutes regulate and restrict the authority of psychotherapists, institutions, and

the public to treat and restrain mentally ill persons. While these statutes may not be in irreconcilable conflict with the common law, they define its bounds and inform its substance.

Constraints on the control of the mentally ill appear throughout Utah law. A person who attempts to improperly civilly commit a person is guilty of a class B misdemeanor and is liable for damages, Utah Code Ann. § 64-7-21. Nontherapeutic detention of a mentally ill person is authorized only in emergency temporary commitment situations. A mental health officer or peace officer may take a person into protective custody only upon a showing of probable cause that there is a "substantial likelihood of serious harm to that person or others." After apprehension, a mentally ill person may be held on nontherapeutic emergency detention for up to twenty-four hours, but only upon a showing of "substantial and immediate danger to himself or others." Utah Code Ann. § 64-7-34. A person suffering from a mental illness may be involuntarily committed only after a demonstration, by clear and convincing evidence, that the patient "poses an immediate danger of physical injury to others or himself," that "there is no appropriate less-restrictive alternative to a court order of commitment," and that treatment is available to meet the patient's needs. Utah Code Ann. § 64-7-36.

The mandate that a mentally ill person's liberty interests be safeguarded to the greatest degree possible is a strident theme throughout Utah's mental health law. The subjection of the patient to "control" is mandated, as the sections cited above indicate, only after rigorous criteria have been satisfied.

When viewed against this statutory backdrop, the social and clinical failings of an expansive duty to protect become evident. Such a duty may well benefit society by preventing an occasional violent act. This benefit, however laudable, does not justify the inevitable retreat from the clear purposes of Utah's mental health laws. In the final analysis, the plaintiff's notion of common law duty directly conflicts with Utah law and must yield to it.

Just as the body of mental health law which was enacted at the time of Ms. Trujillo's assault is an essential analytical tool in determining the existence and scope of the duty to protect, of equal significance was the Legislature's subsequent enactment, in 1988, of Utah Code Ann. § 78-14a-101 creating a duty to warn identifiable potential victims of physical harm. While the statute is not subject to retroactive application to this case, it represents codification of the common law of 1984. As argued above, this Court's holdings outside the mental health

setting, together with social and clinical considerations, and the language and purpose of Utah's mental health statutes, combine to discredit any duty to control patients as a precaution against harm to unidentified potential victims. The 1988 statute is consistent with this view.

Utah Code Ann. § 78-14a-102(1) begins with the unambiguous declaration that a therapist "has no duty to warn or take precautions" ^{3/} This general disclaimer of duty accurately defines the state of the common law, particularly when no potential target of violence in need of warning or precautions has been identified. See, Owens v. Garfield and Ferree v. State, supra.

The Legislature created the sole exception to this general rejection of duty in the next clause of § 78-14a-102(1). By fashioning a duty to warn on therapists who receive threats directed at reasonably identifiable victims, the Legislature codified what, by dictum in Ferree, supra, the Supreme Court indicated may comprise a common law duty. The scope of the duty

^{3/} The appellants attempt to render the section inapplicable by asserting, in footnote 14 at page 40 of their brief, that the University and Salt lake County defendants are "institutions," not "therapists" and therefore outside the scope of the act. This argument is a practical cipher. An institution which employs no therapists will have no clients or patients who might communicate threats requiring warning and hence cannot encounter liability for violating the act. Institutions which employ therapists will be subject to the act under theories of vicarious liability.

defined in § 78-14a-102(1) is clearly communicated by its language. The appellants contend, based on their reading of the legislative history of the section, that a therapist who breaches professional standards retains a duty to warn and protect, the statute notwithstanding. Pursuant to Utah Code Ann. § 68-3-11, the words and phrases used in statutes are to be "construed according to the context and the approved usage of the language." The word "no" has but one approved usage in the English language. "No" loses none of its clarity when used in § 78-14a-102(1) in the context "no duty to warn or take precautions." Unambiguous statutory language may not be contradicted by legislative history. Allisen v. American Legion Post No. 134, 763 P.2d 806 (Utah 1988).

In short, neither the 1988 statute nor the common law which it codified recognized the notion of duty urged by the appellants, but instead each kept faith with the social and clinical imperatives that would make the imposition of the appellants' duty unwise policy and bad law.

4. BRADY V. HOPPER PRESENTS A WELL-REASONED CONSIDERATION OF THE CLINICAL AND LEGAL ELEMENTS OF THE DUTY TO PROTECT AND SHOULD BE FOLLOWED BY THIS COURT.

Brady v. Hopper, 570 F.Supp. 1333 (D.Colo. 1983), aff'd, 75a F.2d 329 (10th Cir. 1984), is, among the welter of opinions published since Tarasoff, supra, the "best" case on the duty of a

psychotherapist to warn or control. It owes this status to its factual similarity to this case, to the quality of its reasoning--reasoning that is cast in a tone that bespeaks a trial judge going toe to toe with a tough issue. In Brady, the mental patient was John Hinkley, who shot the plaintiff, James Brady, in the course of Mr. Hinkley's assassination attempt on President Ronald Reagan. Mr. Brady claimed that Mr. Hinkley's outpatient psychiatrist, Dr. Hopper, owed him a duty to protect him from Mr. Hinkley's violent acts. Mr. Brady alleged that Dr. Hopper declined to hospitalize Mr. Hinkley over the objection of Mr. Hinkley's parents--affirmation of court in Hasenei v. United States, supra, that lack of control by the therapist and maximum freedom for the patient is often the objective of psychiatry. Mr. Hinkley never communicated to Dr. Hopper a threat against Mr. Brady or Mr. Reagan. Mr. Brady's complaint alleged that despite the absence of threats, Dr. Hopper should have discovered that Mr. Hinkley was armed, that he identified with the assassin in the movie "Taxi Driver," and that he was assembling books and articles on political assassinations. According to Mr. Brady's allegations, if Dr. Hopper had acquired knowledge of Mr. Hinkley's activities, he would have controlled Mr. Hinkley's behavior and avoided the assassination attempt.

