2009

Torts: In the Absence of Parents: Expanding Liability for Caretaker's Failure to Protect Minors from Third-party Harm—Bjerke v. Johnson

Calista Menzhuber

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation

Available at: http://open.mitchellhamline.edu/wmlr/vol35/iss2/7
TORTS: IN THE ABSENCE OF PARENTS: EXPANDING LIABILITY FOR CARETAKER’S FAILURE TO PROTECT MINORS FROM THIRD-PARTY HARM—BJERKE V. JOHNSON

Calista Menzhuber†

I. INTRODUCTION.................................................................715

II. HISTORY: NEGLIGENCE, DUTY, AND SPECIAL RELATIONSHIPS.................................................................716
   A. Origins of Negligence..............................................716
   B. Origin of Duty Element in Negligence......................718
   C. No Duty to Protect.................................................720
   D. Exceptions: Special Relationships.........................720
   E. Special Relationships in Minnesota.........................723
      1. Hospital and Patient Relationships..................723
      2. Voluntary Undertaking or Assumption of Duty.....724
      3. Special Relationships under the Restatement.....725
      4. No Duty to Protect from Criminal Activity.........726
      5. Entrustment, Policy and Unique Circumstances.....727
      6. Custody and Normal Opportunities for Self-Protection
         – Section 314A(4).............................................728

III. THE BJERKE DECISION..................................................730
   A. Facts and Procedural History.................................730
   B. Majority Opinion................................................731
   C. Concurrence......................................................733
   D. Dissent............................................................734

IV. ANALYSIS.................................................................735
   A. Significant Expansion of Nonfeasance Liability in Minnesota.........................................................735
   B. Application of Section 314A(4) Outside of Minnesota......736
      1. Custody or Control...........................................737
      2. Deprivation of Normal Opportunities for Protection......740

† J.D. Candidate 2009, William Mitchell College of Law; B.A., College of St. Benedict, 2000. The author would like to thank the editorial staff of the Law Review for all of its work on this case note.

714
I. INTRODUCTION

When a person fails to protect a child in her custody from sexual abuse, should she be civilly liable to that child? She did not cause the harm. She did not increase the harm. She did not prevent others from discovering the harm. She simply did nothing.

That was the problem the Minnesota Supreme Court faced in Bjerke v. Johnson. Suzette Johnson took fourteen-year-old Aja Bjerke into her home. Bjerke entered into a sexual relationship with Johnson’s live-in boyfriend. Johnson did not protect Bjerke from the harm caused by that relationship. A negligence claim ensued, and the court had to decide whether a special relationship existed between Johnson and Bjerke giving rise to a duty to protect. The Minnesota Supreme Court held that such a duty existed, affirming the appellate court’s decision, though on a different legal theory.

This case note first outlines the history of duty in negligence and, particularly, the history of liability for nonfeasance where the defendant did not cause the harm. It outlines how special relationships became one of the few avenues to liability for nonfeasance and discusses the special relationships laid out in the

1. 742 N.W.2d 660 (Minn. 2007).
2. Id. at 663.
3. Id.
4. Id.
5. Id.
6. Id. at 666 (holding a special relationship existed under the Restatement (Second) of Torts § 314A (1965)). The court of appeals had rejected use of section 314A and found a special relationship under section 324A. Bjerke v. Johnson, 727 N.W.2d 183, 189 (Minn. Ct. App. 2007), aff’d on other grounds, 742 N.W.2d 660 (Minn. 2007).
7. See infra Part II.A–C.
Restatement (Second) of Torts. The note then discusses the history of special relationships in Minnesota law. Next, the note describes the facts and the supreme court’s analysis of the Bjerke v. Johnson case, focusing on how the court applied the Restatement (Second) section 314A(4) to establish a special relationship. The note then argues that the Bjerke decision represents a significant expansion of nonfeasance liability in Minnesota compared with the majority of other states. The note also argues, however, that the decision is solidly grounded in the supreme court’s prior holdings on special relationships in Minnesota. The note then identifies outstanding questions with regard to the relationship between the custodian of the child and the child’s parents, the resolution of which will either expand or contract the reach of the Bjerke decision in future cases. Finally, the note concludes that the decision is consistent with the nonfeasance liability trends identified and predicted by commentators and reflected in the latest draft of the Restatement (Third) of Torts.

II. HISTORY: NEGLIGENCE, DUTY, AND SPECIAL RELATIONSHIPS

A. Origins of Negligence

Negligence as a distinct tort developed relatively recently. It began to appear around the start of the nineteenth century as an action against a person who engaged in a “public” or “common” calling. Innkeepers, surgeons, barbers, smiths, and ferrymen were the defendants in what are recognized as the earliest negligence cases. The rise of negligence has been attributed to the beginning of the Industrial Revolution. "Perhaps one of the chief agencies in the growth of the idea is industrial machinery. Early railway trains, in particular, were notable neither for speed nor for safety. They killed any object from a Minister of State to a wandering cow, and this naturally reacted on the law."
The theory was that people in these trades held themselves out to the public to be competent and thus assumed an obligation to do their work properly. Essentially, negligence required that the defendant had “formally undertaken to do something which the common law required him to do reasonably well.”

The essence of liability for those in common callings arose from the “beneficial nature of the relationship” they had with those who required and paid for their services. There existed an entrustment, a burden in exchange for a benefit, and therefore a certain level of care was required.

As the law evolved, the number of relationships which demanded some level of care expanded. The law began to require not only that a person perform an affirmative undertaking properly, but under some circumstances, that a person act to avoid danger or prevent harm to another without a clear undertaking.

Yet throughout this expansion, the concept of a voluntary undertaking remained present. As negligence common law progressed, questions of negligence began to fall into one of two categories: misfeasance (malfeasance) or nonfeasance. Misfeasance exists when a person undertakes an activity and fails to proceed so as to avoid harm to another. Nonfeasance occurs when a person fails to protect another or prevent harm to another.

18. Id.; Keeton et al., supra note 15, § 28 at 161.
19. Harper, supra note 15, § 66, at 153. Justice Cardozo famously stated that “[I]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.” Glanzer v. Shepard, 135 N.E. 275, 276 (N.Y. 1922).
21. Id.
22. Id. at 153-54. For example: “[I]f one erected a building upon his land, he was at once in a more or less definite relationship with others, tenants, guests, persons on and owners of adjoining lands, a relationship that became the basis of definite obligations to avoid harm to others from his property.” Id. at 154.
23. These terms are also referred to as “commission” and “omission” or “action” and “inaction.” Keeton et al., supra note 15, § 56, at 373.
24. Id. at 374. Misfeasance is “misconduct working positive injury to others,” where the defendant has somehow created the risk to the plaintiff. Id. at 373. Therefore: “[I]f a force is within the actor’s control, his failure to control it is treated as though he were actively directing it and not as a breach of duty to take affirmative steps to prevent its continuance . . . .” Restatement (Second) of Torts § 314 cmt. d (1965). For example, failure to blow a train whistle when necessary would be misfeasance though no action was taken; it would be considered negligent operation of a train. See Keeton et al., supra note 15, § 56, at 374.
through inaction.\textsuperscript{25} Misfeasance, clearly involving a voluntary undertaking, understandably gave rise to liability much more often than nonfeasance.\textsuperscript{26} When a person enters into a relationship with another, however, the creation of that relationship itself is a voluntary undertaking, and this undertaking was deemed, in some situations, to give rise to liability for nonfeasance.\textsuperscript{27} Thus, misfeasance and sometimes nonfeasance constitute grounds for the modern negligence action.

\textbf{B. Origin of Duty Element in Negligence}

A negligence claim contains four elements: duty, breach of duty, proximate cause, and actual loss or damage.\textsuperscript{28} Duty is the first element of negligence. If there is no duty, there is no need to inquire further into the other elements.\textsuperscript{29} Thus, duty acts as gatekeeper, limiting or expanding the scope of negligence claims.\textsuperscript{30}

In early tort law, “[t]he defendant’s obligation to behave properly apparently was owed to all the world, and he was liable to any person whom he might injure by his misconduct.”\textsuperscript{31} The negligence claim, however, developed with more limitations than the intentional tort did.\textsuperscript{32} It is famously stated that “[n]egligence in

\begin{footnotesize}
\begin{enumerate}
\item[25.] Keeton et al., \textit{supra} note 15, § 56, at 373. Justice Cardozo distinguished between misfeasance and nonfeasance explaining, “The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good.” H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 898 (N.Y. 1928).
\item[26.] “The courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer harm because of his omission to act.” Keeton et al., \textit{supra} note 15, § 56, at 373.
\item[27.] Describing nonfeasance, Harper noted, “[I]f he is in some relationship with others by reason of some anterior voluntary act, he must, if the relationship is of a certain kind, take active precautions to avoid harm to others.” Harper, \textit{supra} note 15, § 66, at 154.
\item[28.] Keeton et al., \textit{supra} note 15, § 30, at 164-65.
\item[31.] Keeton et al., \textit{supra} note 15, § 53, at 357 (emphasis added).
\item[32.] “The period during which [duty] developed was that of the [I]ndustrial [R]evolution, and there is good reason to believe that it was a means by which the courts sought, perhaps more or less unconsciously, to limit the responsibilities of growing industry within some reasonable bounds.” Id.
\end{enumerate}
\end{footnotesize}
Negligence developed in the context of relationships and voluntary undertakings giving rise to liability, and those ideas permeate the duty requirement.

