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Volume 26
Number 2 *Mineral Law Symposium*

Volume 26 | Number 2

Winter 1990

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EXPLORING THE BOUNDARIES OF DISCRETIONARY IMMUNITY IN OKLAHOMA: *NGUYEN V. STATE*

I. INTRODUCTION

When the government releases a confined mental patient with a history of violence or dangerousness, should the victim of crimes committed by the released patient be allowed to seek compensation by means of civil action against the government? Individuals must be adequately protected from the improper use of official decision-making power to release potentially dangerous mental patients into society.[1] Although the patient has a right to effective treatment, the public has a right to "relief against governmental misconduct."[2] The competing interests of the public's safety and the patient's treatment must be balanced.[3]

In 1990, the Oklahoma Supreme Court faced a case of first impression, *Nguyen v. State*,[4] involving the appeal of a wrongful death action for a murder committed by a mental patient who had been released from a state facility. Oklahoma's Governmental Tort Claims Act[5] waives sovereign immunity in some cases but excepts discretionary acts of the state or its employees from this waiver. Based on the discretionary function exemption, the lower court granted the state's motion to dismiss.[6] On appeal, the Oklahoma Supreme Court established that release decisions are not extended immunity by the discretionary function exception to sovereign liability and that the state must seek shelter from civil liability under a provision that provides immunity for acts done in conformance with "current recognized standards."[7] The court's decision follows the trend of imposing liability on the tortfeasor while protecting good faith

1. *See* Vanderpool v. State, 672 P.2d 1153 (Okla. 1983). There, the court noted that "[r]eexamination of the soundness of the concept of governmental immunity in the light of the expanded role of government in today's society has . . . resulted in a retreat from the concept both legislatively and by case law." *Id.* at 1155.

2. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963).

3. 19 AM. JUR. 2D *Proof of Facts* 583, 596 (1979).

4. 788 P.2d 962 (Okla. 1990).

5. OKLA. STAT. tit. 51, §§ 151-172 (1981 & Supp. 1990).

6. *Nguyen*, 788 P.2d at 963.

7. *Id.* at 966. OKLA. STAT. tit. 51, § 155(28) (1981 & Supp. 1990) provides that "[t]he state or a political subdivision shall not be liable if a loss or claim results from . . . [a]cts or omissions done in conformance with then current recognized standards."

decisions.[8] By pushing decisions to release mental patients from state hospitals out from behind the protective shield of the discretionary function exception to Oklahoma's waiver of sovereign immunity, the *Nguyen* decision forces the state to take a closer look at potentially negligent releases.

II. History of Immunities

A. *Broad History and Origin of Sovereign Immunity*

Certain societal goals or values have dictated that some entities be free of, or immune to, liability for torts.[9] Thus, historically, charities, governments, sovereigns, and even family members have been extended blanket immunity from tort liability for various purposes including protecting the public pocket book,[10] preserving the dignity of the King,[11] and preserving the family unit.[12] These categories were outcome-determinative and arbitrary in their results.[13] The doctrine of sovereign immunity has traditionally offered the sovereign, or government, complete protection from any and all tort liability.[14] This doctrine, derived from the legal structure of England,[15] centered on the idea that "the King could do no wrong."[16] Sovereign immunity was also supported by the concept that courts, as a branch of government, should not be used

8. An extensive list of cases demonstrating judicial disapproval of immunity appears in Vanderpool v. State, 672 P.2d 1153, 1156 n.9 (Okla. 1983).

9. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 131 (5th ed. 1984) [hereinafter PROSSER & KEETON].

> The idea was that, though the defendant might be a wrongdoer, social values of great importance required that the defendant escape liability. The immunity thus might be thought to differ from a privilege, such as the privilege of self-defense, which may reflect the judgment that the defendant's action is not tortious at all, or if tortious, is morally justified.

Id.

10. Payton v. United States, 679 F.2d 475, 487 (5th Cir. 1982).

11. Comment, *Discretionary Immunity in California in the Aftermath of Johnson v. State*, 15 SANTA CLARA L. 454, 454 (1975).

12. PROSSER & KEETON, *supra* note 9, § 122, at 902.

13. *See* Jaffe, *supra* note 2, at 218. "The dichotomy between 'ministerial' and 'discretionary' it [sic] at the least unclear, and one may suspect that it is a way of stating rather than arriving at the result." *Id.*

14. PROSSER & KEETON, *supra* note 9, § 131. at 1033.

15. Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 81 (1968) (quoting Baer, *Suing Uncle Sam in Tort*, 26 N.C.L. Rev. 119 (1948)). "It seems an anomaly that the theory 'the King can do no wrong' could become so entrenched in the laws of a country founded on the precept that the King had indeed done wrong." *Id.*

16. Feres v. United States, 340 U.S. 135, 139-40 (1950). "[T]he political theory that the King could do no wrong was repudiated in America," although our courts have historically supported the doctrine of sovereign immunity. *Id.*

against the government without its consent.[17]

Catalyzed by changing attitudes and understandings,[18] the entire idea of immunity is now being judicially and legislatively limited or abandoned. Courts, demonstrating a growing disenchantment with the protection of immunities, are displaying increasing disapproval of absolute sovereign immunity.[19] Federal and state governments have legislatively responded to this trend by statutorily weakening or abolishing the principle of sovereign immunity.[20]

B. *Federal Sovereign Immunity*

Congress responded to the need that evolved[21] for broadening the Federal shoulders of liability for tortious behavior by enacting the Federal Tort Claims Act (FTCA)[22] in 1946 with the stated purpose of initiating "novel and unprecedented" governmental liability.[23] The FTCA waives governmental immunity and allows the federal government to be sued for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" in instances where a private person would be liable under the same circumstances.[24] Despite this comprehensive language, the FTCA retains a measure of immunity by including certain exceptions.

Under one exception, sovereign immunity is not waived where the act or omission is "based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty* on the part of a federal agency, or an employee of the Government, *whether or not the*

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17. Note, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*, 56 IOWA L. REV. 930, 946 (1971).

18. PROSSER & KEETON, *supra* note 9.

19. *See supra* note 8.

20. *See* Comment, *Misapplication of Governmental Immunity - Epting v. Utah*, 1976 UTAH L. REV. 186, 187.

21. *See* Feres v. United States, 340 U.S. 135, 140 (1950). Prior to enactment of the Federal Tort Claims Act, Congress could grant a private bill to waive sovereign immunity in a specific case. As the requests for these private bills increased, a two-fold pressure mounted on Congress. First, Congress needed to lighten their own burden by shifting this duty to resolve private claims to the courts. Second, Congress needed to provide for more equitable treatment of individuals injured by torts of the federal government. *Id. See also* Gottlieb, *Tort Claims Against the United States*, 30 GEO. L.J. 462, 464 (1942) for information about the requests for private bills and the pressure created on Congress by their volume during 1939-40.