The case came before the trial judge on Dr. Hopper's motion to dismiss, grounded on a claim that he owed no duty to Mr. Brady. The court recast the "special relationship" analysis by asking "to what extent was Dr. Hopper obligated to protect these particular plaintiffs from this particular harm?" Id., 1338. The court was unwilling to obligate Dr. Hopper to protect the world at large. It narrowed the scope of Dr. Hopper's duty by applying the traditional foreseeability test announced by Justice Cardozo in Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928). The court reasoned that in this context, foreseeability was limited to the subjects of specific threats communicated by Mr. Hinkley. Because there were no allegations that Mr. Hinkley threatened President Reagan or Mr. Brady, there was no legal relationship between Dr. Hopper and Mr. Brady and, consequently, no duty or attendant liability.

The same analysis is applicable to this case. The Brady court summarized its reasoning in a paragraph that merits, as an apt summary of Valley's arguments, quotation in full:

The question of whether a legal duty should be imposed necessarily involves social policy considerations. (citation omitted) In the present case, there are cogent policy reasons for limiting the scope of the therapist's liability. To impose upon those in the counseling professions an ill-defined "duty to control" would require therapists to be ultimately responsible for the actions of their patients. Such a rule would closely approximate a strict

liability standard of care, and therapists would be potentially liable for all harm inflicted by persons presently or formerly under psychiatric treatment. Human behavior is simply too unpredictable, and the field of psychotherapy presently too inexact, to so greatly expand the scope of therapists' liability. In my opinion, the "specific threats to specific victims" rule states a workable, reasonable, and fair boundary upon the sphere of a therapist's liability to third persons for the acts of their patients.

Id., 1339.

CONCLUSION

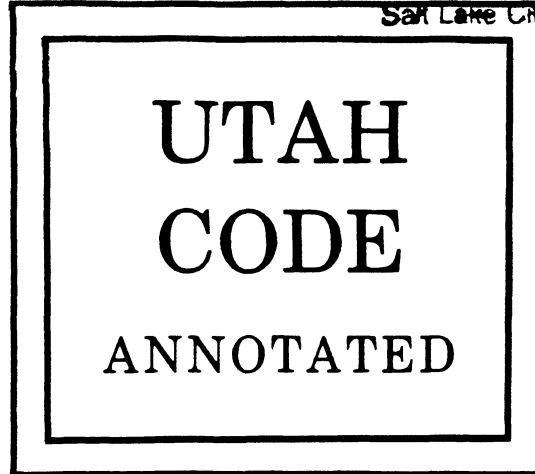
Common law, social policy, clinical practices, and the unpredictability of human behavior all coalesce around the conclusion that the University and Salt Lake County defendants owed no duty to the Higgins. The trial court's judgment should therefore be affirmed.

DATED this 1st day of March, 1991.

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1990 Cumulative Supplement

REPLACEMENT VOLUME 2B

1987 EDITION

Titles 16 to 19

17-5-89. Mental health and substance abuse services.

The board of county commissioners of each county shall provide mental health services in accordance with Chapter 12, Title 62A, and substance abuse services in accordance with Chapter 8, Title 62A.

History: C. 1953, 17-5-89, enacted by L.
1990, ch. 181, § 1.

Effective Dates. — Laws 1990, ch. 181,
§ 30 makes the act effective on July 1, 1990.

64-7-1. Successor to state insane asylum.

The state insane asylum now established and located at Provo in the county of Utah, shall be known as the Utah State Hospital.

History: R.S. 1898, § 2153; L. 1903, ch. 115, § 1; C.L. 1907, § 2153; C.L. 1917, § 5383; L. 1927, ch. 36, § 1; R.S. 1933 & C. 1943, 85-7-1.

Cross-References. — Establishment and support of institution, Utah Const., Art. XIX, Sec. 2.

Guardians of incapacitated persons, §§ 75-5-101 to 75-5-105, 75-5-301 et seq.

Inquiry into defendant's insanity, Chapter 15 of Title 77.

Land grants, Enabling Act, § 12; Utah Const., Art. XX, Sec. 1.

Location of institution, Utah Const., Art. XIX, Sec. 3.

Poor persons, order in which relatives liable for support, § 17-14-2.

Sale of products, disposition of proceeds, § 64-1-9.

COLLATERAL REFERENCES

Utah Law Review. — The "Mentally Ill" and the Law: Sisyphus and Zeus, James E. Beaver, 1968 Utah L. Rev. 1.

Am. Jur. 2d. — 40 Am. Jur. 2d Hospitals and Asylums § 1 et seq.

C.J.S. — 7 C.J.S. Asylums and Institutional Care Facilities §§ 3, 4; 41 C.J.S. Hospitals § 4.

Key Numbers. — Asylums ⇐ 2; Hospitals ⇐ 2.

64-7-21. Unlawful introduction into mental health facility — Criminal and civil liability.

Any person who attempts to introduce another into a mental health facility contrary to the provisions of this chapter is guilty of a class B misdemeanor, besides being liable in an action for damages or subject to other criminal charges.

History: R.S. 1898, § 2194; L. 1903, ch. 115, § 1; C.L. 1907, § 2194; C.L. 1917, § 5424; R.S. 1933 & C. 1943, 85-7-46; L. 1975, ch. 198, § 11.

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

Am. Jur. 2d. — 41 Am. Jur. 2d Incompetent Persons § 37.

A.L.R. — Libel and slander: actionability of imputing to private person mental disorder or incapacity, or impairment of mental facilities, 23 A.L.R.3d 652.

