ZARELLA, J., dissenting. In this appeal involving the sexual exploitation of the plaintiff, Tim Doe #1, by the late George E. Reardon, a physician formerly employed by the defendant, Saint Francis Hospital and Medical Center (hospital), the majority rejects all three of the hospital's jury instruction claims. I agree with the majority's conclusion as to one of those claims, namely, that the trial court properly instructed the jury regarding the existence of a custodial relationship between the plaintiff and the hospital. I strongly disagree, however, with the majority's other conclusions that the trial court properly declined to give the hospital's requested instructions as to knowledge of propensity and use of the hospital's bylaws[1] to establish the standard of care. In my view, both instructions were required by our law, and each instructional error was independently harmful, thus requiring reversal of the trial court's judgment.

With respect to the requested propensity instruction, the plaintiff, the hospital and the trial court all viewed count one of the plaintiff's complaint as a negligent supervision claim in which a key component of the plaintiff's proof would be whether the hospital knew or should have known of Reardon's propensity to sexually abuse children. When it came time to give the jury instructions, however, the court failed to give a charge on actual or constructive notice, despite requests to do so from the plaintiff and the hospital. The court instead gave a charge consistent with the Connecticut Model Civil Jury Instructions on general negligence. For this reason alone, the judgment should be reversed.

On appeal, in order to counter the hospital's claim that the jury charge was improper, the plaintiff argues for the first time that count one was a general negligence claim[2] for which no charge on notice was necessary and, therefore, the charge given was correct. The majority agrees with the plaintiff's position on appeal that count one was a general negligence claim. The majority is thus faced with a dilemma. Ordinarily, the criminal acts of a third person are deemed unforeseeable as a matter of public policy. There is an exception to this rule, however, in § 302 B of the Restatement (Second) of Torts, that permits a finding of negligence for a third party's criminal acts. Even though the plaintiff neither sought a charge under that section, nor tried the case under that section, nor raised that section on appeal, the majority latches onto it to uphold the jury verdict and concludes that the jury was entitled to determine whether the hospital was liable under § 302 B. Nevertheless, the verdict should be reversed under that theory as well because the trial court did not instruct the jury under § 302 B and the charge was thus insufficient as

a matter of law.

With respect to the second instructional issue, the majority concludes that the trial court was not required to give a jury charge that the hospital's bylaws did not establish the legally applicable standard of care in the relevant community because the plaintiff's expert witness testified that the bylaws coincided with that standard. A reading of the transcript, however, shows that this was not the case. The expert witness repeatedly described the hospital's bylaws as the "rules of the road" or the "standard of care" established by the hospital for governing its daily operations and business. He did not state that the hospital's bylaws coincided with or were consistent with the legally applicable standard of care in the relevant community, nor did he connect the bylaws, by implication or otherwise, with that standard. Accordingly, I respectfully dissent from the majority opinion and would remand the case for a new trial.

I

PROPENSITY INSTRUCTION

A

Improper Characterization of the Record

I first disagree with the majority's characterization of the plaintiff's corporate negligence claim as predicated on principles of general negligence, which provides the foundation for its subsequent analysis and conclusion that there was no need for a propensity instruction in connection with that claim. See footnotes 29 and 37 of the majority opinion. Contrary to the conclusion of the majority, count one of the plaintiff's complaint sets forth a classic negligent supervision claim, which requires a plaintiff to plead and prove that he "suffered an injury due to the defendant's failure to supervise an employee whom the defendant had a duty to supervise." *Roberts* v. *Circuit-Wise, Inc.*, 142 F. Supp. 2d 211, 214 (D. Conn. 2001). The complaint specifically alleges that Reardon was employed by the hospital and that the hospital breached its duty in that it "failed to properly monitor and supervise Reardon" and "allowed Reardon to conduct a purported growth study . . . without . . . monitoring him in any way . . . ."

The trial court also characterized count one as a negligent supervision claim in its June 2, 2011 memorandum of decision on the hospital's motion for summary judgment, in which it stated that the plaintiff's two negligence claims "sound in *negligent supervision, monitoring and retention of Reardon* and breach of a special duty to protect [the plaintiff]"; (emphasis added); and that the claims were "based upon the underlying allegations of the sexual abuse of a minor . . . by Reardon as [the hospital's] employee." Thereafter, the court repeatedly characterized count one as alleging negligent supervision, including in its instructions to the jury, when it stated that the issue in count one

was whether the hospital "was . . . *negligent in its supervision* of [Reardon] in that it failed to *monitor or supervise . . . Reardon's activities*," that, "[i]n the first count, the plaintiff contends that [*the hospital*] *was negligent* in that . . . [t]he hospital failed to properly *monitor and supervise* [Reardon]," and that, "[i]f you find that [the hospital] was negligent in either its *supervision* of . . . Reardon or relative to a special duty it owed to the plaintiff as a child, you must next decide if such negligence was a legal cause of any of the plaintiff's claimed injuries." (Emphasis added.)