22. 28 U.S.C. §§ 1346, 2671-80 (1982 & Supp. 1990).

23. Johnson v. United States, 749 F.2d 1530, 1533 (11th Cir. 1985) (quoting Rayonier Inc. v. United States, 352 U.S. 315, 319 (1957)). *See also* Appellants' Brief-in-Chief at 3, *Nguyen*, 788 P.2d 962 (Okla. 1990) (No. 71,844).

24. 28 U.S.C. § 1346(b) (1982).

discretion involved be abused."[25] The discretionary function exemption is a pivotal jurisdictional limit because it exempts all claims based upon the exercise of a discretionary function or duty.[26] The exemption differentiates discretionary actions from ministerial actions, with immunity extending only to conduct that springs from discretionary functions or duties. Establishing the scope of discretionary immunity, however, has caused great conflict and controversy among litigants and courts.

The seminal case regarding the discretionary function exception was *Dalehite v. United States*,[27] where the United States Supreme Court found the discretionary exception to be a wide door that often swings on the hinges of whether or not the action involved policy judgment. The *Dalehite* court relied on the distinction between planning decisions (discretionary) and operational decisions (non-discretionary). Applying the planning-operational test stringently in the government's favor, the Court held that "[w]here there is room for policy judgment and decision there is discretion."[28] The Court, however, declined to conclusively define the discretionary function exception.[29]

Subsequent Supreme Court decisions have reaffirmed the planning-operational distinction, while greatly narrowing the *Dalehite* parameters for discretionary functions.[30] The decisions indicate that initial decision-making may be immune from liability but the execution of those decisions is not.[31] In addition, it appears that there is a measure of governmental importance in discretionary actions, while non-discretionary actions are more routine and lack this type of larger gravity.[32] Because almost every action could be described as discretionary, the Supreme Court has placed significant emphasis on whether the activity is one that Congress intended to protect from liability.[33] Nonetheless, the Court has

25. 28 U.S.C. § 2680(a) (1982) (emphasis added).

26. *See* Dalehite v. United States, 346 U.S. 15 (1953) (Government dismissed as a defendant based on the discretionary function exception).

27. 346 U.S. 15 (1953).

28. *Id.* at 36.

29. *Id.* at 35. "It is unnecessary to define, apart from this case, precisely where discretion ends." *Id.*

30. *See* Berkovitz v. United States, 486 U.S. 531 (1988); Indian Towing Co. v. United States, 350 U.S. 61 (1955).

31. *See supra* note 30.

32. Jaffe, *supra* note 2, at 237.

33. *Berkovitz*, 486 U.S. at 536. In *Berkovitz*, the Court questioned "whether [the] judgment is of the kind that the discretionary function exception was designed to shield." *Id.* Similarly, the Court in United States v. Varig Airlines, 467 U.S. 797 (1984) questioned whether the conduct was "of the nature and quality that Congress intended to shield from tort liability." *Id.* at 813.

continued to express unwillingness to conclusively define the discretionary exception.[34]

Despite the ambiguity, the use of the basic planning-operational analysis to differentiate between discretionary and non-discretionary actions now enjoys extensive application in federal and state courts. Although the distinction between planning and operational decisions is often difficult to apply, it generally charges governmental employees with the duty of non-negligent execution of policy/planning decisions.[35]

In actions entailing the negligent release of mental patients, the delineation between discretionary and non-discretionary functions has often been a critical task.[36] Under Federal law, the release of a mental patient is ordinarily considered a ministerial, non-discretionary action performed in the wake of policy formation.[37] Consequently, under the FTCA, liability for injuries caused by the mentally ill has frequently been imposed on the public facilities treating them.[38]

C. *Purposes of Discretionary Immunity*

Understanding the fundamental purposes behind the protection of discretionary immunity is crucial to its application. Our government's separation of powers dictates that discretionary legislative and executive decisions be protected from judicial review advanced by civil liability.[39] The functionality of our government requires that a waiver of sovereign immunity not interfere with governmental decision-making and policy-setting by granting the judiciary the ultimate authority to review such

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34. United States v. Varig Airlines, 467 U.S. 797 (1984) [hereinafter *Varig*]. The *Varig* Court stated that "[a]s in *Dalehite* it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception." *Id.* at 813.

The Supreme Court in *Berkovitz,* while agreeing with *Varig*, offered more clarification of the exception as it relates to regulated activities. The Court in *Berkovitz* refused to bring all regulatory activities within the exception, stating that "[w]hen a suit charges an agency with failing to act in accord with a *specific mandatory directive*, the discretionary function exception does not apply." *Berkovitz* 486 U.S. at 545 (emphasis added). The Court reasoned that an employee's actions do not involve discretion when that action has been specifically prescribed by policy or regulation. The very purpose of specific requirements is to curtail the use of employee judgment. *Id.* at 538-39.

35. Comment, *supra* note 20, at 188-90.

36. The discretionary function exemption has been the widely-used defense in actions based on the negligent release of a mental patient. *See* Comment, *supra* note 11, at 454.

37. *See* Underwood v. United States, 356 F.2d 92 (5th Cir. 1966); Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980).

38. Comment, *Tort Liability for California Public Psychiatric Facilities: Time for a Change*, 29 SANTA CLARA L. REV. 459, 481 (1989).

39. Elgin v. District of Columbia, 337 F.2d 152 (D.C. Cir. 1964). The government must "operate freely and without the inhibiting influence of potential legal liability asserted with the advantage of hindsight." *Id.* at 154-55. *See also* Note, *supra* note 17 at 946.

matters.[40] The courts cannot endeavor to ascertain when government decisions are reasonable[41] and the courts are not "equipped to investigate and weigh the factors which enter into the decision of other branches."[42] A second purpose of the discretionary function exemption is protection of the public purse. The necessity of thwarting unacceptable financial costs that could result from making all government decisions subject to judicial assessment is inherent in the basic concept of immunity.[43] Governmental tort liability could debilitate the government financially, thus impairing the delivery of services to the general public.

D. *Oklahoma's History of Sovereign Immunity*

The State of Oklahoma has followed a path similar to many other states in an agonized transition from absolute sovereign immunity to limited immunity. Prior to 1978, Oklahoma and every state entity, including all political subdivisions, operated under the common law doctrine of absolute sovereign immunity.[44] The state held a position similar to the pre-FTCA federal posture—the state could not be sued without legislative authorization. Consent required passage by the legislature of a private bill waiving immunity in that particular case.[45]

Several events eventually led to the legislative withdrawal of absolute immunity for political subdivisions of Oklahoma and, ultimately, the state itself. The common law sovereign immunity of political subdivisions was first weakened by a number of cases.[46] Responding to the judicial weakening of absolute immunity in Oklahoma as well as other states,[47] the Oklahoma legislature exposed political subdivisions to liability by enacting the Political Subdivision Tort Claims Act (PTCA)[48] of

40. *See* Note, *supra* note 17 at 946.