Liability for malicious prosecution predi-

cated upon institution of, or conduct in connection with, insanity proceedings, 30 A.L.R.3d 455.

Liability for false imprisonment predicated on institution of, or conduct in connection with, insanity proceedings, 30 A.L.R.3d 523.

64-7-34. Temporary admission to mental health facility — Requirements and procedures — Costs.

(1) Any individual may temporarily be admitted to a mental health facility upon:

(a) written application by a responsible person who has reason to know, stating a belief that the individual is likely to cause serious injury to self or others if not immediately restrained, and the personal knowledge of the individual's condition or circumstances which lead to such belief, and

(b) a certification by a licensed physician or designated examiner stating that the physician or designated examiner has examined the individual within a three-day period immediately preceding said certification and is of the opinion that the individual is mentally ill and, because of the individual's mental illness, is likely to injure self or others if not immediately restrained.

Such an application and certificate shall authorize any mental health or peace officer to take the individual into custody and transport the individual to a mental health facility.

(2) If a duly authorized mental health officer or peace officer observes a person involved in conduct which leads the officer to have probable cause to believe that such person is mentally ill, as defined by this act, and that, because of such apparent mental illness and conduct, there is a substantial likelihood of serious harm to that person or to others pending proceedings for examination and certification as provided in this act, the officer may take the person into protective custody. A peace officer may transport a patient pursuant to this provision either on the basis of his own observation or on the basis of the observation of a mental health officer, reported to him by the mental health officer. Immediately thereafter, the officer shall transport the person to a mental health facility and there make application for the person's admission therein. The application shall be upon a prescribed form and shall include the following:

(a) a statement by the officer that the officer believes on the basis of personal observation or on the basis of the observation of a mental health officer reported to him by the mental health officer that the person is, as a

64-7-54

result of a mental illness, a substantial and immediate danger to self or others.

(b) the specific nature of the danger.

(c) a summary of the observations upon which the statement of danger is based.

(d) a statement of facts which called the person to the attention of the officer.

(3) Any person admitted under this section may be held for a maximum of 24 hours excluding Saturdays, Sundays and legal holidays. At the expiration of that time period, the person shall be released unless application for involuntary hospitalization has been commenced pursuant to § 64-7-36. If such application has been made, an order of detention may be entered pursuant to Subsection (3) of § 64-7-36. If no order of detention is issued, the patient shall be released, except when the patient has made voluntary application for admission.

(4) Cost of all diagnosis and treatment under this section shall be paid by the county in which such person is found, unless the county participates in the state social services medical program as outlined in § 55-15a-3, in which event the state shall pay, or unless the person is financially able to pay the same in which event that person shall pay.

History: C. 1943, 85-7-60, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1963, ch. 159, § 1; 1971, ch. 172, § 8; 1975, ch. 198, § 21; 1979, ch. 97, § 15; 1981, ch. 261, § 1.

Amendment Notes. — The 1981 amendment deleted "upon endorsement for such purpose by a judge of the district court or a member of the board of county commissioners of the county in which the individual is present" after "certificate" in the second paragraph of Subsection (1); inserted "officer" after "mental health" in the first sentence of Subsection (2); inserted the second sentence of Subsection (2); and inserted "or on the basis of the observation

of a mental health officer reported to him by the mental health officer" in Subsection (2)(a).

Meaning of "this act". — The term "this act," referred to in this section, means Laws 1975, ch. 198, §§ 1 to 34, which appear as various sections throughout Titles 26 and 64. See Table of Session Laws in Parallel Tables volume.

Compiler's Notes. — Section 55-15a-3, cited in Subsection (4), is repealed. See § 26-18-10.

Cross-References. Limitation of application as to criminally insane, § 64-7-54.

COLLATERAL REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d Incompetent Persons §§ 8 to 25, 39 to 42.

C.J.S. — 44 C.J.S. Insane Persons §§ 14 to 34.

Key Numbers. — Mental Health ⇐ 37 to 46.

dations to the court regarding the order for involuntary hospitalization of the proposed patient.

History: C. 1953, 64-7-35, enacted by L. 1953, ch. 124, § 2; 1971, ch. 172, § 9), relating to protective custody pending examination and certification.

Compiler's Notes. — Laws 1975, ch. 198, § 35 repealed former § 64-7-35 (C. 1943, 85-7-61, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1971, ch. 172, § 9), relating to protective custody pending examination and certification.

Cross-References. — Admission to practice law, § 78-51-10.

64-7-36. Involuntary hospitalization on court order — Examination of patient — Hearing — Power of court — Findings — Costs.

(1) Proceedings for the involuntary hospitalization of an individual may be commenced by the filing of a written application with the district court of the county in which the proposed patient resides or is found, by a responsible person who has reason to know of the condition or circumstances of the proposed patient which lead to the belief that the individual is mentally ill and should be involuntarily hospitalized. Any such application shall be accompanied by:

(a) a certificate of a licensed physician or a designated examiner stating that within a seven-day period immediately preceding the certification the physician or designated examiner has examined the individual and is of the opinion that the individual is mentally ill and should be involuntarily hospitalized; or

(b) a written statement by the applicant that the individual has been requested to but has refused to submit to an examination of mental condition by a licensed physician or designated examiner. Said application shall be sworn to under oath and shall state the facts upon which the application is based.

(2) Prior to issuing a judicial order, the court may require the applicant to consult a mental health facility or may direct a mental health professional from a mental health facility to interview the applicant and the proposed patient to determine the existing facts and report them to the court.