Furthermore, the plaintiff himself proposed an instruction in his June 10, 2011 preliminary request to charge, stating that, "[*i*]*f you find that* [*the*] *hospital failed to reasonably supervise . . . Reardon and failed to reasonably inspect and oversee his activities, then it is liable for all harms proximately caused by the failure to supervise or inspect*." (Emphasis added.) The plaintiff similarly argued in his July 11, 2011 objection to the hospital's motion for a directed verdict following the conclusion of the evidence: "*The central issue is whether the hospital, in its capacity as employer, premises owner and research institution, failed to supervise and monitor . . . Reardon's interactions with the minor plaintiff* in the course of a 'growth study' funded by the hospital." (Emphasis added.) Likewise, in his August 2, 2011 memorandum of law in opposition to the hospital's postverdict motions, the plaintiff emphatically stated: "This case is not as complicated as [the hospital] wants it to be. To the contrary, it is this simple: [*the*] *hospital failed completely to provide supervision over an employee whom it knew was taking photographs of the genitalia of many naked children in an isolated location, over numerous years, without parents present*. The hospital funded and supported . . . Reardon's 'growth study' but provided no supervision whatsoever." (Emphasis altered.)

The hospital also characterized count one as sounding in negligent supervision, including in its June 10, 2011 request to charge and in its proposed interrogatories and special verdict form dated June 13, 2011. The foregoing representations were made either immediately before the trial or after the trial took place in June and July of 2011. Finally, in repeatedly acknowledging that notice of Reardon's propensity to sexually abuse children was a central issue in the case, including at the hearing on the hospital's motion to sever,[3] the plaintiff, the hospital and the trial court indicated their understanding that count one of the plaintiff's complaint alleged negligent supervision, not general negligence.[4] Indeed, the majority itself characterizes count one as alleging negligent supervision when it declares that "the plaintiff was entitled to a jury determination of whether, under all of the circumstances, *the hospital's complete failure to supervise Reardon's activities exposed the plaintiff to an undue risk of sexual exploitation* even

though the hospital was unaware of Reardon's criminal propensities." (Emphasis altered.) To the extent the majority disregards this essential fact in the remainder of its analysis and agrees with the plaintiff's appellate brief,[5] which is completely at odds with the allegations in his complaint and his *repeated* description of count one throughout the trial proceedings, the majority's reasoning as to whether a propensity instruction was required unjustly allows the plaintiff to change, for purposes of this appeal, the theory under which he litigated that claim. It also enables the majority to review the trial court's instructions under a different standard than the standard required for review of a negligent supervision claim. The majority's mischaracterization of the record thus has significant consequences for the outcome of this appeal because, as discussed in the analysis that follows, the instructions required to guide the jury to a proper decision under the two different standards are not the same.[6]

B

Propensity Instruction Analysis

Having concluded that count one of the plaintiff's complaint does not sound in general negligence, I submit that a proper analysis must recognize that *both* counts of the plaintiff's complaint rely on the existence of a special relationship in alleging that the hospital owed a duty to the plaintiff. Count one, alleging negligent supervision, relies on the employment relationship between the hospital and Reardon. Count two, alleging a special duty of care, relies on the custodial relationship between the hospital and the plaintiff. In certain circumstances, each of these special relationships gives rise to a duty of care. The hospital argues that the law imposes no duty to protect a person from the criminal acts of a third party unless a defendant had actual or constructive knowledge of the third party's criminal propensity to engage in the misconduct at issue. The plaintiff responds that a general foreseeability standard determines the existence of a duty in Connecticut and that the foreseeability instructions that the trial court gave to the jury were legally sufficient. I agree with the hospital that the court improperly declined to instruct the jury that the plaintiff bore the burden of proving that the hospital had actual or constructive knowledge of Reardon's propensity to sexually abuse children before Reardon abused the plaintiff.

I begin with the applicable standard of review and the governing legal principles. "When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents

the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *Archambault* v. *Soneco/Northeastern, Inc.*, 287 Conn. 20, 42, 946 A.2d 839 (2008).

The existence of a duty is also a question of law. E.g., *Murdock* v. *Croughwell*, 268 Conn. 559, 565, 848 A.2d 363 (2004). "The essential elements of a cause of action in negligence are . . . duty; breach of that duty; causation; and actual injury. . . . Duty is a legal conclusion about relationships between individuals, made after the fact, and [is] imperative to a negligence cause of action. . . . Thus, [t]here can be no actionable negligence . . . unless there exists a cognizable duty of care. . . . [T]he test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case. . . .

"With respect to the second inquiry, namely, the policy analysis, there generally is no duty that obligates one party to aid or to protect another party. See 2 Restatement (Second), Torts § 314, p. 116 (1965). One exception to this general rule arises when a definite relationship between the parties is of such a character that public policy justifies the imposition of a duty to aid or to protect another. See [W. Keeton et al., Prosser and Keeton on the Law of Torts] (5th Ed. 1984) § 56, pp. 373–74; see also 2 Restatement (Second), supra, §§ [314 A and 315, pp. 118, 122] . . . . In delineating more precisely the parameters of this *limited* exception to the general rule, this court has concluded that, [in the absence of] a special relationship of custody or control, there is no duty to protect a third person from the conduct of another." (Emphasis altered; internal quotation marks omitted.) *Murdock* v. *Croughwell*, supra, 268 Conn. 566.

Section 315 of the Restatement (Second), which describes in general terms the limited duty of an actor to control the conduct of third persons, is also instructive. It specifically provides: "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection." 2 Restatement (Second),

supra, § 315, p. 122. Section 315 thus identifies two types of relationships that constitute an exception to the general rule that there is no duty to control the conduct of a third person: either the relationship between the defendant and the third person is one that requires the defendant to exercise control over that person, or the relationship between the defendant and the plaintiff is one that requires the defendant to protect the plaintiff from the third person's conduct. The importance of this section is twofold. First, in both instances, the plaintiff bears the burden of proving the existence of the special relationship. Second, and more generally, each of these special relationships gives rise to an exception to the general rule that there is no duty to control the conduct of a third person or to protect others from a third person's conduct. Accordingly, the exception must be construed narrowly.