Generally, duty can be defined as “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” Yet, many variations exist. Somewhat cynical descriptions include: “There is a duty if the court says there is a duty . . . . [D]uty is only a word with which we state our conclusion that there is or is not to be liability . . . .” The Restatement (Second) of Torts initially avoids the word duty and describes the element this way: liability exists for “an invasion of an interest of another, if: (a) the interest invaded is protected against unintentional invasion . . . .” Prosser and Keeton warn “that ‘duty’ is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.” They also conclude that “no better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.”

33. Id. (quoting P.A. Landon, Pollock’s Law of Torts 468 (13th ed. 1920)).
34. See supra discussion in Part IIA.
35. Keeton et al., supra note 15, § 53, at 356. Duty proved difficult to define from the beginning. The first attempt in 1883 was cumbersome and broad:

[W]henver one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Heaven v. Pender, (1883) 11 Q.B.D. 503, 509 (Eng.).
37. Restatement (Second) of Torts § 281 (1965). However, the word “duty” is introduced later in the Restatement. See Restatement (Second) of Torts § 328A (1965). Commentators note that Prosser intended section 281 to be “only a semantic, not a substantive variation” of the standard formula and that he introduced section 328A “precisely for the purpose of harmonizing Section 281’s formulation with the traditional four-part test.” John C. P. Goldberg & Benjamin C. Zipursky, The Restatement (Third) and the Place of Duty in Negligence Law, 54 Vand. L. Rev. 657, 673–74 (2001). In response, other scholars suggest that the duty element is assumed; the “existence of a duty [is] the default position where a defendant’s ‘affirmative act’ or ‘conduct’ creates a risk of harm.” W. Jonathan Cardi & Michael D. Green, Duty Wars, 81 S. Cal. L. Rev. 671, 695 (2008).
39. Id. at 339.
C. No Duty to Protect

Despite an early emergence of liability for some types of nonfeasance, the law has long attempted to circumscribe it by making liability the exception to the rule. As stated in the Restatement (Second) of Torts, “[t]he fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.” This “no-duty-to-protect” rule applies regardless of the severity of the danger or the ease of the action and has led to seemingly harsh results.

D. Exceptions: Special Relationships

As one would expect, exceptions to the no-duty-to-protect rule have developed over time. One exception arises where a relationship between two people is deemed “special.” Just as duty in the broader sense reflects public policy, the decision that certain relationships should give rise to liability for nonfeasance reflects “custom, public sentiment, and views of social policy.” And similar to the public callings that constituted the first undertakings

40. See supra note 22 and accompanying text.
41. See KEETON ET AL., supra note 15, § 56, at 373 (citing LEON GREEN, JUDGE AND JURY, 62 (1930)) (“[T]he highly individualistic philosophy of the older common law . . . shrank from converting the courts into an agency for forcing men to help one another.”).
42. RESTATEMENT (SECOND) OF TORTS § 314 (1965) (emphasis added).
43. Id. cmt. c.
44. See id. (“The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown.”); see also Andrew D. Kaplan, “Cash-ing Out:” Regulating Omissions, Analysis of the Sherrice Iverson Act, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 67, 78 (2000) (describing the public outcry and subsequent legislation after a seven-year-old girl was raped and murdered in a casino restroom while a friend of the perpetrator merely looked on, did not report, and was not civilly or criminally liable); Jay Silver, The Duty to Rescue: A Reexamination and Proposal, 26 WM. & MARY L. REV. 423, 425 (1985) (describing the famous 1964 murder of Kitty Genovese, who was stabbed repeatedly in the street while thirty-eight neighbors looked on, and proposing civil and criminal liability for failure to aid). Minnesota, however, does have a “Good Samaritan Law.” See MINN. STAT. § 604A.01, subdiv. 1 (2006) (making a person’s failure to provide reasonable aid at the scene of an emergency a petty misdemeanor if the person faces no risk in doing so).
46. KEETON ET AL., supra note 15, § 56, at 374.
giving rise to negligence liability, today’s special relationships also reflect such an entrustment.

Relationships that give rise to a duty to protect fall into two major categories outlined in the *Restatement (Second) of Torts*, and a third type that Minnesota law describes as a special relationship and so described here.

First, some relationships are “protective by nature.” This type of special relationship arises generally from section 315(b) and specifically from sections 320 and 314A of the *Restatement (Second) of Torts*. Under section 315(b), there is a duty to control the conduct of a third party where a special relationship “exists between the actor and the other which gives to the other a right to protection.” Section 320 expands upon this rule. Section 314A provides a more general duty to “aid or protect” in several situations: a common carrier has a duty toward its passengers, an innkeeper toward guests, and a possessor of land toward invitees. Lastly and most significant to the *Bjerke* case, section 314A(4) says that “one who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection has a duty to the
other.\footnote{57} The second category contains special relationships which are “custodial in nature,” that is, where a custodian must protect others from a dangerous person in his or her care.\footnote{58} Section 315(a) provides that a special relationship may exist between the actor (the person charged with liability for nonfeasance) and a third party (person causing the injury) such that the relationship “imposes a duty upon the actor to control the third person’s conduct.”\footnote{59} Thus, the injured party has a claim against the actor (essentially a non-actor) for failure to protect him or her from the third party.\footnote{60} This type of special relationship was not applicable in \textit{Bjerke v. Johnson} and therefore will not be discussed further in this note.

The third category, referred to as a special relationship in Minnesota,\footnote{61} comes from \textit{Restatement (Second) of Torts} section 324A:

\begin{quote}
(\textit{O}ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other
\end{quote}

were at issue. The dissent stated, “For purposes of section 314A, \ldots we are only concerned with the availability of normal opportunities of self-protection, not whether a child’s circumstances are conducive to being protected by another.” \textit{Bjerke v. Johnson}, 742 N.W.2d 660, 676 n.2 (Minn. 2007) (Anderson, G. Barry, J., dissenting).

\begin{footnotesize}
\footnote{57} \textit{RESTATEMENT (SECOND) OF TORTS} § 314A (1965) (emphasis added).

\footnote{58} \textit{KEETON ET AL.}, \textit{supra} note 15, § 56, at 383. For example, a parent must protect others from a dangerous child, and an employer must protect others from an employee. \textit{Id.} at 384. Sometimes the two categories overlap. A prison, having two prisoners in its charge, would be required to protect the first from the second, and control the second to protect the first. \textit{See id.} at 383–84.

\footnote{59} \textit{RESTATEMENT (SECOND) OF TORTS} § 315(a) (1965).

\footnote{60} Specifically, a parent has a duty to control a child, a master must control a servant, a possessor of land must control a licensee, and one who takes charge of a person with dangerous propensities must control that person. \textit{RESTATEMENT (SECOND) OF TORTS} §§ 316–319 (1965).

\footnote{61} \textit{E.g.}, \textit{Bjerke v. Johnson}, 727 N.W.2d 183, 190 (Minn. Ct. App. 2007).
\end{footnotesize}
or the third person upon the undertaking.62

This special relationship allows for the transference of liability to someone who assumes a duty for another. In Bjerke v. Johnson, the court of appeals applied this theory, but the supreme court’s majority opinion did not.63 Therefore, this note includes limited discussion of the section 324A special relationship.

Having laid out the three special relationship categories, the Restatement notes that the list is not exclusive and that the law seems to be “working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.”64 Additionally, it is important to note that even where a special relationship arises, the duty created is only to act with reasonable care.65

E. Special Relationships in Minnesota

Minnesota generally follows the Restatement in the area of liability for nonfeasance. The circumstances of the relationship determine whether a duty exists, and the Minnesota Supreme Court has found relatively few special relationships.

1. Hospital and Patient Relationships

Some of the earliest cases in Minnesota recognizing a duty to protect arose where patients were injured in hospitals.66 In Sylvester v. Northwestern Hospital of Minneapolis,67 decided in 1952, an intoxicated patient wandered into the plaintiff’s hospital room and hit him in the abdomen near his healing appendectomy incision.68 The court held the hospital liable, relying on the Restatement (First) of Torts section 320, which imposes a duty to exercise reasonable care on one who “voluntarily takes custody . . . such as to deprive

63. See Bjerke v. Johnson, 742 N.W.2d 660, 667 (Minn. 2007).
64. RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (1965) (emphasis added).
65. Id. cmt. e.
67. 236 Minn. 384, 53 N.W.2d 17 (1952).
68. Id. at 385–86, 53 N.W.2d at 18.
the other of his normal power of self-protection’’ provided that the actor knows or should know of his ability to control the third party and of the need to do so.\textsuperscript{69} While the court noted that a private hospital doesn’t ensure its patients’ safety, it added that the duty of reasonable care “must always be in proportion to the patient’s inability to look after his own safety.”\textsuperscript{70} Thus, the court emphasized that the duty to protect hinged on the patient’s lack of ability to protect himself, provided the hospital could control the third party.