(3) If the court finds from the application, any other statements under oath, or any reports from a mental health professional that there is a reasonable basis to believe that the proposed patient's mental condition and immediate danger to self, others or property requires involuntary hospitalization pending examination and hearing, or if the proposed patient has refused to submit to an interview with a mental health professional as directed by the court, or to go to a treatment facility voluntarily, the court may issue an order directed to a mental health officer or peace officer to immediately take the proposed patient to any mental health facility, or a temporary emergency facility as provided in Section [Subsection] 64-7-38(2), there to be detained for the purpose of examination. Within 24 hours of the issuance of the order for examination, the clinical director of a mental health facility or a designee shall report to the court orally or in writing whether the patient is, in the opinion of the examiners, mentally ill, whether the patient has agreed to become a voluntary patient pursuant to § 64-7-29, and whether treatment programs are available and acceptable without court proceedings. Based on such information, the court may without taking any further action terminate the proceed-

ings and dismiss the application. In any event, if the examiner reports orally, the examiner shall immediately send the report in writing to the clerk of the court.

(4) Notice of the commencement of proceedings for involuntary hospitalization, setting forth the allegations of the application and any reported facts, together with a copy of any official order of detention, shall be provided by the court to a proposed patient prior to, or upon, admission to a mental health facility or, with respect to any individual presently in a mental health facility whose status is being changed from voluntary to involuntary, upon the filing of an application for that purpose with the court. A copy of such order of detention must be maintained at the place of detention.

(5) Notice of the commencement of such proceedings shall be provided by the court as soon as practicable to the applicant, any legal guardian, any immediate adult family members, the legal counsel for the parties involved, and any other persons the proposed patient or the court shall designate, and shall advise such persons that a hearing thereon may be held within the time provided by law, unless the patient has refused to permit release of such information in which case the extent of notice shall be determined by the court.

(6) Proceedings for the involuntary hospitalization of an individual under the age of eighteen years who is under the continuing jurisdiction of the juvenile court may be commenced by the filing of a written application with the juvenile court in accordance with the provisions of this section and said court shall have jurisdiction to proceed in such case in the same manner and with the same authority as the district court.

(7) If there are no appropriate mental health resources within the district, the court may in its discretion transfer the case or patient's custody to any other district court within the state of Utah provided that said transfer will not be adverse to the interest of the proposed patient.

(8) Within twenty-four hours, excluding Saturdays, Sundays, and legal holidays, of the issuance of a judicial order or after admission at a mental health facility of a proposed patient under court order for detention or examination, the court shall appoint two designated examiners to examine the proposed patient. If requested by the proposed patient's counsel, the court shall appoint as one of the examiners a reasonably available qualified person designated by counsel. The examinations, to be conducted separately, shall be held at the home of the proposed patient, a hospital or other medical facility, or at any other suitable place not likely to have a harmful effect on the patient's health.

A time shall be set for a hearing to be held within ten court days of the appointment of the designated examiners unless said examiners or the clinical director of the mental health facility shall inform the court prior to said hearing date that the patient is not mentally ill, that the patient has agreed to become a voluntary patient pursuant to § 64-7-29, or that treatment programs are available and acceptable without court proceedings in which event the court may without taking any further action terminate the proceedings and dismiss the application.

(9) Prior to the hearing, an opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither the patient nor others provide counsel, the court shall appoint counsel and allow sufficient time to consult with the patient prior to the hearing. In the case of an indigent patient, the payment of reasonable attorney's fees for counsel as determined by

the court shall be made by the county in which the patient resides or was found. The proposed patient, the applicant, and all other persons to whom notice is required to be given shall be afforded an opportunity to appear at the hearing, to testify, and to present and cross-examine witnesses, and the court may in its discretion receive the testimony of any other person. The court may allow a waiver of the patient's right to appear only for good cause shown, which cause shall be made a matter of court record. The court is authorized to exclude all persons not necessary for the conduct of the proceedings and may, upon motion of counsel, require the testimony of each examiner to be given out of the presence of any other examiners. The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall receive all relevant and material evidence which may be offered subject to the rules of evidence.

The mental health facility or the physician in charge of the patient's care shall provide to the court at the time of the hearing the following information: the detention order, the admission notes, the diagnosis, any doctors' orders, the progress notes, the nursing notes and the medication records pertaining to the current hospitalization. Said information shall also be supplied to the patient's counsel at the time of the hearing and at any time prior thereto upon request.

(10) The court shall order hospitalization if, upon completion of the hearing and consideration of the record, the court finds by clear and convincing evidence that:

- (a) The proposed patient has a mental illness; and
 - (b) Because of the patient's illness the proposed patient poses an immediate danger of physical injury to others or self, which may include the inability to provide the basic necessities of life, such as food, clothing, and shelter, if allowed to remain at liberty; and
 - (c) The patient lacks the ability to engage in a rational decision-making process regarding the acceptance of mental treatment as demonstrated by evidence of inability to weigh the possible costs and benefits of treatment; and
 - (d) There is no appropriate less restrictive alternative to a court order of hospitalization; and
 - (e) The hospital or mental health facility in which the individual is to be hospitalized pursuant to this act can provide the individual with treatment that is adequate and appropriate to the individual's conditions and needs. In the absence of the required findings of the court after the hearing, the court shall forthwith dismiss the proceedings.
- (11) (a) The order of hospitalization shall designate the period for which the individual shall be treated. When the individual is not under an order of hospitalization at the time of the hearing, this period shall not exceed six months without benefit of a review hearing. Upon such a review hearing, to be commenced prior to the expiration of the previous order, an order for hospitalization may be for an indeterminate period, if the court finds by clear and convincing evidence that the required conditions in Section [Subsection] 64-7-36(10) will last for an indeterminate period.
- (b) The court shall maintain a current list of all patients under its order of hospitalization, which list shall be reviewed to determine those patients who have been under an order of hospitalization for the desig-

nated period. At least two weeks prior to the expiration of the designated period of any order of hospitalization still in effect, the court that entered the original order shall so inform the clinical director of the mental health facility responsible for the care of such patient. The director shall immediately reexamine the reasons upon which the order of hospitalization was based. If the director and staff determine that the conditions justifying such hospitalization no longer exist, the director shall discharge the patient from involuntary treatment and make an immediate report thereof to the court and to the Division of Mental Health. Otherwise, the court shall immediately appoint two designated examiners and proceed under Subsections (8) through (10) of this section.