41. United States v. Varig Airlines, 467 U.S. 797 (1984). The Supreme Court stated that one purpose of the discretionary function exception is "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of a tort suit." *Id.* at 814. *See also* Jaffe, *supra* note 2, at 237.

42. Payton v. United States, 679 F.2d 475, 487 (5th Cir. 1982). *See also* Jaffe, *supra* note 2, at 237.

43. *See* Reynolds, *supra* note 15, at 122.

44. In 1978, the Oklahoma Legislature passed the Political Subdivision Torts Claim Act, which was replaced by the Governmental Tort Claims Act in 1985. OKLA. STAT. tit. 51, §§ 151-170 (1978), *repealed by* OKLA. STAT. tit. 51 §§ 151-172 (1981 & Supp. 1990).

45. *See supra* note 21 and accompanying text.

46. *See* Vanderpool v. State, 672 P.2d 1153 (Okla. 1983); State *ex rel.* State Insurance Fund v. Bone, 344 P.2d 562 (Okla. 1959).

47. *See* Jones v. State Highway Commission, 557 S.W.2d 225 (Mo. 1977); Mayle v. Pennsylvania Department of Highways, 479 Pa. 382, 388 A.2d 709 (1978).

48. OKLA. STAT. tit. 51, §§ 151-170 (1978), *repealed by* OKLA. STAT. tit. 51, §§ 151-172 (1981 & Supp. 1990).

1978. The PTCA waived immunity for cities, counties, and school districts, but left the state itself immune.[49]

The Oklahoma Supreme Court, frustrated by the absence of constitutional restrictions[50] and the lack of legislative action to limit the immunity of the state itself, carved the first inroad weakening absolute state immunity from liability in a 1959 decision, *State ex rel. State Insurance Fund v. Bone.*[51] There, the court made limited state liability possible by holding that the distinction between governmental and proprietary functions was dispositive in deciding if the state could use the immunity defense.[52] This distinction between governmental and propriety functions circumvented absolute immunity by allowing possible recovery if the negligently performed function was proprietary.[53]

Judicial pressure on the legislature to remove state immunity culminated in the court's abrogation of the sovereign immunity doctrine in *Vanderpool v. State.*[54] In response, the Oklahoma legislature, in 1985, statutorily abrogated state immunity by replacing the PTCA with the Governmental Tort Claims Act (GTCA or the Act).[55] The GTCA

49. OKLA. STAT. tit. 51, § 153 (1978).

50. Although any indepth treatment of the constitutional issues is beyond the scope of this note, it is well established that the concept of sovereign immunity has withstood due process and equal protection attacks at the federal and state levels. For attacks on validity of Oklahoma's immunity, under both the Oklahoma Constitution and the United States Constitution, *see, e.g.*, Hazlett v. Board of County Commissioners, 168 Okla. 290, 32 P.2d 940 (1934); Board of County Commissioners v. Guaranty Loan & Investment Corp., 497 P.2d 423 (Okla. 1972); Neal v. Donahue, 611 P.2d 1125 (Okla. 1980). These challenges were often based on OKLA. CONST. art. II, § 6, which states that "[t]he courts of justice of this State shall be open to every person and speedy and certain remedy afforded for every wrong . . . ." *Id.*

51. 344 P.2d 562 (Okla. 1959).

52. *Id.* at 569.

53. Comment, *Texas Municipal Liability: An Examination of the State and Federal Causes of Action*, 40 BAYLOR L. REV. 595, 604 (1988). A governmental function is one that is traditionally performed by the government and benefits the public in general, such as providing police protection, fire protection, schools, and garbage collection. A proprietary function is undertaken when the government voluntarily engages in a business that is normally carried on by private companies intended to produce revenue, such as operating swimming pools, hospitals and zoos. *Id.*

Although the primary inroad into state sovereign immunity was the proprietary function exception until the Court's decision in Vanderpool v. State, 672 P.2d 1153, 1156-57 (Okla. 1983), two further exceptions were judicially developed to narrow the application of the sovereign immunity doctrine. In the first exception, the judiciary refused, in some cases, to apply the doctrine where liability insurance had been procured. *See* Schrom v. Oklahoma Industrial Development, 536 P.2d 904 (Okla. 1975); Lamont Independent School Dist. #1-95 v. Swanson, 548 P.2d 215 (Okla. 1976). In the second exception, immunity was judicially held to be waived where the state was involved in a contract. *See* State Bd. of Public Affairs v. Principal Funding Corp., 542 P.2d 503 (Okla. 1975).

54. 672 P.2d 1153 (Okla. 1983). When *Vanderpool* was decided in 1983, only five states, including Oklahoma, still clung to the doctrine of sovereign immunity as an absolute bar to liability. *Id.* at 1155.

55. OKLA. STAT. tit. 51, § 151-172 (1981 & Supp. 1990). *See also* 1984 Okla. Sess. Laws 811.

waives sovereign immunity[56] for the "state"[57] and its employees in a limited class of cases. It eradicates the governmental-proprietary distinction,[58] and provides a long list of carefully delineated exceptions to the waiver of immunity.[59] Oklahoma's GTCA, like the FTCA, contains a discretionary function exemption.[60] Defining what actions involve the degree of discretion necessary to place them under the umbrella of the discretionary exemption is a difficult task. If the discretionary exception is broadly interpreted, almost every act by a government employee or official could be construed as exempt from the immunity waiver, thus effectively eviscerating the waiver of immunity embodied in Oklahoma's GTCA.[61] On the other hand, too narrow an interpretation frustrates the original purposes of sovereign immunity. Courts must "strik[e] a balance between the plain meaning of the statute and traditional legal concepts."[62] The dilemma leaves the interpreting court somewhat in the position of a "superlegislature" that must balance conflicting interests.[63]

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56. OKLA. STAT. tit. 51, § 152.1 (Supp. 1990) states:

> A. The State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The state, its political subdivisions, and all of their employees acting within the scope of their employment, whether performing governmental or proprietary functions, shall be immune from liability for torts.
>
> B. The state, only to the extent and in the manner provided in this act, *waives its immunity* and that of its political subdivisions. In so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution.

Id. (emphasis added). Section 153 provides:

> A. The state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment subject to the limitations and exceptions specified in this act and only where the state or political subdivision, if a private person entity, would be liable for money damages under the laws of this state. . . .

Id.

57. OKLA. STAT. tit. 51 § 152(10) (Supp. 1990) provides that "'State' means the State of Oklahoma or any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality thereof." *Id.*

58. *Id.* at § 152.1(A).

59. *Id.* at § 155.

60. *Id.* at § 155. Section 155(5) provides, in pertinent part, that:

> The state or a political subdivision shall not be liable if a loss or claim results from:
>
> . . .
>
> 5. Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees . . . .

Id.

61. *Nguyen*, 788 P.2d 962, 964 (Okla. 1990).