2. Voluntary Undertaking or Assumption of Duty

1979 brought three important special-relationship decisions by the Minnesota Supreme Court. First, the court decided \textit{Cracraft v. City of St. Louis Park}.\textsuperscript{71} The plaintiff alleged that the city was liable for the negligent inspection of a building under its own fire code.\textsuperscript{72} The court applied the common law special-relationship doctrine, citing \textit{Restatement (Second) of Torts} section 315, to the municipality\textsuperscript{73} to determine whether it owed more than a mere “general” duty to the public.\textsuperscript{74} A “special duty,” as the court described it, reflects “the ancient doctrine that once a duty to act for the protection of others is voluntarily assumed, due care must be exercised even though there was no duty to act in the first instance.”\textsuperscript{75} The court found that the purpose of the inspections was to protect “the interests of the municipality as a whole” and not to protect individuals.\textsuperscript{76} Thus, the city did not voluntarily undertake the protection of individuals and therefore could not be liable under the special-relationship exception to the “no-duty-to-protect” rule.\textsuperscript{77}

\begin{itemize}
  \item 69. Id. at 387, 53 N.W.2d at 19 (quoting Restatement (First) of Torts § 320 (1934)).
  \item 70. Id. at 386, 53 N.W.2d at 19.
  \item 71. 279 N.W.2d 801 (Minn. 1979).
  \item 72. Municipalities generally owe a duty to the public, but not to individuals. \textit{Id.} at 804. The purpose of building codes is to protect the public, but the codes do not act as insurance by the government as to the buildings’ safety. \textit{Id.} at 804 (quoting Hoffert v. Owatonna Inn Towne Motel, Inc., 293 Minn. 220, 223, 199 N.W.2d 158, 160 (1972)).
  \item 73. The sovereign-immunity defense had previously been abolished by the legislature. \textit{Id.} at 803.
  \item 74. \textit{Id.} at 804–05.
  \item 75. \textit{Id.} at 806.
  \item 76. \textit{Id.} at 805.
  \item 77. The court, though finding no special relationship, laid out four factors it would consider: actual knowledge of a danger, reasonable reliance on the city’s conduct, a statute that “sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole,” and whether the city.
\end{itemize}
Again in 1979, the court analyzed the duty of care in *Walsh v. Pagra Air Taxi, Inc*. The defendant was a “fixed base operator” employed by a municipal airport to provide various airport services, including fire protection. A plane caught fire, and employees attempted to put the fire out but could not access their firefighting equipment because the building door housing the equipment was damaged. As a result, the plane was heavily damaged. The court stated that while the municipality had no general duty to prevent harm to private property, it had voluntarily undertaken the task by providing fire-protection equipment and personnel. Citing the *Restatement (Second) of Torts* section 324A, the court then held that the defendant, the “fixed base operator,” had a duty of care because it had undertaken to perform the city’s duty. This holding again emphasizes that a voluntary undertaking can result in liability where none previously existed.

3. Special Relationships under the Restatement

Just a few months later, the court had another opportunity to address special relationships in *Delgado v. Lohmar*. Here, a group of grouse hunters entered private property without the landowner’s consent. When the landowner approached the hunters to request that they leave his property, one of the hunters in the group accidentally shot and blinded the landowner. The landowner claimed that once the hunters saw him they had a duty to protect, that is, to inform the others in their group of his presence. The court stated the rule that there is generally no duty to protect, but the exception is where a special relationship exists. Specifically, it stated that special relationships exist between “parents and children, masters and servants, possessors of land and licensees, common carriers and their customers, or people who have custody

increased the risk of harm. *Id.* at 806–07.
78. 282 N.W.2d 567 (Minn. 1979).
79. *Id.* at 569.
80. *Id.* at 570.
81. *Id.*
82. *Id.*
83. *Id.* at 570–71 (citing the *Restatement (Second) of Torts* § 324A (1965)).
84. 289 N.W.2d 479 (Minn. 1979).
85. *Id.* at 481–82.
86. *Id.* at 483.
87. *Id.* (citing *Restatement (Second) of Torts* § 314 (1965)).
of a person with dangerous propensities.” Ultimately, the court concluded that the parties were strangers and no special relationship existed between them, but the Delgado case is cited for having recognized and laid out the different types of special relationships recognized in Minnesota.

4. No Duty to Protect from Criminal Activity

In 1985, the court held in Pietila v. Congdon that a homeowner does not have a duty to protect invitees from the criminal acts of third persons. The court stated that “[a] criminal act such as murder or armed robbery committed by a person or persons unknown is not an activity of the owner and does not constitute a condition of the land.” Therefore, no special relationship existed creating a duty for a homeowner to protect guests against criminal acts by third parties.

88. Id. at 484 (citing Restatement (Second) of Torts § 315 (1965)). However, the Delgado case caused some confusion on the issue of special relationships between parents and children. The decision did not distinguish between types of special relationships—whether the parents have a duty to protect their children or whether they have a duty to protect others from their children. The facts of the Delgado case indicate that it only intended to recognize the latter type, see id., which comes from Restatement (Second) of Torts section 316. The case has subsequently been cited, however, as holding that a parent has a duty to protect his or her child, which is not a Restatement special relationship. See Lundman v. McKown, 530 N.W.2d 807, 820 (Minn. Ct. App. 1995) (holding that a Christian Scientist mother whose son died of diabetes because the mother did not believe in obtaining conventional medicine was in a special relationship with son). However, subsequent cases indicate a growing recognition of a duty of parent to child. See Foss v. Kincade, 746 N.W.2d 912, 916 (Minn. Ct. App. 2008), review granted, (recognizing that parents have a “paramount duty” to protect their children, though not in special relationship context), Sunnarborg v. Howard, 581 N.W.2d 397, 399 (Minn. Ct. App. 1998) (holding that third party does not stand in special relationship to child when parent is present because parent has responsibility to protect).

89. The court still held the hunters liable, however, because of the danger of using firearms while trespassing. Delgado v. Lohmar, 289 N.W.2d 479, 484 (Minn. 1979).

90. The supreme court cited it in Bjerke v. Johnson, 742 N.W.2d 660 (Minn. 2007), Louis v. Louis, 636 N.W.2d 314 (Minn. 2001), and Johnson v. State, 553 N.W.2d 40 (Minn. 1996).

91. Pietila v. Congdon, 362 N.W.2d 328 (Minn. 1985) (holding that trustees of home did not have special relationship with nurse who was killed in the home by an unknown intruder).

92. Id. at 333.
5. Entrustment, Policy and Unique Circumstances

In 1989, certain facts finally persuaded the court that a special relationship existed, thereby creating a duty to protect from third persons. In *Erickson v. Curtis Investment Co.*, a woman was raped in a parking ramp monitored by a security firm. The court had to decide whether the owners/operators of the parking ramp and its security firm had a duty to protect her from criminal acts. Recognizing the historic underpinnings of the special relationship, the court defined it as “a situation where B has in some way entrusted his or her safety to A and A has accepted that entrustment.” Furthermore, the harm to be prevented must be one that the defendant is “in a position to protect against and should be expected to protect against.”

Though acknowledging a general reluctance by courts to impose a duty on businesses to protect customers from criminal acts, the court said that the decision depends on the relationship of the parties and foreseeability of the risk involved. “Ultimately, the question is one of policy.” The court decided that the “general characteristics of a parking ramp” create a “unique opportunity for criminals”; thus, the owner and operator of the ramp owed the plaintiff a duty to exercise reasonable care.

Next, the court explained why the security firm also owed the plaintiff a duty to exercise reasonable care. The security firm that patrolled the ramp undertook to perform a duty owed by the owner/operator of the ramp to a third party (i.e., the plaintiff). Thus, under the *Restatement (Second) of Torts* section 324A, the security firm also had a duty to the plaintiff.

93. 447 N.W.2d 165 (Minn. 1989).
94.  Id. at 166.
95.  Id. at 168.
96.  Id.
97.  Id.
98.  Id. at 168–69.
99.  Id. at 169.
100. Id.
101. Id. at 170–71.
102. Id.
6. Custody and Normal Opportunities for Self-Protection – Section 314A(4)

In Harper v. Herman\(^{105}\) in 1993, the court recognized an additional special relationship, found in section 314A of the Restatement (Second) of Torts, which creates a duty in “persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection.”\(^{104}\) The court found no such relationship where a twenty-year-old man, a social guest on a boat, dove off the side into shallow water and sustained serious injuries.\(^ {105}\) The boat owner had no duty to warn or protect because he did not have custody of his guest, nor was the guest deprived of normal opportunities for self-protection.\(^{106}\) The court noted that deprivation of normal opportunities for self-protection means that “the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff’s welfare.”\(^{107}\) Furthermore, “such relations have often involved some existing or potential economic advantage to the defendant” and therefore, “[f]airness . . . may require the defendant to use his power to help the plaintiff, based upon the plaintiff’s expectation of protection, which itself may be based upon the defendant’s expectation of financial gain.”\(^{108}\)

In 1995, in Donaldson v. Young Women’s Christian Ass’n of Duluth,\(^{109}\) the supreme court reiterated the Harper factors of vulnerability, dependency, and considerable power.\(^{110}\) The court held that the YWCA did not have a duty to protect a female resident who committed suicide on its premises because it had no custody or control, there was no entrustment, it did not deprive her of opportunities for self-protection, and it was not in a position to protect the resident from committing suicide.\(^{111}\)

103. 499 N.W.2d 472 (Minn. 1993).
104. Id. at 474 (citing RESTATEMENT (SECOND) OF TORTS § 314A (1965)). Compare RESTATEMENT (SECOND) OF TORTS § 314A (1965) (using the phrase “normal opportunities for protection”), with RESTATEMENT (SECOND) OF TORTS § 320 (1965) (using the term “self-protection”).
105. Harper, 499 N.W.2d at 474.
106. Id.
107. Id. at 474 n.2 (citing KEETON ET AL., supra note 15, § 56 at 374).
108. Id. (citing KEETON ET AL., supra note 15, § 56 at 374.)
109. 539 N.W.2d 789 (Minn. 1995).
110. Id. at 792 (citing KEETON ET AL., supra note 15, § 56 at 374).
111. Id. at 793.
In 1996, the court decided *H.B. ex rel. Clark v. Whittemore*, in which several small children reported sexual abuse to their trailer park manager, who advised them to tell their parents and took no further action.\(^{112}\) The court found that there was no special relationship.\(^{113}\) Specifically, it found no acceptance of entrustment by the manager and noted that although the children were vulnerable, the manager had neither custody nor daily control over them.\(^{114}\) The court stated in dicta that, even if the manager did have custody or control, she did not deprive the children of opportunities for self-protection; in fact, the children demonstrated their ability to protect themselves by telling their parents about the abuse weeks later.\(^{115}\)