Pursuant to the foregoing principle, this court has held that the mere existence of a special relationship is not sufficient to give rise to a duty to control the conduct of a third person or to protect others from a third person's conduct. For a defendant to be held liable for failing to control or provide protection against such conduct, the conduct must have been foreseeable. As we stated in *Fraser* v. *United States*, 236 Conn. 625, 674 A.2d 811 (1996), "[i]n any determination of whether even a special relationship should be held to give rise to a duty to exercise care to avoid harm to a third person, foreseeability plays an important role. Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. . . . Although . . . no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. . . . Thus, initially, if it is not foreseeable to a reasonable person in the defendant's position that harm of the type alleged would result from the defendant's actions to a particular plaintiff, the question of the existence of a duty to use due care is foreclosed, and no cause of action can be maintained by the plaintiff." (Internal quotation marks omitted.) Id., 632–33.

In cases involving special relationships, however, proof of foreseeability requires more than the ability to foresee harm of the same general nature as the type alleged. Section 317 of the Restatement (Second) provides that a master's duty to control a servant to prevent the servant from intentionally harming others exists only if "(a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control

his servant, and (ii) *knows or should know of the necessity* and opportunity for exercising such control." (Emphasis added.) 2 Restatement (Second), supra, § 317, p. 125. Similarly, § 320 of the Restatement (Second) provides that a person has a duty to prevent third persons from harming another in the person's custody if he "(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) *knows or should know of the necessity* and opportunity for exercising such control." (Emphasis added.) Id., § 320, p. 130.

With these principles in mind, I first consider whether, under count one of the complaint alleging negligent supervision, the hospital owed a duty to the plaintiff *only if* it had knowledge of Reardon's propensity to sexually abuse children. I then consider whether, under count two of the complaint alleging breach of a special duty of care, the hospital owed a duty to the plaintiff in the same limited circumstance. I finally consider whether the trial court improperly declined to give the requested propensity instruction under the facts of this case and, if so, whether its failure to do so constituted harmful error.

1

Negligent Supervision

To the extent the plaintiff alleges negligent supervision, this court has not yet determined whether the duty an employer owes to a person under the employer's control is conditioned on knowledge of the wrongdoer's propensity to engage in the alleged misconduct.[7] It also has not determined what a plaintiff must prove in order to demonstrate that an employer knew or should have known of the necessity and opportunity for exercising control so as to prevent its employee from harming others. Although this court previously has not decided whether a plaintiff bears the burden of proving that an employer had either actual or constructive knowledge of an employee's propensity to engage in the type of conduct that resulted in the plaintiff's harm, such a rule is strongly supported by § 317 of the Restatement (Second).

As previously discussed, § 317 provides that a master has a duty to control the conduct of a servant so "as to prevent him from intentionally harming others" if he "knows or has reason to know that he has the ability to control his servant" and "knows or should know of the necessity and opportunity for exercising such control." Id., § 317 (b), p. 125. Comment (c) to § 317, entitled, "Retention in employment of servants known to misconduct themselves," further explains with respect to the meaning of "knowledge": "[*T*]*he master may subject himself to liability under the rule stated in this* [*s*]*ection by retaining in his employment servants who, to his knowledge, are in the habit of miscon-*

ducting themselves in a manner dangerous to others. . . . Thus a railroad company which knows that the crews of its coal trains are in the habit of throwing coal from the cars as they pass along tracks laid through a city street, to the danger of travelers, is subject to liability if it retains the delinquents in its employment, although it has promulgated rules strictly forbidding such practices." (Emphasis added.) Id., comment (c), p. 126. Consequently, § 317 clearly requires that the employer have actual or constructive knowledge of the "necessity" for exercising control over its employee in order to be held liable for the employee's intentional or criminal misconduct.[8] This contrasts with claims alleging general negligence, which do not involve special relationships or the criminal acts of an employee but, rather, require only that the actor should have anticipated "harm of the [same] general nature" as that which occurred in order to establish that the defendant owed a duty to the plaintiff. *Sic* v. *Nunan*, 307 Conn. 399, 407, 54 A.3d 553 (2012).

Consistent with § 317, at least thirty-five other jurisdictions that have considered a claim of negligent supervision arising from an employee's intentional or criminal misconduct have required proof that the employer knew or should have known of the employee's propensity to engage in the type of misconduct at issue.[9] See, e.g., *Belmont* v. *MB Investment Partners, Inc.*, 708 F.3d 470, 491 (3d Cir. 2013) (claim of negligent supervision under Pennsylvania law requires proof under § 317 that employer knew or should have known of employee's dangerous propensities such that he might cause harm to another); *Doe* v. *New York*, United States District Court, Docket No. 09-Civ. 9895 (SAS) (S.D.N.Y. March 4, 2013) (claim of negligent supervision under New York law requires proof that employer knew or should have known of employee's propensity to engage in conduct that caused injury to another); *Spicer* v. *District of Columbia*, United States District Court, Docket No. 10-1576 (BJR) (D.D.C. January 2, 2013) (claim of negligent supervision under District of Columbia law requires evidence that employer knew or should have known that employee behaved in dangerous or otherwise incompetent manner and that employer, armed with actual or constructive knowledge, failed to adequately supervise employee); *Finley* v. *Kondaur Capital Corp.*, United States District Court, Docket No. 12-02197-WGY (W.D. Tenn. December 19, 2012) (claim of negligent supervision under Tennessee law requires evidence that employer had knowledge of employee's unfitness for job); *Petersen* v. *Stanislaus*, United States District Court, Docket No. 1:12-cv-00933-AWI-BAM (E.D. Cal. October 12, 2012) (claim of negligent supervision under California law requires evidence that employer knew or in exercise of reasonable care should have known that employee was unfit and posed particular risk or hazard to plaintiff of kind that subsequently