(c) The clinical director of a mental health facility or a designee responsible for the care of a patient under an order of hospitalization for an indeterminate period shall at six-month intervals reexamine the reasons upon which the order of indeterminate hospitalization was based. If the clinical director or the designee determine that the conditions justifying such hospitalization no longer exist, the director shall discharge the patient from involuntary treatment and make an immediate report thereof to the court and the Division of Mental Health. If the clinical director or designee has determined that the conditions justifying such hospitalization continue to exist, the director shall send a written report of such findings to the court and to the Division of Mental Health. The patient and the patient's counsel of record shall be notified in writing that the involuntary treatment will be continued, the reasons for such, and that the patient has the right to a review hearing by making a request to the court. Upon receiving the request, the court shall immediately appoint two designated examiners and proceed under Subsections (8) through (10) of this section.

(12) In the event that the designated examiners are unable, because of refusal of a proposed patient to submit to an examination, to complete such examination upon the first attempt to conduct the same, the court shall fix a reasonable compensation to be paid to such designated examiners for services in the cause.

(13) Any person hospitalized under this act or a person's legally designated representative who is aggrieved by the findings, conclusions and order of the court, shall have the right to a rehearing upon a petition filed with the court within thirty days of the entry of the court order. In the event the petition alleges error or mistake in the findings, the court shall appoint three impartial designated examiners previously unrelated to the case who shall conduct an additional examination of the patient. The rehearing shall in all other respects be conducted in the manner otherwise permitted.

(14) Costs of all proceedings under this section shall be paid by the county in which the proposed patient resides or is found.

History: C. 1943, 85-7-62, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1963, ch. 60, § 1; 1967, ch. 174, § 131; 1971, ch. 172, § 10; 1975, ch. 198, § 22; 1979, ch. 97, § 17; 1981, ch. 261, § 2.

Amendment Notes. — The 1981 amend-

ment substituted "issuing a judicial order" in Subsection (2) for "filing the application"; inserted "or to go to a treatment facility voluntarily" and "or a temporary emergency facility as provided in section 64-7-38(2)" in the first sentence of Subsection (3); added the last three

sentences of Subsection (3); added the last sentence of Subsection (4); deleted "parent or" before "legal guardian" in Subsection (5); deleted "of a child or other person" after "legal guardian" in Subsection (5); deleted "with whom the proposed patient has been residing" after "members" in Subsection (5); added "unless the patient * * * court" to Subsection (5); substituted "issuance of a judicial order" in the first sentence of Subsection (8) for "filing of an application"; substituted "agreed to become a voluntary patient pursuant to section 64-7-29" in the last paragraph of Subsection (8) for "become voluntary"; substituted "Prior to the hearing" in the first sentence of Subsection (9) for "At the hearing"; added "and allow sufficient time * * * hearing" to the first sentence of Subsection (9); inserted the fourth sentence of the first paragraph of Subsection (9); inserted "the detention order" in the first sentence of the last paragraph of Subsection (9); substituted "by clear and convincing evidence" in Subsection (10) for "beyond a reasonable doubt"; rewrote Subsection (11) which read: "The order of hospitalization shall state whether the individual shall be detained for a

temporary period not to exceed six months or an indeterminate period. If hospitalization for a designated temporary period is ordered, the patient shall not be retained for a longer period unless upon a hearing held pursuant to this section within such designated temporary period. Unless otherwise directed by the court, it shall be the responsibility of the division of mental health to assure the carrying out of the order within such period as the court shall specify"; substituted "rehearing" in the first and last sentences of Subsection (13) for "new hearing"; deleted "in this act" at the end of the last sentence of Subsection (13); and made minor changes in punctuation.

Meaning of "this act". — See note under same catchline following § 64-7-34.

Cross-References. — Juvenile court, commitment by order of, § 78-3a-39.

Legal capacity of children, Chapter 2 of Title 15.

Limitation of application as to criminally insane, § 64-7-54.

Re-examination of order for hospitalization, § 64-7-45.

COLLATERAL REFERENCES

Utah Law Review. — Note: Hospitalization of the Mentally Ill in Utah: A Practical and Legal Analysis, 1966 Utah Law Review 223.

The "Mentally Ill" and the Law: Sisyphus and Zeus, James E. Beaver, 1968 Utah L. Rev. 1.

Am. Jur. 2d. — 41 Am. Jur. 2d Incompetent Persons §§ 8 to 25, 39 to 42.

C.J.S. — 44 C.J.S. Insane Persons §§ 14 to 34.

Key Numbers. — Mental Health ⇐ 37 to 46.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Attorney fees.
—Indigents.

Constitutionality.

Former Subsection (6)(c) was unconstitutionally vague and overbroad and violated due process of law, since it allowed for the involuntary commitment of mentally ill individuals who were not a threat to themselves and/or were able to make rational decisions as to their own treatment. *Colyar v. Third Judicial Dist. Court*, 469 F. Supp. 424 (D. Utah 1979).

Attorney fees.

—Indigents.

Attorney appointed by court to represent al-

legedly insane person was not entitled to recover fee from county since lawyer was not necessarily required to represent patient at involuntary hospitalization proceeding, notwithstanding attorney's claim that provision requiring appointment of counsel for indigent defendants entitled attorney to recover reasonable value of services from county. *Bedford v. Salt Lake County*, 22 Utah 2d 12, 447 P.2d 193 (1968) (decided prior to 1975 amendment).