In 1999, the court held in *Gilbertson v. Leininger* that homeowners did not have a special relationship under section 314A with an adult social guest who stayed overnight and fell in their home, sustaining serious injuries.\(^{116}\) The question of liability arose because the homeowners, believing the guest was still intoxicated from the night before, did not obtain emergency care until late the next day.\(^{117}\) The court found that the homeowners had no custody over their guest, the guest did not lack the opportunity for self-protection, and the guest had no reason to expect protection from her hosts.\(^{118}\)

Most recently, in 2007, the court had yet another opportunity to address special relationships in *Becker v. Mayo Foundation*.\(^{119}\) A hospital was sued for failing to recognize and report child abuse of an infant.\(^{120}\) The court found that no special relationship existed because the hospital did not accept custody of the infant while treating her injuries, and it did not “exercise control over . . . [the

\(^{112}\) 552 N.W.2d 705, 707 (Minn. 1996).
\(^{113}\)  *Id.* at 708.
\(^{114}\)  *Id.* at 708–09. The court also commented that “[a]n adult who does not stand in a caretaking relationship with a child should not have thrust upon her an ill-defined legal responsibility to take ‘some reasonable action’—as suggested by the dissent—because the child chose to report mistreatment to her.” *Id.* at 709.
\(^{115}\)  *Id.* The court also noted, “[W]e recognize a feeling of shame and fear about telling their parents would be a natural reaction for the children, but we decline to graft an exception to the common law rule of no duty simply because the personal feelings of the victims might inhibit their taking care of themselves.” *Id.*
\(^{116}\)  599 N.W.2d 127, 132 (Minn. 1999).
\(^{117}\)  *Id.* at 129–30.
\(^{118}\)  *Id.* at 131–32.
\(^{119}\)  737 N.W.2d 200 (Minn. 2007).
\(^{120}\)  *Id.* at 205.
child’s] daily welfare”; the child’s parents held that role. The court further rejected a special relationship under section 314A because though the infant was clearly vulnerable, she was not “deprived of ordinary means of protection . . . because she never had any such means.”

The Minnesota Supreme Court has found few instances of special relationships, but it has provided a multitude of factors that would suggest a special relationship exists. To briefly review, the factors suggesting a section 314A special relationship are primarily custody or control over daily welfare and deprivation of power or opportunity for self-protection. Additional supporting factors include entrustment and acceptance, dependence, being in a position to protect and being expected to protect, particular vulnerability, considerable power over the plaintiff’s welfare, financial gain, and unique circumstances. This conglomeration of factors reflected the state of the section 314A special relationship in Minnesota when the supreme court heard Bjerke v. Johnson.

III. THE _BJERKE_ DECISION

A. Facts and Procedural History

Suzette Johnson owned and ran a horse farm called Island Farm, where she lived with her male friend Kenneth Bohlman. Johnson often invited teenagers to visit her farm to ride and learn about horses. One of these children was Aja Bjerke, who was fourteen years old in 1997 on her first visit to Island Farm.

Bjerke continued to visit Island Farm for weekends and short time periods, and soon she began to increase the length and frequency of her stays. She spent the entire summers of 1998 and 1999 at the farm, and by the spring of 2000, she resided full-time with Johnson and Bohlman.

Early in her stay, Bjerke and Bohlman entered into a sexual relationship that lasted several years. The relationship was...
consensual, and Bjerke attempted to hide the relationship from Johnson because she “loved Bohlman and did not want him to get into trouble.”

Bjerke left Island Farm in 2001 at age eighteen and subsequently informed law enforcement about the sexual relationship. Bjerke then filed a negligence claim against Johnson for failing to protect her from sexual abuse. Johnson moved for summary judgment on the grounds that she had no duty to protect Bjerke from harm by a third person because no special relationship existed between them.

The district court granted partial summary judgment, holding that Johnson had no duty to protect, and then it certified the issues for appeal. The court of appeals reversed, finding a special relationship giving rise to a duty to protect under Restatement (Second) of Torts section 324A.

B. Majority Opinion

The Minnesota Supreme Court affirmed the court of appeals’ decision, though on different grounds. The court agreed that Johnson had a special relationship with Bjerke and therefore a duty to protect her, but it did not reach a majority decision regarding the Restatement (Second) of Torts section 324A. Instead, the supreme court found a special relationship under the Restatement (Second) of Torts section 314A, the rule cited in Harper v. Herman: a special relationship “arises when an individual, whether voluntarily or as required by law, has ‘custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection.’”

129. Id.
131. Bjerke, 742 N.W.2d at 663.
132. Id. at 663–64. Johnson also claimed assumption of the risk as an affirmative defense to bar the negligence claim. Id.
133. Id. The district court also held that assumption of the risk did apply to minors so as to bar the negligence claim. Id.
134. Bjerke v. Johnson, 727 N.W.2d 183, 190 (Minn. Ct. App. 2007), aff’d on other grounds, 742 N.W.2d 660 (Minn. 2007). The court of appeals also held that Bjerke was not capable of assuming the risk prior to age sixteen. Id. at 195.
135. Bjerke, 742 N.W.2d at 663.
136. Id. at 667.
137. Id. at 665 (quoting Harper v. Herman, 499 N.W.2d 472, 474 (Minn.
The court first analyzed the custody prong of the test and held that Johnson had custody of Bjerke as a matter of law as early as the summer of 1998 when Bjerke spent her first summer at Island Farm. Although Johnson never obtained legal custody, the court decided that she satisfied a non-legal definition of custody by “accept[ing] entrustment of some level of care for Bjerke when Bjerke stayed at Johnson’s home, at a location distant from her parents’ home.” The court pointed out that Johnson provided room, board, and rules for Bjerke and thus had a “large degree of control over Bjerke’s welfare, strongly indicating that there was a special relationship between the two.”

Having satisfied the custody element, the court analyzed the second prong of the test: whether Bjerke was “deprived of normal opportunities of self-protection.” The court of appeals held that Bjerke’s opportunities for self-protection were the same in Johnson’s custody as in her parents’ custody; therefore, she was not deprived of them. The supreme court rejected this idea, stating that a child’s “primary source of protection” is her parents.

Bjerke, a minor, was living away from her parents under the daily care and supervision of Johnson, and the court found that this created a “substantial” deprivation of normal opportunities for protection. Furthermore, the court noted that Bjerke need only have lost normal opportunities for protection; it was not necessary that she lose all protection.

The majority also addressed the potential disconnect between its decision in H.B. and its decision in Bjerke. Because the H.B. court did not find the requisite custody, its comment that the young children were capable of self-protection because they could tell their parents about their abuse was “mere dicta.” Moreover, Bjerke’s situation involved “special considerations” not existent in H.B. First, she lived away from her parents, her normal source of

138. Id.
139. Id.
140. Id. (citing Becker v. Mayo Found., 737 N.W.2d 200, 213 (Minn. 2007)).
141. Id. at 666.
142. Id.
143. Id.
144. See id.
145. Id.
146. Id. at 667 n.3.
147. Id. at 667.
protection, while she was abused. Second, she lived with her abuser, where she would be under pressure not to report the abuse. Thus, the court concluded that Bjerke was sufficiently distinguishable from H.B.

Persuaded on both custody and lack of opportunity for self-protection, the majority held that a section 314A special relationship existed between Bjerke and Johnson. If Bjerke could show that the harm was foreseeable, then Johnson had a duty toward Bjerke. No holding was issued on whether a special relationship under section 324A existed.

C. Concurrence

Two justices concluded that a special relationship should exist under section 324A in addition to section 314A of the Restatement (Second) of Torts. They argued that Johnson gratuitously undertook to “render services to Bjerke’s parents . . . which [she] should have recognized as being necessary for Bjerke’s protection,” that she undertook a duty owed by Bjerke’s parents to Bjerke, and finally that the parents relied on Johnson’s undertaking.

148. Id.
149. Id.
150. Id.
151. Id. The court found that genuine issues of material fact existed as to foreseeability, which precluded summary judgment. Id. at 668. The evidence showed that Johnson and others had noticed “unusual and intimate behavior” between Bohlman and Bjerke over the course of Bjerke’s stay at Island Farm. Id. at 668–69.
152. Id. at 667.
153. Id. at 671 (Hanson, J., concurring).
154. Id. The justices rejected Johnson’s argument that the word “undertaking” required explicit agreement between Bjerke’s parents and Johnson, relying on the common meaning of the term and the court’s decision in Erickson, 447 N.W.2d 165 (Minn. 1989), where no explicit agreement was found. Id. at 672. The concurrence also argued that making an adult’s responsibility to a child rest solely on the adult’s explicit agreement with the child’s parents would violate public policy. Id. at 674. It would create a “dead zone” where the “custodian, who was in the best position to care for the child, would have no duty to do so, while the parents, who were too distant to actually care for the day to day needs of the child, would retain the duty to do so.” Id. The duties of parents and custodians are not “mutually exclusive, but can be shared and overlap.” Id. The concurrence satisfied the final prong of section 324A by arguing that Johnson both undertook a duty owed to Bjerke by her parents, and that the harm was suffered because Bjerke’s parents relied on Johnson. Id. at 675.
155. Id. at 674.
D. Dissent

According to the dissent, no special relationship existed under sections 314A or 324A, and the Bjerke case represents a “significant expansion of third party liability.” The dissent did not dispute the custody issue, but questioned whether Bjerke was deprived of opportunities for self-protection. The dissent focused on the H.B. decision, where small children reported sex abuse to their trailer park manager. In H.B. the court concluded that the children were capable of self-protection because they actually protected themselves by telling their parents of the abuse. If these small children were capable of self-protection, the dissent argued, Bjerke certainly was. The dissent also rejected the majority’s conclusion that because Bjerke was living in the same household as her abuser she was less able to protect herself than the children in H.B. Finally, the dissent argued that “for purposes of section 314A, however, we are only concerned with the availability of normal opportunities of self-protection, not whether the child’s circumstances are conducive to being protected by another.”