materialized); *Svacek* v. *Shelley*, 359 P.2d 127, 131–32 (Alaska 1961) (claim of negligent supervision under Alaska law requires proof of elements in § 317, including that employer knew or should have known of employee's dangerous propensities); *Saine* v. *Comcast Cablevision of Arkansas, Inc.*, 354 Ark. 492, 497–500, 126 S.W.3d 339 (2003) (claim of negligent supervision under Arkansas law submitted to jury for determination of whether employer was on notice that appreciable risk of harm to third parties could be caused by negligent supervision or retention of employee); *Keller* v. *Koca*, 111 P.3d 445, 448–49 (Colo. 2005) (claim of negligent supervision under Colorado law predicated in part on employer's antecedent ability to recognize potential employee's attributes of character or prior conduct that would create undue risk of harm to those with whom employee came in contact in executing employment responsibilities); *Matthews* v. *Booth*, Delaware Superior Court, Docket No. 04C-09-219MJB (Del. Super. May 22, 2008) (claim of negligent supervision under Delaware law requires actual or constructive knowledge of employee's propensity to engage in type of harm alleged); *Malicki* v. *Doe*, 814 So. 2d 347, 361–62 (Fla. 2002) (claim of negligent supervision under Florida law requires evidence under § 317 that employer knowingly employed person that it knew or should have known was dangerous and liable to do harm to others); *Novare Group, Inc.* v. *Sarif*, 290 Ga. 186, 190–91, 718 S.E.2d 304 (2011) (claim of negligent supervision under Georgia law requires evidence sufficient to establish that employer reasonably knew or should have known of employee's tendencies to engage in behavior relevant to injuries allegedly incurred by plaintiff); *Wong-Leong* v. *Hawaiian Independent Refinery, Inc.*, 76 Haw. 433, 444–45, 879 P.2d 538 (1994) (claim of negligent supervision under Hawaii law requires evidence under § 317 demonstrating employer's actual or constructive knowledge of necessity and opportunity for exercising control, such as awareness of employee's propensity for misconduct or some reasonable basis for knowing that employee is engaging in, or might engage in, misconduct); *Rausch* v. *Pocatello Lumber Co.*, 135 Idaho 80, 86, 14 P.3d 1074 (App. 2000) (claim of negligent supervision under Idaho law requires proof under § 317 that employer knew of employee's dangerous propensities and need to control employee to prevent injury to others); *Hills* v. *Bridgeview Little League Assn.*, 195 Ill. 2d 210, 233–38 and n.3, 745 N.E.2d 1166 (2000) (claim of negligent supervision under Illinois law requires proof of elements of § 317, including that employer was aware of dangerous propensities that required it to control employee because serious crimes are generally unforeseeable); *Sandage* v. *Board of Commissioners*, 897 N.E.2d 507, 511–14 (Ind. App. 2008) (claim of negligent hiring and retention under Indiana law requires proof of elements of § 317, including that employer had notice of employee's propensity to engage in alleged

misconduct); *Estate of Harris* v. *Papa John's Pizza*, 679 N.W.2d 673, 680 (Iowa 2004) (claim of negligent supervision under Iowa law requires proof that employer knew or in exercise of ordinary care should have known of employee's unfitness at time employee engaged in misconduct); *Kansas State Bank & Trust Co.* v. *Specialized Transportation Services, Inc.*, 249 Kan. 348, 362, 819 P.2d 587 (1991) (claim of negligent supervision under Kansas law requires evidence that employer had reason to believe that undue risk of harm to others would exist as result of quality of employee that employer had reason to believe would be likely to cause harm); *Dragomir* v. *Spring Harbor Hospital*, 970 A.2d 310, 317 (Me. 2009) (claim of negligent supervision under Maine law requires proof of elements under § 317, including that employer had actual or constructive knowledge of employee's violent propensities); *Hersh* v. *Kentfield Builders, Inc.*, 385 Mich. 410, 412, 189 N.W.2d 286 (1971) (claim of negligent supervision under Michigan law requires evidence that employer knew or should have known of employee's propensities before commission of wrongful conduct); *Oslin* v. *State*, 543 N.W.2d 408, 415 (Minn. App. 1996) (claim of negligent supervision under Minnesota law requires evidence that employer knew or should have known of employee's propensities for type of wrongful conduct alleged), review denied, Minnesota Supreme Court, Docket Nos. C1-95-1579 and C8-95-1580 (Minn. April 1, 1996); *Jones* v. *Alden Mills*, 150 Miss. 90, 104–105, 116 So. 438 (1928) (claim of negligent supervision under Mississippi law requires knowledge of employee's violent disposition); *Dibrill* v. *Normandy Associates, Inc.*, 383 S.W.3d 77, 87 (Mo. App. 2012) (claim of negligent supervision under Missouri law requires proof of elements in § 317, including that employer had reason to know of necessity and opportunity for exercising control over employee based on evidence of foreseeability that employee would create unreasonable risk of harm outside scope of employment); *Farr* v. *Cambridge Co-Operative Oil Co.*, 164 Neb. 45, 47, 49–53, 81 N.W.2d 597 (1957) (claim of negligent supervision under Nebraska law requires proof of elements of § 317 of First Restatement, including knowledge and notice of employee's potentially dangerous conduct); *Medlin* v. *Bass*, 327 N.C. 587, 590–91, 398 S.E.2d 460 (1990) (employer deemed liable for negligent employment under North Carolina law *if* employer had either actual or constructive knowledge of employee's "unfitness or bad habits" with constructive knowledge proven by demonstrating that employer could have known facts had he used ordinary care in oversight and supervision); *Richard* v. *Washburn Public Schools*, 809 N.W.2d 288, 297 (N.D. 2011) (claim of negligent supervision under North Dakota law requires proof that master employed servants who, to master's knowledge, are in habit of misconducting themselves in manner dangerous to others); *Clinton* v. *Faurecia Exhaust Systems, Inc.*, Ohio Court of Appeals, Docket No. 2012-CA-1