62. Ricco, *Developments in Tort Liability of The Federal Government Under the Federal Tort Claims Act*, 1987 ANN. SURV. AM. L. 619, 620.

63. *Id.* at 620.

III. Statement of the Case

A. *Facts*

On February 26, 1987, David Earl Hart, a mental patient known to have violent tendencies, was given a limited release to outpatient status by Central Oklahoma Community Health Center.[64] On July 10, 1987, Hart randomly selected and fatally shot 18-year-old Dung Ngoc Nguyen, a college student who was employed by a movie theatre in Oklahoma City.[65] Nguyen's parents sued the State of Oklahoma for his wrongful death, claiming that the state, acting through the health center facility, was negligent in releasing Hart.[66] The State's motion to dismiss was granted by the trial court, based on the authority of an Oklahoma statute which permits the changing of a mental patient's status from inpatient to outpatient "when, in the opinion of the person in charge, such transfer will not be detrimental to the public welfare or injurious to the patient . . . ."[67] The trial court held that the decision to release is a discretionary function and, therefore, immune from tort liability.[68] The parents of the decedent appealed.

B. *Issue*

On appeal, the Oklahoma Supreme Court addressed the issue of whether the decision to release a mental patient is a discretionary function under Oklahoma's GTCA that renders the state immune to liability for injuries to a third party caused by a released mental patient.[69]

IV. The Nguyen Decision

The Oklahoma Supreme Court ruled that the State's decision to release a mental patient is not discretionary and, therefore, does not enjoy immunity from liability for tortious actions.[70] In evaluating the presence

64. *Nguyen*, 788 P.2d at 963.
65. *Id. See also* Appellants' Brief-in-Chief, supra note 23, at 1.
66. *Nguyen*, 788 P.2d at 963.
67. *Nguyen*, 788 P.2d at 963-64 n.2, (citing OKLA. STAT. tit. 43A, § 7-101(c) (Supp. 1986)). Reflecting subsequent changes, outright discharge under current Oklahoma law requires that the patient not be "dangerous to himself or others." OKLA. STAT. tit. 43A, § 7-101(B)(1) (Supp. 1990).
68. *See Nguyen*, 788 P.2d at 963.
69. *Id.*
70. *Id.* In so ruling, the court summarily overruled a contradictory 1988 appellate decision, Powell v. State, 770 P.2d 903 (Okla. Ct. App. 1988), which had held that a release decision for involuntary commitment was a discretionary act and exempt from liability. *Id.* Just three months after the *Nguyen* decision removed the cloak of state immunity from tort liability for negligent release of mental patients, the Oklahoma Supreme Court encountered a case involving the liability of a state hospital that released a diagnosed schizophrenic, who subsequently killed his stepfather. The

of nonliable discretion in decisions regarding the care of confined mental patients, the *Nguyen* decision endorsed the use of the planning-operational test,[71] significantly narrowing the scope of activity that will fall within the discretionary exemption.[72] The court stated that the appropriate determinative factor for immunity is whether the state acted in conformance with currently recognized standards, as referred to in another exception to the waiver of immunity extended by the GTCA.[73]

V. ANALYSIS

In approaching the question of discretion in a decision to release or transfer a mental patient, the Oklahoma Supreme Court examined various aspects of the problem. The *Nguyen* court considered how broadly to apply the waiver of sovereign immunity by examining legislative intent.[74] The court decided what approach or test best served the purpose of the GTCA in marking the boundaries of discretionary functions.[75] The court also acknowledged the need to protect the public and the state, and the competing policy interests at stake.[76]

A. *The Breadth of Sovereign Immunity*

In considering the intended breadth of the GTCA waiver of immunity, the court examined the legislative intent embodied in the GTCA to protect the state from widespread litigation arising from various routine decisions that have unfortunate consequences, including the erroneous release or transfer of a mental patient.[77] In assessing Oklahoma's GTCA, the *Nguyen* court pointed out that the legislature had specifically provided for immunity in other circumstances that involve injuries inflicted by state-confined individuals.[78] The inclusion of specific exemptions for activities involving prisoners and detained juveniles emphasizes

slaying occurred over two years after release. Although the summary judgment for the hospital was upheld due to the remoteness and unforeseeability of the murder, the court held that "a mental hospital may have a duty to foreseeable victims injured due to the negligent release of a psychiatric patient . . . ." Wofford v. Eastern State Hosp., 795 P.2d 516, 517 (Okla. 1990).

71. *Nguyen*, 788 P.2d at 964.

72. *Id.*

73. *Id.* at 966. (Okla. Stat. tit. 51, § 155(28) (1981 & 1990 Supp.) states that "[t]he state or a political subdivision shall not be liable if a loss or claim results from . . . [a]cts or ommissions done in conformance with then current recognized standards." *Id.*

74. *Nguyen*, 788 P.2d at 964.

75. *Id.*

76. *Id.* at 965-66.

77. *Id.* at 966.

78. *Id.* OKLA. STAT. tit. 51, § 155(23) & (24) (Supp. 1990) provides immunity for:

the exclusion of any similar provision for mental patients.[79] Furthermore, in amending the Act in 1988, the legislature split a former exemption that originally included immunity provisions for decisions involving both criminal and juvenile detainees[80] to provide separate comprehensive exemptions for each of those areas of government activity.[81] This further demonstrates the intentional exclusion of a specific provision extending all-encompassing immunity to activities regarding mental patients.

The Oklahoma Supreme Court affirmed previous decisions in noting that governmental immunity rooted in the discretionary function exemption is a very limited type of immunity[82] that will survive only where specifically granted by the Act.[83] Although the decision to release or transfer a mental patient invariably involves some discretion, the court reasoned that granting immunity in this area extends far too broad a protection to those responsible for decision-making.[84] Such a broad grant of immunity opens the door to negligently expeditious, poorly-evaluated decisions that are dangerous to the public.[85] Thus, the discretionary exception cannot be used as the basis for indiscriminate protection of the government.[86]

B. *Test to Identify Discretionary Functions*

The *Nguyen* court employed the widely-used planning-operational

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. . .

23. Provision, equipping, operation or maintenance of any prison, jail or correctional facility, or injuries resulting from the parole or escape of a prisoner by a prisoner to any other prisoner . . . .

24. Provision, equipping, operation or maintenance of any juvenile detention facility, or injuries resulting from the escape of a juvenile detainee, or injuries by a juvenile detainee to any other juvenile detainee . . . .

79. *Nguyen*, 788 P.2d at 966. "It is our construction of the Act in its entirety that the legislature could but did not exempt the analogous situation of the release of a mental patient." *Id.*

80. *See* 1988 Okla. Sess. Laws 1085.

81. *See supra* note 78.