The dissent also analyzed section 324A. It noted that the scope of the undertaking limits the scope of the duty. Since Johnson did not undertake to protect Bjerke from third parties, she could not have had a duty to do so. The dissent also argued that public policy requires that courts exercise restraint in transferring parental rights. “A parent’s abdication of his or her parental duties does not effectuate the transfer of those duties to another.” The dissenting justices further argued that even if protection of Bjerke was within the scope of Johnson’s undertaking, the case did not satisfy the other elements of section 324A.

156. Id. at 681 (Anderson, G. Barry, J., dissenting).
158. Id. at 709.
159. Bjerke, 742 N.W.2d at 676 (Anderson, G. Barry, J., dissenting).
160. Id.
161. Id. at 676 n.11 (emphasis added).
162. Id. at 677.
163. Id. at 678.
164. Id.
165. Id.
166. They argued that Johnson’s failure to intervene did not increase the risk of harm under 324A(a), that she did not undertake a duty owed to Bjerke by her parents under 324A(b), and that the harm to Bjerke was not caused by her parents’ reliance on Johnson under 324A(c). See id. at 678–81.
IV. ANALYSIS

The *Bjerke* case involved offensive behavior on the part of two adults. Not only was there sexual abuse of a minor by Bohlman, there was evidence suggesting that Johnson accepted Bjerke into her home to give her a “more stable environment” and then closed her eyes when she suspected an inappropriate relationship between Bohlman and Bjerke.

However, our common law tradition does not easily accommodate the creation of a duty in one person to protect another. The *Bjerke* decision represents a significant expansion of nonfeasance liability in Minnesota compared with a majority of other states. Yet the decision is solidly grounded in the supreme court’s prior holdings on special relationships. However, there are outstanding questions about how the *Bjerke* decision will be applied, especially with regard to the relationship between the custodian of the child and the child’s parents. The answers to these questions will determine the extent of the expansion of nonfeasance liability in Minnesota. The decision is also consistent with the trends and predictions for nonfeasance liability given by commentators and reflected in the latest draft of the *Restatement (Third) of Torts*.

A. Significant Expansion of Nonfeasance Liability in Minnesota

Over the last few decades, the Minnesota Supreme Court rarely found that special relationships gave rise to a duty to protect. Instead, it had emphasized the narrowness of the exceptions allowed under Minnesota law. The majority in *H.B.* rejected the dissent’s basis for liability, stating that it did not “even remotely
fall[] within the parameters this court has carefully carved out as the outer boundaries for this exception to the common law rule” that there is no general duty to protect. 175

Prior to Bjerke, the court had not found any cases persuasive on both the custody factor and the lack of opportunity for self-protection factor under section 314A(4). As discussed earlier, the court repeatedly rejected special relationships where the plaintiff was a guest in the home or on the property of the defendants. 176 The court had rejected a special relationship where the protection of small children from sexual predators was at issue. 177 The court had also rejected a homeowner’s duty to protect against unknown criminal intruders. 178

Until Bjerke, the Minnesota Supreme Court had not recognized a special relationship between two private individuals. 179 Special relationships only existed between certain businesses and individuals, 180 hospitals and patients, 181 innkeepers and guests, and common carriers and passengers. 182 The Bjerke decision expanded nonfeasance liability into the realm of private citizens, specifically to custodians of minor guests using section 314A(4).

B. Application of Section 314A(4) Outside of Minnesota

Few other state supreme courts have recognized a section 314A(4) special relationship similar to that in Bjerke, making this decision a significant expansion of nonfeasance liability on the national scene, as well as in Minnesota.

To create a special relationship under section 314A(4), one

statute required a trailer park manager be on duty to respond to emergencies. Id. at 709 (majority opinion).

175. Id. at 709 (majority opinion).
176. See Gilbertson v. Leininger, 599 N.W.2d 127 (Minn. 1999); Harper v. Herman, 499 N.W.2d 472 (Minn. 1993).
179. However, appellate level cases had done so. See Laska v. Anoka County, 696 N.W.2d 133 (Minn. Ct. App. 2005) (holding that daughter of day care operator who had accepted entrustment of children had special relationship with infant who died of SIDS while at the daycare); Lundman v. McKown, 530 N.W.2d 807, 820–21 (Minn. Ct. App. 1995) (holding that where the child of a Christian Scientist mother died for lack of conventional medical treatment, the stepfather and the Christian Scientist nurse hired by the mother were in a special relationship with the child).
must take “the custody of another under circumstances such as to
deprive the other of his normal opportunities for protection.” Since
custody must exist before the second element is analyzed,
custody is often examined in more detail than is the second
element, deprivation of opportunities for protection.

1. Custody or Control

In _Bjerke_, the Minnesota Supreme Court determined that
custody can take on an informal and common-language meaning.
Relying on the Random House Dictionary definition, “keeping;
guardianship; care,” the court found that Johnson took custody
of Bjerke when she began living at Island Farm full-time for a
summer. Though custody has not been consistently defined
across the United States, the _Bjerke_ definition is significantly
broader than what most other state high courts have adopted.

One of the most common applications of section 314A(4) is in
the relationship between a prison and an inmate. Formal legal
custody exists in a prison setting, so it is well settled that the prison
must protect inmates during their confinement, even from suicide.
Custody has also been expanded to include traffic stops. When a police officer has stopped a person on the
roadside, the driver’s liberty is restrained. Even though the driver is not formally under arrest, he is not free to go. Thus, a special relationship may exist between the officer and the driver and even between the officer and the passengers in the vehicle.\footnote{188}{Id. However, no custody was found where a police officer stopped a woman on suspicion of drunk driving but did not arrest her. Nelson v. Driscoll, 983 P.2d 972, 981 (Mont. 1999). Rather, the officer suggested she walk home or get a ride, and she was killed by another driver as she walked home. \textit{Id.} at 975–76. The court stated that custody “contemplate[s] a degree of control akin to possession, or a degree of control which results in a physical or legal restraint on one’s liberty,” and it found that depriving Nelson of her ability to drive home did not place her in the officer’s custody. \textit{Id.} at 981.}

Courts have found hospitals and institutions to have custody of mentally ill or handicapped patients.\footnote{189}{See DeMontiney v. Desert Manor Convalescent Ctr. Inc., 695 P.2d 255, 260 (Ariz. 1985) (noting that institution caring for “mental hold” patient had custody of patient for purposes of section 314A); Hofflander v. St. Catherine’s Hosp., Inc., 664 N.W.2d 545, 572 (Wis. 2003) (holding that custody existed where a hospital assumed “enhanced responsibility to protect a vulnerable, mentally disabled person” as the hospital had more control over patient in psychiatric ward than other patients).}

When patients are involuntarily committed, a custodial relationship may exist subjecting the hospital or institution to liability for failure to protect.\footnote{190}{See In re T.W., 126 P.3d 491, 500 (Mont. 2005) (Leaphart, J., dissenting) (noting that woman with mental disabilities who was involuntarily committed to the Montana Developmental Center was indisputably within the custody of the center).}

In addition, schools often have custody over students. Courts have viewed a school or school district as standing \textit{in loco parentis}, in the place of the parents, while children are at school.\footnote{191}{E.g. Doe Parents No. 1 v. Hawaii Dep’t of Educ., 58 P.3d 545, 591 (Haw. 2002).}

By mandating school attendance, a “state usurps a parent’s protective custody of his or her child, replacing it with that of school teachers and administrators.”\footnote{192}{\textit{Id.}} Historically, the relationship between universities and their students was considered \textit{in loco parentis} as well because students were viewed as minors.\footnote{193}{See Nero v. Kansas State Univ., 861 P.2d 768, 774 (Kan. 1993); see also Webb v. Univ. of Utah, 125 P.3d 906, 911 (Utah 2005) (noting “... the fundamental reality that despite the relative developmental maturity of a college student compared to, say, a pre-schooler, a college student will inevitably relinquish a measure of behavioral autonomy to an instructor ...”).}

Today, however,
university students are generally viewed as adults and therefore not in the custody of universities.\textsuperscript{194}

Outside of these commonly accepted custodial relationships, state high courts have found the possibility of custody in a few outlying situations. Though none appear to have expanded custody quite to the level that \textit{Bjerke} did, these decisions approach the \textit{Bjerke} definition.