(Ohio App. October 5, 2012) (claim of negligent supervision under Ohio law requires evidence of employment relationship, employee's incompetence, employer's actual or constructive knowledge of such incompetence, employee's act or omission causing plaintiff's injuries, and employer's negligence in hiring or retaining employee as proximate cause of plaintiff's injuries); *N.H.* v. *Presbyterian Church (U.S.A.)*, 998 P.2d 592, 600 (Okla. 1999) (claim of negligent supervision under Oklahoma law requires that employer have knowledge of employee's propensity to commit conduct that led to plaintiff's injury); *Broadley* v. *State*, 939 A.2d 1016, 1022 (R.I. 2008) (claim of negligent supervision under Rhode Island law dismissed in part because plaintiffs failed to prove that employee at facility for disabled persons was known to exhibit aggressive behavior toward patients); *Degenhart* v. *Knights of Columbus*, 309 S.C. 114, 116–17, 420 S.E.2d 495 (1992) (claim of negligent supervision insufficient under South Carolina law and § 317 because evidence failed to demonstrate that employer had notice of employee's improper outside activities and, therefore, knew or should have known that it should exercise control over employee); *Kelsey-Seybold Clinic* v. *Maclay*, 466 S.W.2d 716, 720 (Tex. 1971) (claim of negligent supervision under Texas law and § 317 deemed viable because employer received specific information from which it knew or should have known of need to exercise control over employee and thus was under duty to use reasonable means to prevent employee from harming others); *Jackson* v. *Righter*, 891 P.2d 1387, 1392 (Utah 1995) (claim of negligent supervision under Utah law and § 317 requires proof that employer reasonably could have been expected to appreciate threat to plaintiff of employee's actions and to act to minimize or protect against threat); *Bradley* v. *H.A. Manosh Corp.*, 157 Vt. 477, 480–82, 601 A.2d 978 (1991) (claim of negligent supervision deemed sufficient under Vermont law and § 317 because evidence demonstrated that employer had knowledge of employee's predisposition to careless behavior); *Niece* v. *Elmview Group Home*, 131 Wn. 2d 39, 51–52, 929 P.2d 420 (1997) (claim of negligent supervision under Washington law and § 317 requires showing of knowledge of dangerous tendencies of particular employee); *L.L.N.* v. *Clauder*, 209 Wis. 2d 674, 699–700, 563 N.W.2d 434 (1997) (claim of negligent supervision under Wisconsin law deemed inadequate in absence of allegations of actual or constructive knowledge of criminal propensities); *Shafer* v. *TNT Well Service, Inc.*, 285 P.3d 958, 962, 964–67 (Wyo. 2012) (claim of negligent supervision under Wyoming law requires proof, in accordance with § 317, that employer knew, or had reason to know, of necessity and opportunity to exercise control over employee).

In keeping with § 317 of the Restatement (Second) and the principles followed by the overwhelming major-

ity of other jurisdictions in addressing claims of negligent supervision, Connecticut trial courts have concluded that, in order to hold an employer liable for an employee's sexual misconduct, the employer must have had actual or constructive knowledge of the employee's propensity to engage in such misconduct. For example, in *See* v. *Bridgeport Roman Catholic Diocesan Corp.*, Superior Court, judicial district of Fairfield, Docket No. CV-93-0300948-S (July 31, 1997) (20 Conn. L. Rptr. 271), in which the plaintiffs alleged that they had been sexually assaulted by a priest who worked in the defendants' diocese, the trial court denied in part the defendants' motion for summary judgment on the ground that certain affidavits produced by the plaintiffs raised a genuine issue of material fact as to whether the defendants knew or should have known of the priest's "sexual proclivities . . . ." Id., 276. During the course of its discussion, the court first recognized as a matter of established Connecticut law that the defendants "did not owe a duty of care to the plaintiffs to protect them from [the priest's] actions unless the defendants knew or had reason to know that [the priest] had the propensity to engage in sexual misconduct." Id., 275. The court reasoned that a mere showing that the defendants had been aware that the priest had psychological problems or that two prior complaints, unrelated to sexual misconduct, had been filed against him would be insufficient. See id. Rather, in order to satisfy their burden, the plaintiffs would be required to demonstrate that the defendants knew or should have known of the priest's predisposition to sexual misconduct. Id.