82. *Nguyen*, 788 P.2d at 964 (citing Robinson v. City of Bartlesville Bd. of Educ., 700 P.2d 1013 (Okla. 1985)). The court did not agree with the State's argument that Oklahoma's GTCA should be interpreted as offering broader immunity than the FTCA because the FTCA requires that the act be done with *due care* to come under the immunity umbrella, while this requirement of due care is absent from the exemption provision in the GTCA. Answer Brief of Appellee at 15, Nguyen v. State, 788 P.2d 962 (Okla. 1990) (No. 71,844) (citing OKLA. STAT. tit. 51, § 155(5) (1986 Supp.); 28 U.S.C. § 2680(a)).

83. *Nguyen*, 788 P.2d. at 966 n.16 (citing Jarvis v. City of Stillwater, 669 P.2d 1108 (Okla. 1983)). *Jarvis* states that "[o]nly those remnants of that ancient doctrine may be deemed currently viable which draw their efficacy from an explicit provision in the Act[,]" and that "[u]nless *explicitly* immunized by law, a political subdivision [or any other state entity] is now *liable* in tort." *Id.* at 1111 (emphasis in original).

84. *Nguyen*, 788 P.2d at 964.

85. *Id.* at 965-66.

86. *Id.* at 964-65.

method in deciding whether the release of a mental patient is an immune, discretionary act or one that is non-discretionary and ministerial.[87] The test, developed by the United States Supreme Court in *Dalehite v. United States*,[88] considers planning decisions discretionary, but regards operational-type activities and decisions as ministerial. Justice Wilson, author of the *Nguyen* opinion, explained:

> Under [the planning-operational] approach, once a discretionary policy decision has been made, government employees have a duty to execute the policy on the operational level without negligence. Moreover, the general rule under the planning-operational test is that *the discretion is exhausted by the initial adoption of policy*, and that decisions to apply broad policy in specific cases are operational level decisions.[89]

The basic weakness in any discretionary-ministerial analysis lies in the fact that nearly every imaginable act involves some measure of discretion.[90] At what point does the amount of discretion involved render immunity desirable, subordinating the individual's good to protect the larger interest society holds in a functional government? The planning-operational approach answers this question by sheltering basic strategic decisions which involve balancing of policy considerations.[91] These decisions customarily occur at the beginning of the administrative process.

In deciding what test to use, the *Nguyen* court noted that the planning-operational approach was utilized in *Robinson v. City of Bartlesville Board of Education*,[92] where the court held that planning actions are discretionary while operational ones are non-discretionary or ministerial. *Robinson* resolved the question of where planning or discretionary actions ended and ministerial or operational actions began in the Bartlesville School Board's construction and maintenance of a parking lot.[93] The court held that the Board's decision to construct the parking lot was a discretionary decision based on policy, but that it was operational to carry out the decision to construct and maintain the parking lot in a

87. *Id.* at 964.

88. 346 U.S. 15 (1953).

89. *Nguyen*, 788 P.2d at 965 (quoting 19 AM. JUR. 2D *Proof of Facts* 583, 594-95 (1979)) (emphasis added).

90. Eisenberg, *The Vicarious Liability of Governmental Entities: Judicial and Legislative Attempts to Reduce Accountability for Tortious Acts*, 1987 ANN. SURV. AM. L. 637, 650 (1987).

91. *Nguyen*, 788 P.2d at 965.

92. *Nguyen*, 788 P.2d at 964 (citing Robinson v. City of Bartlesville Bd. of Educ., 700 P.2d 1013 (Okla. 1985)).

93. *Robinson*, 700 P.2d at 1017.

reasonably safe manner.[94] Promoting one of the basic purposes of discretionary immunity, this approach protects policymaking decisions of other governmental branches from judicial review.[95]

The *Nguyen* court reasoned that the planning-operational approach was similarly applicable to the release of a mental patient,[96] relying on *Lipari v. Sears, Roebuck & Co.*[97] *Lipari* involved the release of a Veterans Administration psychiatric patient to outpatient status.[98] Following release, the patient withdrew himself from the intended continuing outpatient treatment and ultimately injured a woman and killed her husband.[99] The woman sued the government and the seller of the gun for the wrongful death of her husband and her own personal injuries.[100] In its motion to dismiss, the government asserted the discretionary function exception as a complete defense.[101]

The *Lipari* court stated that the purpose of the discretionary function exception is "to bar tort litigation challenging governmental decisions which are founded on a balancing of *competing policy considerations*."[102] In considering the application of the discretionary function exemption, the court noted that the plaintiff challenged the "V.A.'s negligent implementation of its rules," or operational decisions, rather than the "V.A.'s rules or policies," which would be planning decisions.[103] Weighing this factor against the government, the *Lipari* court asserted that each and every exercise of judgment by a governmental official cannot provide a basis for use of the discretionary exemption.[104] The court held that the decision to release the patient to outpatient status was a non-discretionary, operational function and denied the government's motion to dismiss.[105] Similarly, the *Nguyen* court reasoned that only governmental actions that involve an appraisal and weighing of

94. *Id.*
95. Note, *supra* note 17, at 946.
96. *Nguyen*, 788 P.2d at 965-66.
97. 497 F. Supp. 185 (D. Neb. 1980).
98. *Id.* at 187.
99. *Id.*
100. *Id.*
101. *Id.* at 188.
102. *Id.* at 195 (emphasis added).
103. *Id.* The *Lipari* court noted that there are adequate, effective ways to scrutinize the decision to release a mental patient for actionable negligence, just as there are ways to evaluate similar decisions made by private therapists. Accordingly, "[i]n applying the [tort] standard, the Court will not be reviewing the reasonableness of the V.A.'s policies, but will be only assessing the reasonableness of the therapist's evaluation of [the patient]." *Id.*
104. *Id.* at 195-96.
105. *Id.* at 196.

competing policy interests are shielded by the discretionary function exemption.[106]

C. *Protection of the Public and the State*

1. Protecting the Public

The *Nguyen* court emphasized the underlying policy considerations of public welfare and safety inherent in granting state immunity to decisions to release mental patients.[107] The court focused on the State of Washington's treatment of a gruesome case, *Petersen v. State,*[108] involving the Washington State Tort Claims Act (TCA).[109] The *Nguyen* court observed that the facts in *Petersen* demonstrate the inherent danger to the public of broadly applied immunity and strongly "illustrate one of the overriding policy considerations affecting our decision today—public welfare and safety."[110] It is a rightful function of government to safeguard the public from dangerous individuals held in state facilities.[111] The statutory foundation of *Petersen,* the Washington TCA, provides:

> The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person.[112]

Following enactment of the TCA, Washington courts preserved the long-established discretionary policy of immunity enjoyed by the State of Washington prior to the Act, but narrowed its application.[113]

Applying the *Lipari* court reasoning, the *Petersen* court found that the decision to release a mental patient was not a policy decision.[114] The

106. *Nguyen,* 788 P.2d at 965.

107. *Id.* at 965-66.