In two cases, the court found custody of minors in summer school programs which were voluntary, not statutorily mandated. In \textit{Graham v. Montana State University}, a high school student attended a camp at a university and was injured in a motorcycle accident there.\textsuperscript{195} The court concluded that, although the university did not have custody of its adult students, taking in a minor created a custodial relationship analogous to that of any school and its minor students.\textsuperscript{196} Additionally, in \textit{Brown v. Knight}, a four-year-old child was injured when she fell into a fire pit while playing at a park during a summer school program.\textsuperscript{197} The Massachusetts court held that the child was in the custody of the proprietress of the program.\textsuperscript{198} Both courts concluded that custody existed where the defendants had taken charge of minors. \textit{Brown} emphasized that payment was relevant.\textsuperscript{199} \textit{Graham} emphasized the similarity between the summer program and a high school setting.\textsuperscript{200} In contrast to the majority of cases recognizing custody of students by a school, neither court required that the children be compelled to participate in those programs.

In \textit{Erickson v. Lavielle}, the South Dakota Supreme Court confronted the issue of whether two adults who joined a group of children for a pontoon ride on the lake for a few hours assumed a section 314A(4) duty toward the children.\textsuperscript{201} The court determined

\textsuperscript{194}. \textit{See Nero}, 861 P.2d at 774. However, special relationships can still be formed between universities and students in some situations. \textit{See Webb}, 125 P.3d at 911.

\textsuperscript{195}. \textit{Graham v. Mont. State Univ.}, 767 P.2d 301 (Mont. 1988).

\textsuperscript{196}. \textit{Id.} at 303–04. Though the court found custody, and therefore a duty, the plaintiff failed to show proximate cause. \textit{Id.} at 304.


\textsuperscript{198}. \textit{Id.} at 792 ("[I]n taking for pay custody of Susan, a child unable to care for herself, in place of her parents or regular guardians, the defendant had an onerous duty to protect Susan from foreseeable harm, including a duty to take affirmative protective acts . . . .").

\textsuperscript{199}. \textit{Id.}

\textsuperscript{200}. \textit{Graham}, 767 P.2d at 303–04.

\textsuperscript{201}. \textit{Erickson v. Lavielle}, 368 N.W.2d 624 (S.D. 1985).
that it was a question for the jury and reversed summary judgment, holding the door open for a factual finding of custody in this situation.

In light of the scarcity of decisions with a similar definition of custody, the Bjerke court appears to be breaking new ground. Yet as we have seen, it is not completely alone in extending custody beyond its well-accepted applications, especially where minors are concerned.

2. Deprivation of Normal Opportunities for Protection

Once custody is established under section 314A(4), a court determines whether custody was taken "under circumstances such as to deprive [a person] of his normal opportunities for protection." In many decisions, the second element is simply implied, but in other cases, like Bjerke, the court offers a substantial explanation for the second element. The common applications of the second element closely align with applications of the first element. Specifically, prisoners and school children are often found to be deprived of the opportunity to protect themselves.

The Bjerke court held that Bjerke was deprived of her normal

202. Id. at 627.
203. It is useful to note cases where courts held that there was no custody. See, e.g., Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647 (Iowa 2000) (finding national chapter of a fraternity had no custodial relationship with an adult member who died due to excessive alcohol consumption); D.W. v. Bliss, 112 P.3d 232 (Kan. 2005) (where husband was mentoring and having illegal sexual relationship with a minor, inviting minor to the home and to other locations for sexual activity, the wife had no custody or control over minor who did not live in the home with husband and wife); Dupont v. Aavid Thermal Techs., Inc., 798 A.2d 587 (N.H. 2002) (holding that minor employee was not in custody of employer because employment is voluntary, employer was not parental proxy, and employment relationship not analogous to school/student relationship); In re Rockweit v. Senecal, 541 N.W.2d 742 (Wis. 1995) (holding that a family friend who visited the family's campsite and did not extinguish the campfire upon leaving did not have any custody over child who fell into the firepit).
204. Some appellate courts have utilized a more expansive concept of custody. A Restatement (Second) of Torts section 314A illustration is based in part on a New Jersey case where the court found that a grandmother who was babysitting her grandchild had custody of the child, and therefore she was potentially liable for the child's injuries that occurred during her watch. Restatement (Second) of Torts § 314A illus. 7 (1965) (citing Barbarisi v. Caruso, 135 A.2d 539 (N.J. Super. Ct. App. Div. 1957)).
205. Restatement (Second) of Torts § 314A(4) (1965).
206. See Restatement (Second) of Torts § 320 cmt. b (1965) (noting lack of ability to defend along with loss of protection from someone who would be likely to offer protection occurs in both the prison and school settings).
opportunities for self-protection because she was living away from her parents and was dependent on Johnson. This conclusion represents a new and broader application of the second element of section 314A(4). The decision essentially removes the common requirement that the deprivation of protection be involuntary.

It is well settled that an inmate confined in a prison has lost the ability to protect herself from at least some external factors. The prisoner is unable to avoid certain dangerous places or situations and has lost the potential protection of those who might otherwise provide it. In Joseph v. State, the court reasoned that the “imprisonment has diminished the prisoners’ ability to care for themselves or has limited the ability of others to help prisoners avoid harm, including self-inflicted harm.” Thus, the prison setting involuntarily removes the prisoner’s ability to defend herself and removes anyone else’s ability to protect the prisoner.

Schools also remove children from their parents’ protection, imposing on the school a duty toward the children. However, “[t]he basic premise for this duty is that a child is compelled to attend school so that the ‘protective custody of teachers is mandatorily substituted for that of the parent.’” The deprivation of normal opportunities for self-protection does not exist merely because the children are in the care of the school. By mandating

207. Bjerke v. Johnson, 742 N.W.2d 660, 666 (Minn. 2007).
209. Id.
211. Id.
212. See RESTATEMENT (SECOND) OF TORTS § 320 cmt. b (1965) (“[A] child while in school is deprived of the protection of his parents or guardian. Therefore, the actor who takes custody . . . of [that] child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.”).
213. Williams v. Ky. Dep’t of Educ., 113 S.W.3d 145, 148 (Ky. 2003) (quoting Yanero v. Davis, 65 S.W.3d 510, 529 (Ky. 2001)). See also Doc Parents No. 1 v. State, Dep’t of Educ., 58 P.3d 545, 591 (Haw. 2002) (stating that due to statute requiring school attendance, children were deprived “of the protection from reasonably foreseeable harm that their parents normally provide”); Marquay v. Eno, 662 A.2d 272, 279 (N.H. 1995) (noting that a major factor in the special relationship between a school and student is that school attendance is required); McLeod v. Grant County Sch. Dist. No. 128, 255 P.2d 360, 362 (Wash. 1953) (“[T]he relationship here in question is that of school district and school child. It is not a voluntary relationship. The child is compelled to attend school. He must yield obedience to school rules and discipline formulated and enforced pursuant to statute. The result is that the protective custody of teachers is mandatorily substituted for that of the parent.”) (citation omitted).
school attendance, the state essentially removes parents’ ability to protect their children.

In both prisons and schools, those in custody are deprived of opportunities for protection in part because others who might protect them are prevented from doing so. Neither the child nor the inmate is voluntarily in custody, and those that would normally protect the child or inmate have not voluntarily relinquished their ability to protect. That is not the case in *Bjerke*. Bjerke herself voluntarily went to live with Johnson, and Bjerke’s parents voluntarily relinquished their ability to protect their daughter by not living in the same home. Though the *Bjerke* decision is certainly a reasonable interpretation of section 314A(4), it significantly expands the definition of “deprivation of opportunities for self-protection.” Under *Bjerke*, the word “deprivation” no longer connotes an involuntary loss of rights; rather it merely means a “lack” of opportunity for self-protection.\(^{214}\)

However, when courts decrease the importance of involuntariness in the custody element, a corresponding decrease in involuntariness in the deprivation-of-protection element seems to be the trend. As noted earlier in *Graham*, the court broadened the custody element to the voluntary summer program for high school students at a college,\(^ {215}\) consequently broadening the deprivation-of-protection element as well. In *Brown*, when the child was in a summer school program at the park, the court similarly broadened the deprivation-of-protection element.\(^ {216}\) The *Bjerke* case seems to reflect the same trend. When the definition of custody is broadened, deprivation of opportunities for self-protection follows.

C. *Bjerke* Decision Grounded in Prior Minnesota Decisions

Over the last few decades, the Minnesota Supreme Court rarely found special relationships giving rise to a duty to protect—under section 314A(4) or otherwise.\(^ {217}\) Yet, as the court explained in each case why a special relationship did not exist, it provided criteria that would signal a special relationship.\(^ {218}\) Thus, while the

\(^{214}\) In fact, the *Bjerke* court used the term “lack” in place of “deprivation” in three instances. See *Bjerke* v. Johnson, 742 N.W.2d 660, 666–67 (Minn. 2007).

\(^{215}\) See supra text accompanying notes 195–96, 200.


\(^{217}\) See cases cited infra notes 219, 226. But see case cited infra note 223.

\(^{218}\) See cases cited infra notes 219, 223, 226.
Bjerke decision represents a significant expansion of nonfeasance liability under section 314A(4) in Minnesota, it is not inconsistent with the reasoning of cases leading up to Bjerke.

To briefly review, the court had set out multiple criteria signaling a section 314A special relationship. Custody or control,219 along with deprivation of “normal opportunities for protection,”220 or “normal powers of self-protection,” are required for a section 314A(4) relationship. Factors signaling deprivation of normal opportunities for protection include particular vulnerability, dependence, and considerable power held by the actor over another.221 Entrustment is important to special relationships generally.222 When entrustment exists, acceptance of entrustment is required.223 Additionally, whether an actor is in a position to assist and should be expected to assist is important.224 Finally, the court has recognized that duty is ultimately a question of policy,225 and sometimes special or unique circumstances create a duty.