In *Beach* v. *Jean*, 46 Conn. Supp. 252, 261–65, 746 A.2d 228 (1999), the trial court applied the same rule to grant the defendants' motion for summary judgment with respect to the plaintiff's claim that the defendants owed a duty to protect the plaintiff against sexual abuse by a priest in the defendants' diocese. The court concluded that the plaintiff had failed to raise a genuine issue of material fact as to whether the defendants knew of the priest's propensity to engage in sexual misconduct. Id., 264. Although the materials produced by the plaintiff in opposing summary judgment raised a question of fact regarding whether the defendants regularly visited the priest's church or required him to report on matters at his church, the court concluded that the failure to supervise, without any evidence that the defendants should have known of the priest's propensity for sexual misconduct, was insufficient to satisfy the plaintiff's burden of proving that the conduct was foreseeable. See id., 262–64.

Federal courts and other Connecticut trial courts applying Connecticut law have also applied this rule in cases involving sexual misconduct. See, e.g., *Miller* v. *Ethan Allen Global, Inc.*, United States District Court, Docket No. 3:10-CV-1701 (JCH) (D. Conn. August 23,

2011) (granting motion to dismiss negligent supervision claim because plaintiff alleged no facts from which to infer that defendant was or should have been aware of employee's propensity to engage in alleged misconduct); *Favale* v. *Roman Catholic Diocese of Bridgeport*, 233 F.R.D. 243, 246–47 (D. Conn. 2005) (denying plaintiff's motion to compel defendant's employee to testify regarding alleged anger management history and psychological conditions because only defendant's knowledge of employee's propensity to engage in misconduct of same type as alleged by plaintiff was relevant to existence of duty); *Burford* v. *McDonald's Corp.*, 321 F. Supp. 2d 358, 364–65 n.4 (D. Conn. 2004) (denying defendants' motion for summary judgment on negligent supervision claim and stating that, "[a]t trial, [the] [p]laintiff will have to prove that she suffered injury as a result of alleged harassment that occurred after [the employer] was put on notice of [the employee's] propensity to engage in tortious conduct"); *Abate* v. *Circuit-Wise, Inc.*, 130 F. Supp. 2d 341, 344–46 (D. Conn. 2001) (although court had "serious reservations" regarding whether plaintiff would be able to prove sufficient facts from which reasonable jury could conclude that defendant knew or should have known that coworker had propensity to engage in sexually harassing behavior, plaintiff had met pleading requirement by alleging defendant's knowledge that coworker might sexually harass persons such as plaintiff, and, therefore, court denied defendant's motion to dismiss negligent supervision count); *Shanks* v. *Walker*, 116 F. Supp. 2d 311, 314–15 (D. Conn. 2000) (plaintiff's allegations sufficient to state claim for negligent supervision when plaintiff cited to events that could have informed employer of employee's propensity for violence); *Barnett* v. *Woods*, Superior Court, judicial district of Fairfield, Docket No. CV 00-0371822 (July 31, 2000) (27 Conn. L. Rptr. 596, 597) (under Connecticut law, defendant does not owe plaintiff duty to protect her from another employee's actions unless defendant knows or has reason to know that employee has propensity to engage in tortious conduct); *Karanda* v. *Pratt & Whitney Aircraft, United Technologies Corp.*, Superior Court, judicial district of Hartford, Docket No. CV 98-582025-S (May 10, 1999) (24 Conn. L. Rptr. 521, 527) (same).

Many of our sister states similarly require a plaintiff to prove that an employer knew or should have known of an employee's propensity to engage in sexual misconduct in order to establish that the employer had a duty to control the employee's conduct. Indeed, my research has not revealed a single case, in any jurisdiction, that has rejected this standard in cases involving allegations of sexual abuse by an employee. See, e.g., *Doe* v. *Hartz*, 52 F. Supp. 2d 1027, 1073–74 (N.D. Iowa 1999) (applying Iowa law, which requires plaintiff to prove both special relationship and that defendant knew or should have known of third party's mental disease or defect or pro-