108. 100 Wash. 2d 421, 671 P.2d 230 (1983). In *Petersen,* a mental patient was diagnosed as a drug abuser suffering from schizophrenia and was detained in a state hospital after an episode of self-mutilation. Less than one month later, he was allowed to visit his mother for a day. He failed to return and was caught recklessly driving a car. Despite this, he was released the next day. He shortly thereafter injured Petersen in a car accident and six months later, killed two people and raped another. 100 Wash. 2d at 423-25, 438, 671 P.2d at 234-35, 242.

109. *Nguyen,* 788 P.2d at 965.

110. *Id.* at 965-66.

111. *Id.* at 966. "Protection of the public from the harmful tendency of those incarcerated in State institutions is, we hold, a governmental function . . . ." *Id.* (quoting Neal v. Donahue, 611 P.2d 1125, 1128 (Okla. 1980)).

112. WASH. REV. CODE § 4.92.090 (1963). Oklahoma's Act similarly provides for the eradication of the distinction between governmental and proprietary acts and holds the state liable where a private person would be. *See supra* note 56 for text of Oklahoma's Act.

113. *Petersen,* 100 Wash. 2d at 431-32, 671 P.2d at 239-40 (1983).

114. *Id.* at 240-41.

Petersen court followed the majority trend in holding that the sole purpose of the immunity found in discretionary functions was to protect policy decisions from judicial evaluation.[115] Again, to qualify as a discretionary act, a decision must involve a balancing of policy considerations.[116] Based on the failure of the discretionary exception defense, the State of Washington had to defend itself on grounds that the decision was not negligent.[117] This approach provides the public with more protection because it discourages questionable releases.

2. Protecting the State

In addition to the necessity of safeguarding public welfare, the state must be allowed some measure of protection. Without some shield, the state could possibly sustain liability for the release of any mental patient who was discoverably violent.[118] The *Nguyen* court held that this protection could not arise from the discretionary function exemption. Rather, the court stated that state decisions to release mental patients are furnished the intended degree of protection by the exception which exempts "[a]cts or omissions done in conformance with then current recognized standards."[119] Indicating that no protection can be extended to negligence, the court stated that "[t]he state cannot exercise its judgment without due regard for the known facts and circumstances and have the advantage of immunity under our Act."[120] The *Nguyen* court remanded the case with instructions to the trial court to "determine whether the state acted within the then current recognized standards."[121] In summary, the court stated that, "the question is not whether the release of a mental patient is a protected discretionary function but whether acts allegedly committed by those charged with the release of mental patients fall below current recognized professional standards."[122]

D. *Competing Policy Interests*

Interpretation of the discretionary function exception as it relates to

115. *Id.* at 240 (citing King v. Seattle, 84 Wash. 2d 239, 246, 525 P.2d 228, 233 (1974)).
116. *Id.*
117. *Id.* at 240-41.
118. 19 AM. JUR. 2d *Proof of Facts* 583, 604 (1979). "[I]f the releasee's prior psychiatric history includes evidence indicating the possibility or likelihood that he might be dangerous or harm someone if released, a release may be found to have been negligent or even grossly negligent." *Id.*
119. *Nguyen*, 788 P.2d at 966 (quoting OKLA. STAT. tit. 51, § 155(28) (1981 & Supp. 1990)).
120. *Id.*
121. *Nguyen*, 788 P.2d at 966.
122. *Id.* *See also supra* note 70 and accompanying text.

the release of mental patients necessarily involves the weighing of conflicting interests.[123] The conclusion that a decision is discretionary is often, in reality, a complex policy determination. At odds are the interests of both the government and public in rehabilitating the mentally ill and ensuring public safety.[124] The goal of rehabilitating the mentally ill could be swallowed by the goal of averting possible risk of injury to members of society. Imposing liability on the government for the behavior of released patients could thwart the delivery of optimal care to these individuals.[125] Prioritizing these interests is difficult. Underlying, but often overlooked, societal goals support the efficient release of individuals who suffer from mental illness.[126] Society is benefited by the release of institutionalized mental patients, and potentially harmed by premature or inappropriate releases.[127]

The goal of our entire tort compensation system, the just allocation of losses,[128] is eviscerated by inappropriate governmental immunity. "Society should not be subjected to a risk of harm over which it has no control."[129] Following a judicial trend toward protection of the public safety interests with compensation for injury,[130] the Fifth Circuit Court of Appeals stated in *Payton v. United States*,[131] that "[t]he more serious, in terms of physical or mental impairment, and isolated the loss the closer the question becomes as to whether the individual can be expected

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123. Travin & Bluestone, *Discharging the Violent Psychiatric Inpatient*, 32 J. FORENSIC SCI. 999, 1003 (1987) states:

> The courts in California and New York, which have had numerous cases of negligent release, have pointed out the need of the public to accept certain facts about the treatment of mental disorders, including the facts that psychiatric treatment is not an exact science, that rehabilitative visits outside the hospital are often therapeutic, and that there are inherent risks in releasing patients which ultimately must be balanced against the needs of the patient to be given the opportunity to improve and return to society.

Id.

124. *See* Comment, *supra* note 38, at 484. "[R]ehabilitative programs are so vital that each member of society must accept the risk presented by a released patient." *Id.* (citing Beauchene v. Synanon Foundation, Inc., 88 Cal. App. 3d 342, 151 Cal. Rptr. 796 (1979)).

125. Leesfield, *Negligence of Mental Health Professionals: What Conduct Breaches Standards of Care*, 23 TRIAL 57 (1987). "Courts must carefully balance imposing liability against discouraging the least restrictive treatment. Failure to use the least restrictive treatment could impede patient recovery." *Id.*

126. Annotation, *Liability of One Releasing Institutionalized Mental Patient for Harm He Causes*, 38 A.L.R. 3d 699, 702 (1971).

127. 19 AM. JUR. 2D *Proof of Facts* 583, 596 (1979). *See also* Comment, *supra* note 11, at 464-66.

128. PROSSER & KEETON, *supra* note 9, § 1, at 6.

129. Comment, *supra* note 38, at 484-85.

130. *See* Hicks v. United States, 511 F.2d 407 (D.C. Cir. 1975); Eanes v. United States, 407 F.2d 823 (4th Cir. 1969); White v. United States, 317 F.2d 13 (4th Cir. 1963).

131. 636 F.2d 132 (5th Cir. 1981).

to absorb the loss as incident to an acceptable social or political risk of governmental activities."[132] Certainly society's individual members, when unnecessarily injured by this risk, should not find themselves blocked by governmental immunity from judicial recourse. This conflict has spawned a continuing struggle.

The *Nguyen* court acknowledged that society has at least a limited right to isolation from mentally ill individuals,[133] especially those with a history of dangerous behavior.[134] When the government is executing established policy decisions, there is a recognized duty to the public in general to use reasonable measures to protect society.[135] Studies indicate that a growing number of mental patients have a criminal history.[136] This is largely due to our progressing views of criminal rehabilitation and the mitigating power granted to evidence of mental illness.[137] The illusive goal is to encourage optimal care, including complete and limited release of the mental patients, while avoiding injuries caused by negligent release decisions.