1. Custody or Control over Daily Welfare

Until Bjerke, the Minnesota Supreme Court was not presented with facts that were persuasive on the custody issue.226 Several significant facts make Bjerke persuasive when prior cases were not.

As a minor, Bjerke resided with Johnson in her home for a substantial amount of time.227 Though not explicitly stated, the court may have distinguished between guests and live-in residents.

219. The term “custody” comes from section 314A(4) of the Restatement (Second) of Torts. The term “control” was added through case law. See Becker v. Mayo Found., 737 N.W.2d 200, 212 (Minn. 2007); Gilbertson v. Leininger, 599 N.W.2d 127, 131 (Minn. 1999); H.B. ex rel. Clark v. Whittemore, 552 N.W.2d 705, 708–09 (Minn. 1996); Donaldson v. Young Women’s Christian Ass’n of Duluth, 539 N.W.2d 789, 792 (Minn. 1995).
220. See Becker, 737 N.W.2d at 213; H.B., 552 N.W.2d at 709.
221. RESTATEMENT (SECOND) OF TORTS § 314A(4) (1965).
222. Becker, 737 N.W.2d at 213; Donaldson, 539 N.W.2d at 792; Harper v. Herman, 499 N.W.2d 472, 474 n.2 (Minn. 1993) (citing KEETON ET AL., supra note 15, § 56, at 374).
224. See H.B., 552 N.W.2d at 708; Erickson, 447 N.W.2d at 168.
225. Erickson, 447 N.W.2d at 168.
226. Funchess v. Cecil Newman Corp., 632 N.W.2d 666, 673 (Minn. 2001); Erickson, 447 N.W.2d at 169.
227. See Erickson, 447 N.W.2d at 169.
228. See cases cited supra note 219.
229. See Bjerke v. Johnson, 742 N.W.2d 660, 663 (Minn. 2007).
based on length of stay. In comparison, the plaintiff in Harper was an adult guest on a boat for one afternoon. In Gilbertson, the plaintiff was an adult house-guest who stayed overnight. In H.B., the minor plaintiffs never resided with the defendant, nor did the injury occur on the defendant’s property. In Donaldson, the plaintiff was an adult making a temporary residence at a YWCA. In Becker, the infant patient briefly stayed in the hospital to receive treatment for a particular problem; the hospital did not accept custody or take control over daily welfare. Johnson, in contrast, provided room and board, established rules, required chores, and had authorization to seek medical treatment for Bjerke. Because prior case law allowed “control over daily welfare” to substitute for custody, the facts in Bjerke support the court’s decision.

In short, because Bjerke resided for a substantial period of time under Johnson’s care, the living arrangement more closely resembled custody. The dissent did not even dispute the custody issue; rather, it argued that the custody did not deprive Bjerke of normal opportunities for self-protection. Although this decision significantly expanded the concept of custody, the court’s definition of custody had been developing over time, and Bjerke provided a significantly clearer showing of custody than prior cases.

2. Deprivation of Normal Opportunities for Self-Protection

Under prior case law, deprivation of normal opportunities for self-protection included additional factors: particular vulnerability, dependence, and the defendant’s considerable power over the plaintiff. The Bjerke case incorporates these elements—some
indirectly—in its analysis. At first glance, Bjerke appears somewhat inconsistent with prior cases applying this factor; however, it follows the formula of section 314A adopted in prior cases, making the deprivation of protection element secondary to the custody element.

In describing deprivation of opportunities for protection, the court applied the elements laid out in prior case law. The court directly addressed dependence, stating that “[t]he natural dependence which Bjerke would have had upon Johnson increased as her stays at the farm became progressively longer.” The court also indirectly addressed whether Johnson had considerable power over Bjerke, linking that factor to the level of control Johnson had over Bjerke’s daily welfare. The court did not directly address particular vulnerability, but it pointed out a “special consideration[]” that Bjerke lived in the same household as Bohlman when the abuse occurred, which could create extra pressure not to report.

In addition, although the court’s decision on deprivation of normal opportunities for self-protection appears at odds with prior cases on point, it is consistent with the formula set out in section 314A. In H.B. the court stated that small children could protect themselves because they could tell their parents about sexual abuse. In Becker the court stated that the infant was not deprived of the opportunity for self-protection because she had none to begin with. But in Bjerke, the court stated that a high school student who voluntarily lived away from her parents did not have normal opportunities for self-protection because her parents were not there to observe her behaviors. The outcomes are arguably inconsistent based on the age and vulnerabilities of the plaintiffs.

Despite the differing outcomes, the Bjerke decision was consistent with the language of the Restatement (Second) of Torts section 314A(4) that appeared in prior cases. The lack of a self-
protection element is subordinate to the custody element, and it need only be discussed where custody is found. Custody itself must create the circumstances which deprive a person of opportunities for self-protection in order to form a special relationship. Custody did not deprive the children in H.B. of anything, nor did custody deprive the infant in Becker of any protection. The custody arrangement did place Bjerke away from her parents’ daily observation. Whether the distance between parent and child sufficiently deprived Bjerke of the protection necessary to satisfy the requirement was a matter of dispute between the majority and the dissent. However, the Bjerke holding clearly applied the two elements of section 314A(4) in their proper order, the second dependent on the first, and therefore the decision is not inconsistent with H.B. or Becker where no custody was found.

3. Entrustment and Acceptance

The Bjerke decision also followed Erickson, pointing out that Bjerke’s parents entrusted Johnson with custody and that Johnson accepted that entrustment when she took Bjerke into her home. But like the Erickson decision, the court did not elaborate on entrustment. It also declined to comment on whether Johnson was in a position to assist Bjerke or whether she should have been expected to, a rule that came out of the Erickson decision.

4. Public Policy

Noticeably absent in the Bjerke decision on whether a special relationship existed was a discussion of public policy. Policy was a major consideration in several prior cases where the courts asked whether a defendant should be required to protect the plaintiff from criminal acts. Because crime prevention is primarily a government function, transferring it to a private party is a

247. Id. at 667 n.3 (majority opinion) (noting that when no custodial relationship exists any analysis of duty is dicta).
248. Id. at 666.
249. Id. at 665.
251. The court does address public policy later in the decision where it holds that primary assumption of the risk is not a defense for Johnson. See Bjerke, 742 N.W.2d at 670.
252. Funchess v. Cecil Newman Corp., 632 N.W.2d 666, 673 n.4 (Minn. 2001);
significant policy consideration. However, the Bjerke situation is distinguishable from the prior cases because the criminal was not a stranger, and, therefore, creating a duty to protect was justifiable on policy grounds.

In Pietila the court rhetorically asked, “[H]ow can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath, and the psychotic? Must the owner prevent all crime?” In Funchess, the court noted that “criminals are unpredictable and bent on defeating security measures.” In both cases, the court held there was no duty to protect against criminals. However, in Erickson the court took note of the inherent problem of a “duty to contain a slippery criminal” but held instead that the parking ramp presented such a “unique opportunity” for criminal activity that it justified a duty.

The Bjerke case is distinguishable in that a stranger did not commit the criminal acts. A member of the household, a person in an intimate relationship with both Johnson and Bjerke, committed the acts. While it may be impossible to predict a criminal break-in, it is possible to see signs of an inappropriate relationship occurring in one’s home and predict the harm that will come of it. Thus, the policy argument applied in prior cases against a duty to protect from unknown criminals is obviated when confronted with the situation in Bjerke.

D. Unanswered Questions: The Presence or Absence of Parents

The duty to protect based on a special relationship is fundamentally grounded in the nature of the relationship itself. When the relationship is between a child and a custodian, the custodian’s relationship with the parents may be irrelevant unless it enters through other means, as it did in Bjerke. The court found

---

Erickson, 447 N.W.2d at 169.


254. Funchess, 632 N.W.2d at 673 n.4 (denying a special relationship duty to protect between landlord and tenant).

255. Funchess, 632 N.W.2d at 673; Pietila, 362 N.W.2d at 333.


257. For example, under a common carrier/passenger special relationship where a child is a passenger on a train, the relationship between the parent and the child or between the parent and the railroad company is irrelevant; the child is
that a child’s “primary source of protection” is her parents,\textsuperscript{258} and, when parent and child live together, the parent “is more able” to observe behavior that would indicate abuse.\textsuperscript{259} The court concluded that, because Bjerke and her parents lived apart, her parents could not effectively make such observations, and thus Bjerke was deprived of normal opportunities for self-protection.\textsuperscript{260} The \textit{Bjerke} decision raises questions which will need to be addressed as the courts apply the \textit{Restatement (Second) of Torts} section 314A to caretaker/child relationships. The answers to these questions will determine the extent of the expansion in nonfeasance liability created by the \textit{Bjerke} decision.

Two alternative interpretations arise from \textit{Bjerke}, each generating its own subsequent problem. First, the court made no real inquiry into the level of oversight Bjerke’s parents had while living apart from her, which may indicate that the court believes that \textit{any} absence from parents is a deprivation of opportunities for self-protection. This would greatly expand liability for nonfeasance in a custodial relationship. Second, if the court were to analyze the factual situation to determine whether the parents had sufficient oversight while living apart, then the presence or absence of the parents’ oversight, a factor outside the control of the custodian, could affect the custodian’s liability.\textsuperscript{261}

Considering the first issue, if the court believes that \textit{any} child living apart from parents is deprived of normal opportunities for self-protection, then liability could be greatly expanded. Courts may even charge a custodian with a duty to protect against harm that the parents may not have been able to prevent.