pensity to engage in inappropriate conduct in order to establish duty to control third party's conduct); *Mark K.* v. *Roman Catholic Archbishop of Los Angeles*, 67 Cal. App. 4th 603, 611–12, 79 Cal. Rptr. 2d 73 (1998) (existence of duty depends on whether employer knew or should have known of employee's propensity to engage in misconduct), review denied, California Supreme Court, Docket No. S074684 (Cal. January 27, 1999); *Iglesia Cristiana La Casa Del Señor, Inc.* v. *L.M.*, 783 So. 2d 353, 359 (Fla. App. 2001) (reversing judgment of trial court in favor of plaintiff because, inter alia, plaintiff had not adduced sufficient evidence to support conclusion that defendant church should have anticipated that seemingly normal and nonviolent pastor would abuse position as pastor to rape minor victim); *Alpharetta First United Methodist Church* v. *Stewart*, 221 Ga. App. 748, 753, 472 S.E.2d 532 (1996) (reversing trial court's denial of defendants' motion for summary judgment, holding, inter alia, that plaintiff failed to adduce evidence that defendants should have known of employee's propensity for type of sexual misconduct alleged by plaintiff); *Kenneth R.* v. *Roman Catholic Diocese of Brooklyn*, 229 App. Div. 2d 159, 161, 654 N.Y.S.2d 791 ("necessary element" of cause of action for negligent supervision is that employer knew or should have known of employee's propensity for conduct that caused injury), cert. denied, 522 U.S. 967, 118 S. Ct. 413, 139 L. Ed. 2d 316 (1997); *Medlin* v. *Bass*, supra, 327 N.C. 591 (employer liable for negligent employment *if* employer had either actual or constructive knowledge of employee's "unfitness or bad habits," with constructive knowledge proven by showing that employer could have known facts had he used ordinary care in oversight and supervision); *Steppe* v. *Kmart Stores*, 136 Ohio App. 3d 454, 466, 737 N.E.2d 58 (1999) (employer liable for negligent supervision if it had actual or constructive knowledge of employee's propensity for type of misconduct alleged), appeal denied, 88 Ohio St. 3d 1448, 725 N.E.2d 287 (2000); *N.H.* v. *Presbyterian Church (U.S.A.)*, supra, 998 P.2d 600 (employer liable for employee's misconduct on basis of negligent supervision theory if employer had prior knowledge of employee's propensity to commit very harm for which damages are sought); *Hutchison ex rel. Hutchison* v. *Luddy*, 560 Pa. 51, 64–65, 742 A.2d 1052 (1999) (employer liable under negligent supervision theory if employer knew or should have known of employee's propensity to engage in misconduct); *L.L.N.* v. *Clauder*, supra, 209 Wis. 2d 699 (employer liable for negligent supervision "only if it knew or should have known of employee's propensity to subject third party to unreasonable risk of harm).[10]

Limiting an employer's duty to control the misconduct of its employees to instances in which it has actual or constructive knowledge of the employee's propensity to engage in the type of misconduct at issue is consistent

with basic public policy principles that long have dictated limiting the scope of third party liability. Put simply, when the misconduct is not the employer's own, its ability to foresee and prevent harm resulting from that conduct is much more limited than when the employer is the primary actor. When, as in the present case, the misconduct at issue is not only intentional but criminal, the ability to anticipate the misconduct and to prevent any harm that may result therefrom becomes even more difficult. No employer hires an employee with the expectation that the employee will engage in criminal conduct, and an employer should not be required to anticipate conduct of this kind. The lack of such an expectation accords with the well established principle that, "[u]nder all ordinary and normal circumstances, in the absence of any reason to expect the contrary, [an] actor may reasonably proceed upon the assumption that others will obey the criminal law." W. Keeton et al., supra, § 33, p. 201. The difficulty of reasonably foreseeing the misconduct of a third person justifies a more specific and stringent inquiry than that which is characteristic of a general foreseeability analysis. Accordingly, as our own lower courts and many other jurisdictions have routinely recognized, I would conclude in cases involving criminal misconduct that, as a condition to the existence of a duty, it is appropriate to inquire whether the defendant knew or should have known of the third person's propensity to engage in the type of misconduct at issue. See 2 Restatement (Second), supra, § 317 (b) (ii), p. 125 (master is under duty to exercise reasonable care to control servant while servant is acting outside scope of employment to prevent servant from intentionally harming others or from conducting himself so as to create unreasonable risk of bodily harm to others if master "*knows or should know of the necessity* and opportunity for exercising such control" [emphasis added]). Such a rule properly limits a defendant's liability to instances in which it knows or should know of the employee's propensity, yet has failed to act. Any other rule would not limit a defendant's liability to the *reasonably* foreseeable misconduct of a third person.[11]

2

Special Duty of Care

Insofar as the plaintiff alleges the breach of a special duty of care, fewer courts have considered whether the duty one owes to a person in one's custody should be conditioned on knowledge of the propensity of the wrongdoer to engage in the misconduct at issue. In *Saunders* v. *State*, 446 A.2d 748, 751 (R.I. 1982), however, the court persuasively reasoned that it should. On a certified question from the United States District Court for the District of Rhode Island; id., 749; the Supreme Court of Rhode Island held that prison officials and employees owe a duty to protect a prisoner in

custody from violent attacks by other inmates only if prison personnel knew or had reason to anticipate that the inmate who committed the attack had dangerous propensities and was likely to be violent. Id., 751. In its analysis of the issue, the court observed that "the prior-notice rule is, in effect, merely a more specific application of the general rule of foreseeability." Id. The more specific application was required, the court concluded, because it effected the proper balance between the goals of affording reasonable protections to prisoners and avoiding the imposition of unreasonable burdens on prison officials. See id. In doing so, the court recognized that extending liability under the exception requires a careful balancing of public policy principles. See id.

Requiring knowledge of propensity for claims based on a custodial relationship between the parties is consistent with the principles articulated in § 320 of the Restatement (Second), which provides that an actor has a duty to prevent third persons from harming another in the actor's custody if he "knows or has reason to know that he has the ability to control the conduct of the third persons" and "knows or should know of the necessity and opportunity for exercising such control." 2 Restatement (Second), supra, § 320, p. 130. In explaining the considerations involved in determining duty under this provision, comment (c) to § 320 provides that "[t]he custody of another may be taken under such circumstances as to associate the other with persons who are peculiarly likely to do him harm from which he cannot be expected to protect himself. If so, the actor who has taken custody of the other is required to exercise reasonable care to furnish the necessary protection. This is particularly true where the custody not only involves intimate association with persons of *notoriously* dangerous character, but also deprives the person in custody of his normal ability to protect himself . . . ." (Emphasis added.) Id., comment (c), p. 131.