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132. *Id.* at 144.

133. Nguyen v. State, 788 P.2d 962, 966 (Okla. 1990). *See also supra* note 107 and accompanying text. *Contra* Bowers v. De Vito, 686 F.2d 616 (7th Cir. 1982), which stated that the public has "no constitutional right to be protected by the state against being murdered by criminals or madmen." *Id.* at 618. In other words, a person has no absolute right to be protected from crimes committed by the mentally ill.

134. *See* Mestrovic & Cook, *The Dangerousness Standard: What Is It and How Is It Used?*, 8 INT'L J. LAW & PSYCHIATRY 443 (1986).

135. *Payton*, 636 F.2d at 147-48 (footnote omitted). The Oklahoma Supreme Court recently decided that a mental hospital may have a duty to foreseeable victims. *See supra* note 70.

136. "Crimes committed by the mentally ill appear to be widespread. Each year, 20,000 persons charged with crimes or convicted of crimes enter mental institutions." Carmen, *Civil Liabilities of Government Psychotherapists and Agencies for the Release of the Mentally Ill*, 12 J. PSYCHIATRY & LAW 183, 184 (1984). *See* also Travin, *supra* note 123, at 1002 nn.25-27 (citing Steadman, Cocozza, & Melick, *Explaining the Increased Arrest Rate Among Mental Patients: The Changing Clientele of State Hospitals*, 135 AM. J. PSYCHIATRY 816 (July 1978); Steadman, Vanderwyst, & Ribner, *Comparing Arrest Rates of Mental Patients and Criminal Offenders*, 135 AM. J. PSYCHIATRY 1218 (Oct. 1978); Rabkin, *Criminal Behavior of Discharged Mental Patients: a Critical Appraisal of the Research*, 86 PSYCHOLOGICAL BULL. 1 (Jan. 1979)).

137. *See* Carmen, *supra* note 136. The author states: "Another development has been in the insanity defense, where more states are opting for the 'guilty but mentally ill' verdict. This assures that such persons will serve time in a mental institution, the release date being determined by administrative agencies." *Id.* at 185.

In some instances where the confinement and treatment of a mental patient is court-ordered, the doctrine of judicial immunity has been extended to protect those carrying out these judicial mandates. *See* Tobis v. State, 52 Wash. App. 150, 758 P.2d 534 (1988); Adkins v. Clark County, 105 Wash. 2d 675, 717 P.2d 275 (1986). Another Washington court held that, "[w]hen psychiatrists or mental health providers are appointed by the court and render an advisory opinion to the court on a criminal defendant's mental condition, they are acting as an arm of the court and are protected from suit by absolute judicial immunity." *Tobis*, 758 P.2d at 537 (quoting Bader v. State, 43 Wash. App. 223, 226, 716 P.2d 925, 927 (1986)).

VI. FUTURE IMPLICATIONS

A. *Development of Current Recognized Standards*

The *Nguyen* court held that the determinative factor for granting state immunity is the adherence to "current recognized standards" required in a separate GTCA exception.[138] Perhaps the most difficult challenge arising from this decision will be the development of acceptable current recognized standards.[139] The extent of the state's duty to discover violent propensities in detainees will have to be established[140] and a method must be generated to determine if that duty has been fulfilled.[141] Various approaches have been taken by courts, but no approach has gained the widespread confidence of the judiciary.[142]

The *Nguyen* court expressed thoughtful recognition "of the fact that psychiatry is not an exact science and psychiatrists and/or therapists cannot predict with certainty the future acts of their patients,"[143] indicating that the requirement of conformity with current recognized standards is a potentially broad hoop to jump through. This acknowledgment may offer a measure of leeway and protection for the decision-maker while leaving negligent, incompetent decisions open to liability. Acknowledging that the lack of predictive technology makes accurate prophecy difficult, the *Nguyen* court avoided the formulation of specific guidelines for meeting the conformity-to-current-standards requirement.[144]

The statutory foundation for the acceptable Oklahoma standard relating to the discharge or transfer of patients is set forth in Oklahoma's Mental Health Act.[145] Before discharge, this statute requires that the

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138. OKLA. STAT. tit. 51, § 155(28) (Supp. 1990).

139. *See generally* Mestrovic & Cook, *supra* note 134.

140. Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977). (A leading case involving the parole of a prisoner which stated that the care exercised in evaluating the potential releasee must be commensurate with the potential risk).

141. *See* Annotation, *supra* note 126 at 700. Prevailing standards and guidelines are ambiguous. For example, one suggestion has been that the general standard of care is that of adequate "care, skill, and knowledge" to avoid being held liable. *Id.*

142. *See supra* note 126.

143. *Nguyen*, 788 P.2d at 966. The United States Supreme Court noted that "[p]sychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, or the appropriate diagnosis to be attached to given behavior and symptoms, or cure and treatment, and on likelihood of future dangerousness." Ake v. Oklahoma, 470 U.S. 68, 81 (1985).

144. *Nguyen*, 788 P.2d at 966.

145. OKLA. STAT. tit. 43A, § 7-101 (Supp. 1990) provides in part:

B. The person in charge shall discharge a patient:

1. *Who is not dangerous to himself or others . . . .*

person in charge formulate an opinion about the dangerousness of the patient.[146] In situations involving the transfer of a patient to outpatient status, the person in charge must determine whether a transfer to outpatient status is "detrimental to the public welfare," according to the rules prescribed by the Commissioner of Mental Health.[147] It is currently unknown whether the Commissioner's decisions in formulating rules for the transfer of mental patients to outpatient or other nonhospital status will be considered discretionary, planning decisions — decisions that involve the balancing of competing policy interests. The Commissioner's decisions could be considered merely operational ones that are subject to judicial scrutiny. If the Commissioner's decisions are regarded as operational and non-discretionary, this opens the avenue of governmental liability for his actions.

In the future, courts will have to decide what pre-decision acts conform to current recognized standards. Oklahoma's basic statutory foundation needs supplemental guidelines that specify adequate methodology to be used in forming non-negligent release and transfer decisions. Resolving difficult release questions is onerous without established guidelines that are supported by the professional community.

In reference to release and transfer, how does the decision-maker form a non-negligent opinion about the dangerousness of the patient? The answer has been established in assorted cases by employing several methods, including the use of the malpractice standard of ordinary care[148] and the gauge of professional judgment.[149] As an alternative to the professional standard or the criterion used to establish malpractice, a

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> C. *In accordance with rules prescribed by the Commissioner, a person in charge may transfer a patient to an outpatient or other nonhospital status when, in the opinion of the person in charge, such transfer will not be detrimental to the public welfare or injurious to the patient* and the necessary treatment may be continued on that basis . . . . .

Id. (emphasis added). In 1989, the legislature added the current requirement: "that the patient not be dangerous to himself or others." (S.B. No. 358, 42nd Leg., 1st Reg. Sess., 1989 Okla. Sess. Laws 1451, 1452).