68-3-1. Common law adopted.

The common law of England so far as it is not repugnant to, or in conflict with, the constitution or laws of the United States, or the constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state.

History: R.S. 1898 & C.L. 1907, § 2488; Married women's property rights, § 30-2-1 et seq.
C.L. 1917, § 5838; R.S. 1933 & C. 1943, 88-2-1.

Cross-References. — Common-law crimes abolished, § 76-1-105.

NOTES TO DECISIONS

ANALYSIS

Construction and application.
Champerty.
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Divorce and dower.
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Compiler's Notes. — The following annotations should be read with caution. The points of law expressed therein, while true when the cases were decided, may have been altered or rendered void by subsequent legislation or judicial opinion.

Construction and application.

This section, by implication at least, excludes common law from all subjects that are regulated by statute. *Rio Grande, Western Ry. v. Salt Lake Inv. Co.*, 35 Utah 528, 101 P. 586 (1909).

The common law of England was not adopted in this territory or state until this section was enacted. Nor does this section adopt its rigor and harshness, but only so much as was and had been generally recognized and enforced in this country, and as is and was suitable to our conditions. *Hatch v. Hatch*, 46 Utah 116, 148 P. 1096 (1915).

We adopted the common law of England only where it is suitable to our conditions, morals, history and background. Generally, we look to

the system of common law and equity which prevails in and has been and is now being developed by the decisions of this country and we reject the common law of England which is not suitable or adapted to our needs, morals or ideals. *Cahoon v. Pelton*, 9 Utah 2d 224, 342 P.2d 94 (1959).

Champerty.

Common law on subject of champertous contracts held modified by former statute providing that "measure and mode of compensation of attorneys and counselors at law is left to agreement, express or implied, of parties." *Croco v. Oregon Short Line R.R.*, 18 Utah 311, 54 P. 985, 44 L.R.A. 285 (1898); *Kennedy v. Oregon Short Line R.R.*, 18 Utah 325, 54 P. 988 (1898); *Potter v. Ajax Mining Co.*, 22 Utah 273, 61 P. 999 (1900).

Contributory negligence.

The doctrine of contributory negligence has attained a status similar to a statutory enactment, and abrogation should be by legislative

enactment. *Bridges v. Union Pac. R.R.*, 26 Utah 2d 281, 488 P.2d 738, (1971). See § 78-27-37.

Corporate purchase of stock.

Under English common law as adopted by Utah, a corporation could not purchase its own stock in absence of express statutory or charter authority. *Shumaker v. Utex Exploration Co.*, 157 F. Supp. 68 (D. Utah 1957).

Crimes against nature.

Because of this section it was held that the definition of the "infamous crime against nature" with man or beast had to be sought in the common law in so far as not defined by criminal statute. *State v. Johnson*, 44 Utah 18, 137 P. 632 (1913).

Criminal law.

Criminal statute covering phase of common law would not be construed as merely restating common law where wording indicated intent to broaden or change common law. *Oleson v. Pincock*, 68 Utah 507, 251 P. 23 (1926).

Criminal procedure.

Common law applies to criminal procedure unless otherwise provided by statute; and § 78-24-8(4), forbidding physician to testify without consent of his patient, does not apply to criminal proceedings, common law being applicable. *State v. Dean*, 69 Utah 268, 254 P. 142 (1927).

Divorce and dower.

Under this section, common-law rule that a divorce a vinculo bars dower has been adopted. *Whitmore v. Hardin*, 3 Utah 121, 1 P. 465 (1881).

Common law respecting dower remained in force during all time Utah remained a territory, and continued in force after it became a state, except as modified by statutory enactment. *Hilton v. Thatcher*, 31 Utah 360, 88 P. 20 (1906).

Forcible entry and detainer.

The English statute (5 Richard, II) "was a part of the common law as adopted by the American jurisdictions." *Buchanan v. Crites*, 106 Utah 428, 150 P.2d 100, 154 A.L.R. 167 (1944).

Married women.

The English common law, with its rigorous limitations imposed upon married women, was not adopted in the territory of Utah, but only so much thereof as was applicable to the conditions of the new territory. *Hatch v. Hatch*, 46 Utah 116, 148 P. 1096 (1915).

The common-law right of the husband to sue another person for criminal conversation with his wife which was based on the theory of a trespass against the wife which had to be brought by the husband because he and the wife were one, is contrary to law on that subject as developed in this country on the concept of the rights of married women and such a right did not become part of the law of Utah by virtue of this section. However, the law of this state does authorize an action to recover damages for criminal conversation based on the exclusive right of either spouse to intercourse with the other. *Cahoon v. Pelton*, 9 Utah 2d 224, 342 P.2d 94 (1959), distinguished, *Black v. United States*, 263 F. Supp. 470 (D. Utah 1967).

Notwithstanding this section, prior will of woman was not revoked by her subsequent marriage, contrary to rule at common law. *Estate of Armstrong v. Logan*, 21 Utah 2d 86, 440 P.2d 881 (1968).

Statute of uses.

Although statute of uses never became part of English common law and has not been adopted by Utah Legislature, rule of law, which executes passive or naked trust and vests legal title in person having use, is part of Utah common law. *Henderson v. Adams*, 15 Utah 30, 48 P. 398 (1897).

Water rights.

The Legislature, by this section, did not intend to adopt the common-law doctrine as to riparian owners, thereby divesting itself of title to bed of navigable waters. *State v. Rolio*, 71 Utah 91, 262 P. 987 (1927).

Writ of elegit.

Writ of elegit did not exist in territory of Utah. *Thompson v. Avery*, 11 Utah 214, 39 P. 829 (1895).