The \textit{Bjerke} case is a good example of a situation where one could reasonably conclude that a child’s parents could not have protected her even if she had lived in their home. First, Bjerke never lacked the ability or the opportunity to tell anyone, including her parents, about her relationship.\textsuperscript{262} She talked to her parents in a special relationship with the railroad company because of his or her status as passenger. \textit{See} Bjerke v. Johnson, 742 N.W.2d 660, 674 (Minn. 2007) (Hanson, J., concurring).

\textsuperscript{258} Bjerke, 742 N.W.2d at 666.
\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} \textit{But cf. Restatement (Second) of Torts} § 324A (1965) (creating a duty to protect based on the relationship between one who “undertakes . . . to render services to another . . . necessary for the protection of a third person . . .” and the receiver of those services).
\textsuperscript{262} Bjerke, 742 N.W.2d at 666.
regularly on the telephone and frequently contacted them while living with Johnson. She intentionally kept the relationship a secret because she wanted it to continue. In addition, Bjerke was not forced to go to or remain at the farm, nor was she forced to enter into the relationship with Bohlman. Finally, no cited evidence indicated that Bjerke’s parents would have observed any behavioral changes in her if she had lived with them.

If a court concludes that living away from parents automatically equals deprivation of opportunities for self-protection, then a custodian may be liable for what the parents could not have prevented. If the parents could not prevent the harm, then arguably no actual deprivation of opportunity for self-protection would occur. Hence, negligence liability would turn on deprivation in theory rather than actual deprivation.

Considering the second issue, if liability depends on the level of the parents’ actual oversight of their child while living apart, then the custodian’s liability could depend on the parents’ relationship to the child, which runs contrary to the rule that the special relationship itself creates liability. For example, when parents are heavily involved in their child’s daily life by monitoring and observing her behavior via frequent visits, telephone calls, and e-mail, the likelihood that they will observe a change in behavior increases. Even if they do not observe a behavior change, the opportunity to do so exists. The child’s normal opportunities for self-protection, that is, her parents’ oversight, are not lost. It would follow then, that a parent who abdicates all oversight over the child creates a duty to protect in the custodian, while a parent who maintains a great deal of oversight relieves the custodian of a duty to protect. A caretaker’s liability could then turn on the level of oversight that the child’s parents choose to exercise. This would

263. Brief and Appendix of Appellant at 7, Bjerke v. Johnson, 742 N.W.2d 660 (Minn. 2007) (No. A06-0117).
264. Bjerke, 742 N.W.2d at 664.
265. Bjerke, 742 N.W.2d at 666–69. By her junior year, Bjerke had her driver’s license and drove herself back and forth between Island Farm and school. See Brief and Appendix of Appellant at 5, Bjerke v. Johnson, 742 N.W.2d 660 (Minn. 2007) (No. A06-0117). She subsequently enrolled in post-secondary education at a local college for her senior year of high school and thus had substantial independence. Id.
266. Bjerke, 742 N.W.2d at 664.
267. Compare to Becker, where the court held that the infant patient at the Mayo clinic was not actually deprived of opportunities for protection because she had none. Becker v. Mayo Found., 737 N.W.2d 200, 213 (Minn. 2007).
produce a result unfair to the custodian, and it would conflict with the special-relationship rule. The relationship must be between the actor and the person in need of protection—here, the custodian and the child.

Ultimately, the court’s emphasis on the idea that parental oversight constitutes “normal opportunities for self-protection” poses questions that future applications of the Bjerke decision must address. The direction the court takes with these questions will determine the true extent of the case’s expansion of nonfeasance liability in Minnesota, especially with regard to the protection of children.

E. Trend Toward Broader Liability for Nonfeasance and the Restatement (Third) of Torts

Through the introduction of special relationships, the exceptions to the no-duty-to-protect rule have been increasing, and commentators have long noticed a trend toward the expansion of liability.268 The Restatement (Second) of Torts expanded the Restatement (First) of Torts’ section on affirmative duty, listed specific special relationships for the first time, and noted that the law appeared to be “working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.”269 The Restatement (Third) of Torts recognizes even more special relationships and predicts new ones appearing on the horizon.

The third installment of the Restatement (Third) of Torts is titled “Liability for Physical Harm”270 and has substantially narrowed its scope to negligence and related issues.271 The structure differs significantly from the first two Restatements in both numbering and organization. In its current form, the Restatement (Third) of Torts

269. RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (1965).
270. The first two installments, Products Liability and Apportionment of Liability, were completed in 1998 and 2000 respectively. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM Introduction xli (Proposed Final Draft No. 1, 2005).
271. This installment does not cover products liability, intentional torts or liability for non-physical harm such as invasion of privacy or damage to reputation, all of which are either addressed in prior installments or still governed by the Restatement (Second) of Torts. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM Introduction xlii (Proposed Final Draft No. 1, 2005).
provides even more support for the *Bjerke* decision than did the *Restatement (Second)*.

First, one should note its organization. Chapter seven of the *Restatement (Third) of Torts* covers affirmative duties. It begins by rephrasing the no-duty rule and introducing the exceptions. Section 37 states that “[a]n actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38–44 is applicable.”

Next, the chapter lays out the seven areas of affirmative duty, the exceptions to the no-duty rule.

Of particular relevance to the *Bjerke* discussion is section 40, titled “Duty Based on Special Relationship with Another.” Section 40 recognizes more special relationships than did the *Restatement (Second) of Torts*, and it changes the language of the section 314A(4) custodial relationship applied in *Bjerke*. Section 40, part 7 reads:

(a) [A]n actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.

(b) Special relationships giving rise to the duty provided in Subsection (a) include:

... (7) a custodian with those in its custody, if:
a) the custodian is required by law to take custody or voluntarily takes custody of the other; and
b) the custodian has a superior ability to protect the other.

By replacing the “deprivation of opportunities for protection” language and requiring only that the custodian has “superior ability to protect,” the *Restatement (Third) of Torts* appears to expand the breadth of the custodial special relationship. Whether Johnson had a superior ability to protect Bjerke may be particularly

---

272. *Restatement (Third) of Torts: Liability for Physical Harm* § 37 (Proposed Final Draft No. 1, 2005). *Compare Restatement (Third) of Torts: Liability for Physical Harm, supra, with Restatement (Second) of Torts § 314 (1965) (“[T]he fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”).*


applicable in light of the injury. Where there is sexual abuse in the home, the court noted, the child is pressured not to report.\footnote{275}{Bjerke v. Johnson, 742 N.W.2d 660, 667 (Minn. 2007).}

Under the psychological pressure of sexual abuse and because of a minor’s inability to understand the long-term harm, a court might find that Johnson had a superior ability to report.

In addition, the comments and reporters’ notes to section 40 provide support for the \textit{Bjerke} decision in that they loosen the definition of custody to extend to more clearly voluntary relationships than is currently the case. They also recognize broader and more numerous special relationships than did the \textit{Restatement (Second) of Torts}.

The \textit{Restatement (Third) of Torts} recognizes a broader school/student special relationship, which was missing in the \textit{Restatement (Second)}, and it bases the duty on custody and replacement of the child’s parental protection.\footnote{276}{\textit{RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM} § 40 cmt. 1 (Proposed Final Draft No. 1, 2005).}

It notes that the school/student relationship includes students attending athletic competitions and notes the disparity between courts on special relationships between colleges and students, which have not entirely gone away.\footnote{277}{\textit{Id}.}

The comments and reporters’ notes provide examples of additional special relationships, such as between a daycare and its clients’ children, between camps and their campers,\footnote{278}{\textit{Id}. § 40 cmt. n.} and between a school bus driver and the bus’s riders.\footnote{279}{\textit{Id}. § 40 cmt. i (noting overlap between custodial relationships and those between common carriers and passengers).} This reflects a trend toward broader definitions of custody and deprivation of protection which will expand the special-relationship exception to the no-duty rule.

Additionally, the \textit{Restatement (Third) of Torts} notes that the special relationships listed are not exclusive.\footnote{280}{\textit{Id}. at cmt. O.} The reporters predict that a likely addition to the special relationship list is the relationship between family members, especially when they are living together.\footnote{281}{\textit{Id}.} The \textit{Restatement (Third)’s} comments also note that parents have a custodial duty toward their children,\footnote{282}{\textit{Id}.} though thus
far the parent/child relationship has not been added to the list of special relationships laid out in section 40. Again, the indication is that the Restatement (Third) of Torts is recognizing an expansion of liability based on special relationships.

While it remains to be seen how and when the new Restatement (Third) of Torts special–relationship rule will be applied to a custodial relationship, it represents a trend toward greater liability. Based on the Bjerke decision, Minnesota may be at the forefront of this trend.

V. CONCLUSION

American courts have historically been reluctant to create a duty in one person to protect another, so the Bjerke decision reflects a significant expansion of nonfeasance liability both in Minnesota and across the country. However, the decision clearly employs the special–relationship factors laid out in decisions leading up to Bjerke and thus is consistent with prior Minnesota common law.

The Bjerke decision does leave us with questions about how it will be applied in the future. Does the court believe that any separation between child and parents is a deprivation of opportunity for self-protection? Alternatively, does the level of parental oversight determine whether an opportunity for self-protection is lost? Future courts may be asked to answer these questions, and their answers will determine the scope of the Bjerke decision.

Ultimately, the Bjerke decision represents what the Restatement (Third) of Torts and commentators predict is a trend toward greater nonfeasance liability through the exception of special relationships. Bjerke nudged open the door to greater nonfeasance liability in Minnesota. It broadened the definition of custody and the concept of deprivation of opportunities for self-protection. Now the courts must decide just how far that door has been opened.