146. OKLA. STAT. tit. 43A, § 7-101(B)(1) (Supp. 1990). *See also* Mestrovic & Cook, *supra* note 134.

147. OKLA. STAT. tit. 43A, § 7-101(C) (Supp. 1990). "Commissioner" is the person selected and appointed by the Mental Health Board. *Id.* at § 1-103(e).

148. *See* Perreira v. State, 768 P.2d 1198 (Colo. 1989). "The duty of the psychiatrist in such a case is to use reasonable care, in accordance with the knowledge and skill ordinarily possessed by psychiatric practitioners under similar circumstances, to protect potential victims from future acts of violence by the patient." *Id.* at 1213.

149. *Nguyen*, 788 P.2d at 966 refers to "current recognized professional standards." Perhaps public welfare should not be dependent on professional standards formulated by the very group that uses these self-made standards to establish due care.

three-judge dissent in *Perreira v. State*[150] suggested adoption of the Ohio Supreme Court's method, which entails a three-part judicially mandated test to establish liability.[151] The Ohio test accommodates competing policy concerns[152] by requiring, among other common sense provisions, "a thorough evaluation" of the likelihood of violence coupled with "good faith decision[s]" to release a mental patient.[153]

Another possibility, the requirement of a dispositive committee,[154] is a promising alternative to the one-man, "person in charge" approach called for in the Oklahoma Mental Health Act.[155] Such an approach has advantages for the patient and, because of its enhanced defensibility, for the state. Because a committee of various individuals make the decision to release or transfer the patient, there is less potential for negligence and error.

B. *Further Implications*

A growing segment of the hospitalized mentally ill are considered dangerous, escalating the number of confined mental patients whose release could create state liability.[156] Unless custodial authorities are given appropriate release guidelines, this developing area of liability could cause significant overcrowding and undertreatment of patients.[157]

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150. 768 P.2d 1198, 1226 (Colo. 1989).

151. *Id.* at 1226-27 (citing Littleton v. Good Samaritan Hosp. & Health Center, 39 Ohio St. 3d 86, 99, 529 N.E.2d 449, 460 (1988)).

152. *Id.* at 1227.

153. *Littleton*, 39 Ohio St. 3d at 99, 529 N.E.2d at 460. The Ohio Supreme Court held:

> [A] psychiatrist will not be held liable for the violent acts of a voluntarily hospitalized mental patient subsequent to the patient's discharge if: (1) the patient did not manifest violent propensities while being hospitalized and there was no reason to suspect the patient would become violent after discharge, or (2) a thorough evaluation of the patient's propensity for violence was conducted, taking into account all relevant factors, and a good faith decision was made by the psychiatrist that the patient had no violent propensity, or (3) the patient was diagnosed as having violent propensities and, after a thorough evaluation of the severity of the propensities and a balancing of the patient's interests and the interests of potential victims, a treatment plan was formulated in good faith which included discharge of the patient. *Id.*

154. *See* Travin & Bluestone, *supra* note 123, at 1006. "Our experience with this committee [approach] argues that it not only makes good clinical sense, but it also makes good legal sense." Such a committee could include the independent senior consulting psychiatrist, the person in charge, and the staff members actually involved with the patient. *Id.*

155. OKLA. STAT. tit. 43A, § 7-101(B) & (C) (Supp. 1990).

156. Several studies have indicated that approximately eleven percent of hospitalized mental patients have been violent prior to admission. Travin, *supra* note 123, at 1000. *See also* Carmen, *supra* note 136.

157. *See* Carmen, *supra* note 136, at 184. Carmen notes a very significant trend in mental health care toward deinstitutionalization. Reduced funding and staffing have reflected this longstanding trend toward community treatment. Thus, the system suffers from widespread inadequacy to support a growing number of institutionalized persons. If liability were imposed on the psychotherapist

Mounting patient admissions coupled with decreasing releases could place unacceptable financial and moral burdens on society. Supporting the increased institutionalized population could cripple the public treasury[158] as surely as the blanket exposure to tort liability promoted by the over-zealous application of the waiver of immunity. An increasing number of individuals could be funneled into a system constricted by lack of funding and manpower. The inhibiting effect of potential liability would impede the outflow. These considerations must be balanced with the importance of public safety concerns.

Additionally, by widening the door for government tort liability in the area of released mental patients, the *Nguyen* decision could advance the potential for state liability for other mental health care decisions. Liability could extend to the initial decision of whether or not to confine. The state could be charged with tort liability for the failure to initially institutionalize an individual who later injures himself or others. If liability for non-commitment develops, more and more of the segment of our population that might be evaluated as "dangerous" could pass through the loop of the institutionalized mentally ill. Another possibility that arises from the *Nguyen* holding is liability for failure to release. A patient experiencing continued confinement designed to avert state liability could sue the state for *not* releasing them.[159] Realistic, effective guidelines must be developed that address the inherent dilemma in mental health treatment between patient welfare and public safety.

VII. CONCLUSION

By stripping off the protection of the discretionary function exception to the state's waiver of immunity, the *Nguyen* decision forces the state to take a closer look at potential negligence in mental health care decisions.

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or the state each time the prediction of the future course of mental illness was wrong, few releases would ever be made. *Id.*

158. *See* Ricco, *supra* note 62, at 630. Also consider that liability for release ultimately imposes a heavier burden to commit those individuals who could be considered dangerous, having the detrimental synergistic effect of increasing the likelihood of injury caused by released patients simply because more individuals have been committed. *See also* Travin, *supra* note 123, at 1001.

159. Courts are traditionally very protective of an individual's right to freedom as evidenced by the insufficiency of the preponderance of the evidence standard and the requirement of clear and convincing evidence to initially have a person committed. *See* Addington v. Texas, 441 U.S. 418 (1979).

Also, it is possible that an individual's dangerousness is not adequate reason to deny his liberty. Even if a criminal is considered to be dangerous, but not insane, he is set free after he serves his sentence. *See* O'Connor v. Donaldson, 422 U.S. 563 (1975), where a mental patient sued the government for his continued confinement, depriving him of his constitutional right to liberty.

The specific circumstances of the case are often the only way to decide the matter. Although at least one court concluded that the public had to absorb the risk of releasing "rehabilitated" mental patients,[160] courts generally will find liability unless an honest error has been made. The critical emerging question is whether the decision was made with due care.

The *Nguyen* decision will lead to the demise in Oklahoma of the jurisdictional issue forced by the immunity question and suggests that future decisions in the area of governmental mental health care will focus on conformance with current recognized standards. It will lead to better resolutions based on full trials and factual development rather than summary disposition based on immunity.

Diana H. Clark

160. Beauchene v. Synanon Foundation, Inc., 88 Cal. App. 3d 342, 347, 151 Cal. Rptr. 796, 798-99 (1979).