COLLATERAL REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d Common Law §§ 13 to 18.

C.J.S. — 15A C.J.S. Common Law §§ 11, 13 to 15.

Key Numbers. — Common Law ⇐ 12.

COLLATERAL REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d Sundays and Holiday § 70 et seq.
C.J.S. — 40 C.J.S. Holidays §§ 4 to 6.
A.L.R. — Service of summons or complaint on Sunday or holiday, validity of, 63 A.L.R.3d 423.
Key Numbers. — Holidays ⇐ 4 to 6.

68-3-9. Seal, how affixed.

When the seal of a court or public officer is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto. In all other cases the word "seal" may include a scroll printed or written.

History: R.S. 1898 & C.L. 1907, § 2495; C.L. 1917, § 5845; R.S. 1933 & C. 1943, 88-2-9.
Cross-References. — Custody of seals by archivist, § 63-2 to 62.5.
 Great seal of the State of Utah, Utah Const., Art. VII, Sec. 20; § 67-1a-8.
 Municipal seals, § 10-1-202.
 Seals of courts, §§ 78-7-14, 78-7-15.

COLLATERAL REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d Seals § 3.
C.J.S. — 79 C.J.S. Seals § 3.
Key Numbers. — Seals ⇐ 3.

68-3-10. Joint authority is authority to majority.

Words giving a joint authority to three or more public officers, or other persons, are to be construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

History: R.S. 1898 & C.L. 1907, § 2496; C.L. 1917, § 5846; R.S. 1933 & C. 1943, 88-2-10.
Cross-References. — Personal representatives, majority concurrence required unless will provides otherwise, § 75-3-716.

NOTES TO DECISIONS

Board of education.
 Joint authority is not "otherwise expressed" in any statute prescribing the powers and duties of a board of education. Tooele Bldg. Ass'n v. Tooele High School Dist. No. 1, 43 Utah 362, 134 P. 894 (1913).

68-3-11. Rules of construction as to words and phrases.

Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.

History: R.S. 1898 & C.L. 1907, § 2497; C.L. 1917, § 5847; R.S. 1933 & C. 1943, 88-2-11.
Cross-References. — Duty of court to construe statutes, § 78-21-3.

NOTES TO DECISIONS

ANALYSIS

Construction and application.

Court's duty.

Meaning of word "maintain."

Meaning of word "may."

Supplying omissions.

Title of act.

Words used repeatedly in statute.

Construction and application.

Where there is doubt respecting true meaning of certain words, then words should be read in light of conditions and necessities which they are intended to meet and objects sought to be attained thereby. *United States Smelting, Refining & Milling Co. v. Utah Power & Light Co.*, 58 Utah 168, 197 P. 902 (1921).

Presumption is that words are used in their ordinary sense and if a different interpretation is sought it must rest upon something in the character of the legislation or in the context which will justify a different meaning. *Deseret Sav. Bank v. Francis*, 62 Utah 85, 217 P. 1114 (1923).

Unless technical terms are used, words employed in statute must be given their usual and ordinary meaning. *Cache Auto Co. v. Central Garage*, 63 Utah 10, 221 P. 862, 30 A.L.R. 1217 (1923).

Meaning of words found in statute must be determined from general context of the same and the intent or object sought to be accomplished by the legislation, and courts in attempting to arrive at the intent of the Legislature will disregard mere forms and look to the substance. *State v. Franklin*, 63 Utah 442, 226 P. 674 (1924).

Words and phrases are to be construed according to the context and the approved usage of the language; except in case of technical words and phrases, they must be construed according to their plain and ordinary meaning, but technical rules of construction may be disregarded where it is manifest, when the subject of legislation, considered from all points of view, is such as to convince the understanding that the Legislature could not have intended a literal interpretation. *State v. Hendrickson*, 67 Utah 15, 245 P. 375, 57 A.L.R. 786 (1926).

This section is merely declaratory of pre-existing rules of statutory construction. *State v. Navaro*, 83 Utah 6, 26 P.2d 955 (1933).

Definition of word may depend upon the character of its use in a statute. *State v. Navaro*, 83 Utah 6, 26 P.2d 955 (1933).

Unless contrary appears, terms of legislative enactment must be taken in their ordinary and usual significance as they are generally under-

stood. *Emmertson v. State Tax Comm'n*, 93 Utah 219, 72 P.2d 467, 113 A.L.R. 1174 (1937).

Court's duty.

It is duty of courts to enforce plain intent of statute, but courts ought not to construe an act to effect the forfeiture of property of one citizen to another, unless "plain and unequivocal mandate of the Legislature admits of no other rational construction." *Rospigliosi v. Glenallen Mining Co.*, 69 Utah 41, 252 P. 276 (1926) (construing usury statute).

In construction of statutes it is duty of courts to ascertain intent of legislative body, and in determining this intent, not only should language of act be considered, but also purposes and objects sought by Legislature, and if legislation is within constitutional power, to enforce such intent. *Price v. Tuttle*, 70 Utah 156, 258 P. 1016 (1927).

It is court's duty, when possible, to give to every word, phrase, clause, and sentence of statute a consistent, reasonable meaning. *Robinson v. Union Pac. R.R.*, 70 Utah 441, 261 P. 9 (1927).

Meaning of word "maintain."

In applying this section to the construction of word "maintain," the court said that that which is contained in statute by implication is as much part of statute as that which expressly appears therein. *Merrill v. Spencer*, 14 Utah 273, 46 P. 1096 (1896).

Meaning of word "may."

Word "may" as used in § 78-56-10, providing that judge of city court "may" employ shorthand reporter upon request of any party, should be construed as discretionary, not mandatory. *Purcell v. Wilkins*, 57 Utah 467, 195 P. 547 (1921).

Supplying omissions.

In construing statutes court may supply manifest omissions in order to avoid absurd and mischievous consequences and to effect legislative intent. *Gunnison Sugar Co. v. Public Utils. Comm'n*, 69 Utah 521, 256 P. 790 (1927).

Court may inquire into purpose sought to be accomplished in order to supply missing words

of statute, and words which are obviously necessary to complete sense will be supplied to effect a meaning clearly shown by other parts of statute. *Chez ex rel. Weber College v. Utah State Bldg. Comm'n*, 93 Utah 538, 74 P.2d 687 (1937).

Title of act.

While it is true that the title is not integrated into the operating portion of legislation, and that it will not be permitted to contradict or defeat a plainly expressed intent, and that such title cannot be used to create an ambiguity or uncertainty when the language in the body of the act is clear, nevertheless, where clarity is lacking in the language of an enactment, the title may be considered to shed light upon and clarify the meaning. *Great Salt Lake Auth. v. Island Ranching Co.*, 18 Utah 2d 45, 414 P.2d 963 (1966).

Words used repeatedly in statute.

Word repeatedly used in statute will be presumed to bear same meaning throughout statute, unless there is something to show that another meaning was intended. *Merrill v. Spencer*, 14 Utah 273, 46 P. 1096 (1896); *State v. Tingey*, 24 Utah 225, 67 P. 33 (1902).

The same words, especially if found in different statutes, may not always have the same effect, and it follows that in order to determine intention and purpose of lawmaker, and to harmonize conflicting provisions where such occur, it at times becomes necessary for courts to expand or to restrict ordinary and usual meaning of words, phrases, or clauses found in particular section or statute. *Board of Educ. of Carbon County School Dist. v. Bryner*, 57 Utah 78, 192 P. 627 (1920).

COLLATERAL REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d Statutes §§ 204, 225 to 227, 238, 250.

C.J.S. — 82 C.J.S. Statutes §§ 314, 315, 329, 330, 348.

Key Numbers. — Statutes ⇐ 178, 179, 188, 192, 208.

68-3-12. General rules.

In the construction of these statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the Legislature or repugnant to the context of the statute:

- (1) "Month" means a calendar month, unless otherwise expressed, and the word "year," or the abbreviation "A.D." is equivalent to the expression "year of our Lord."
- (2) "Oath" includes "affirmation," and the word "swear" includes "affirm." Every oral statement under oath or affirmation is embraced in the term "testify," and every written one, in the term "depose."
- (3) "Signature" includes any name, mark, or sign written with the intent to authenticate any instrument or writing.
- (4) "Writing" includes printing, handwriting, and typewriting.
- (5) "Person" includes individuals, bodies politic and corporate, partnerships, associations, and companies.
- (6) The singular number includes the plural, and the plural the singular.
- (7) Words used in one gender comprehend the other.
- (8) Words used in the present tense include the future.
- (9) "Property" includes both real and personal property.
- (10) "Land," "real estate," and "real property" include land, tenements, hereditaments, water rights, possessory rights, and claims.
- (11) "Personal property" includes every description of money, goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation, right or title to property is created, acknowledged, transferred, increased, defeated, discharged, or diminished, and every right or interest therein.

CHAPTER 14a

LIMITATION OF THERAPIST'S DUTY TO WARN

Section	
78-14a-101.	Definitions.
78-14a-102.	Limitation of therapist's duty to warn.

78-14a-101. Definitions.

As used in this chapter, "therapist" means:

- (1) a psychiatrist licensed to practice medicine under Sections 58-12-26 through 58-12-43, the Utah Medical Practice Act;
- (2) a psychologist licensed to practice psychology under Chapter 25a, Title 58;
- (3) a marriage and family therapist licensed to practice marriage and family therapy under Chapter 39, Title 58;
- (4) a social worker licensed to practice social work under Chapter 35, Title 58; and
- (5) a psychiatric and mental health nurse specialist licensed to practice advanced psychiatric nursing under Chapter 31, Title 58.

History: C. 1953, 78-14a-101, enacted by L. 1988, ch. 89, § 1; 1989, ch. 42, § 15.

Amendment Notes. — The 1989 amendment, effective July 1, 1989, substituted "Sections 58-12-26 through 58-12-43" for "Chapter

12, Title 58" in Subsection (1) and "Chapter 25a" for "Chapter 25" in Subsection (2).

Effective Dates. — Laws 1988, ch. 89 became effective on April 25, 1988, pursuant to Utah Const., Art. VI, Sec. 25.

78-14a-102. Limitation of therapist's duty to warn.

(1) A therapist has no duty to warn or take precautions to provide protection from any violent behavior of his client or patient, except when that client or patient communicated to the therapist an actual threat of physical violence against a clearly identified or reasonably identifiable victim. That duty shall be discharged if the therapist makes reasonable efforts to communicate the threat to the victim, and notifies a law enforcement officer or agency of the threat.

(2) No cause of action arises against a therapist for breach of trust or privilege, or for disclosure of confidential information, based on a therapist's communication of information to a third party in an effort to discharge his duty in accordance with Subsection (1).

(3) This section does not limit or effect a therapist's duty to report child abuse or neglect in accordance with Section 62A-4-503.

History: C. 1953, 78-14a-102, enacted by L. 1988, ch. 89, § 2.

Effective Dates. — Laws 1988, ch. 89 be-

came effective on April 25, 1988, pursuant to Utah Const., Art. VI, Sec. 25.

MAILING CERTIFICATE

I hereby certify that, on the 7TH day of March, 1991, I caused to be mailed, postage prepaid, 4 true and correct copies of the foregoing BRIEF OF VALLEY MENTAL HEALTH, INC., AS AMICUS CURIAE to each of the following:

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