Comment (d), which discusses the duty to anticipate danger under § 320, contains several illustrations, all of which involve situations in which the actor with custodial responsibility had actual knowledge of the harm that might befall the person in his custody. See id., comment (d), p. 131. Thus, "a schoolmaster who knows that a group of older boys are in the habit of bullying the younger pupils to an extent likely to do them actual harm, is not only required to interfere when he sees the bullying going on, but also to be reasonably vigilant in his supervision of his pupils so as to ascertain when such conduct is about to occur." Id., pp. 131–32.

Like a claim predicated on an employer's duty to control the conduct of its employees, a claim predicated on the duty to protect a person in one's custody from the criminal misconduct of a third person contemplates an exception to the general rule precluding liability in

such cases. Thus, because the same difficulty of accurately foreseeing the misconduct of a third person exists when a custodial relationship gives rise to a duty to protect, the same limitation on liability should apply. Accordingly, the duty to protect a person in one's custody from the criminal conduct of third persons should be confined, consistent with § 320, to those instances in which the custodian has actual or constructive knowledge of the third person's propensity to engage in the misconduct at issue.[12]

3

Instructional Error Analysis

Applying the foregoing principles in the present case, I would conclude that there was instructional error and that the error was not harmless. The following additional facts are relevant to a resolution of this issue.

The parties and the court acknowledged on numerous occasions, outside the presence of the jury, that knowledge of Reardon's propensity to abuse children was a central issue in the case. For example, the plaintiff's counsel argued with respect to a motion to sever that the present case was distinguishable from another potentially relevant criminal case because "there was no issue of notice" in that case, whereas there would be "issues of notice" in the present case. The plaintiff also argued in a motion to preclude the testimony of an expert witness for the hospital, Anna Carol Salter, that, if the court allowed her to offer her opinion testimony, "[t]he court must . . . caution . . . Salter not to offer any opinions on the 'ultimate' issue of the [hospital's] 'notice' of . . . Reardon's molestation activities." Thereafter, in a preliminary request to charge the jury, the *plaintiff* asked the court for an instruction that the hospital could be found liable "if it had [actual or constructive] notice of Reardon's activity and failed to act." The proposed instruction continued: "The [hospital] had actual notice if it actually knew of the unsafe condition long enough before the plaintiff's injury to have taken steps to correct the condition or to take other suitable precautions. . . . The plaintiff may also prevail if you find that the [hospital] had constructive notice of Reardon's activity. That means that the [hospital], using reasonable care, should have known of the unsafe condition in time to have taken steps to correct the condition or to take other suitable precautions." The instruction used the terms "unsafe condition" and "Reardon's activity" interchangeably, and further described Reardon's *sexual abuse of children* as the unsafe condition or activity in question.[13]

The trial court likewise recognized that knowledge of Reardon's propensity to abuse children was a central issue in the case. During arguments on the motion to sever, the court stated that "the issue is did [the hospital] know [of the abuse] or should [it] have known what

was going on as to . . . [the plaintiff]. . . . [I]t's not the degree of the abuse that's an issue, it's the question of the knowledge of the [hospital] that any abuse by Reardon took place." Similarly, during the voir dire examination of a witness at trial, the court excluded evidence of a complaint made to the Hartford County Medical Association concerning Reardon because there was no "reliable evidence . . . that the association notified the [hospital] or that the [hospital] had any knowledge" of the complaint, and, "without notice to the [hospital], it doesn't make it more likely that the [hospital] would have foreseen the plaintiff's abuse by . . . Reardon." The trial court also declined to allow Salter to answer a question posed by the hospital's counsel as to whether the hospital "could have foreseen that Reardon had a propensity to abuse children" because that was "the ultimate issue for the jury to decide." The plaintiff's counsel expressed the same view in an objection made immediately after the question was asked but before the trial court ruled.

The hospital also indicated that knowledge of propensity was the critical issue in the case on numerous occasions throughout the proceedings. The hospital asked for a propensity instruction in its preliminary request to charge, which proposed in relevant part: "In order to prove that [the hospital] owed [the plaintiff] . . . a duty, the plaintiff must prove that the specific harm alleged by the plaintiff was foreseeable to [the hospital]. Specifically, the plaintiff must prove that [the hospital] had either actual or constructive notice that . . . Reardon had a propensity to sexually abuse children before the plaintiff was abused by . . . Reardon." In addition, the hospital proposed interrogatories relating to negligent supervision and special duty of care that included questions relating to whether the plaintiff had proven that the hospital knew or should have known of Reardon's propensity to engage in the sexual abuse of children before he abused the plaintiff.[14]

The trial court, however, rejected the hospital's proposed jury instructions and interrogatories. Immediately before closing arguments, the trial court stated: "I'm going to note for the record that we had a charging conference yesterday in which, after some good discussion between the parties and the court trying to fashion and craft a charge acceptable to all parties, we couldn't quite get to the promised land. But I have provided a copy to counsel, both late yesterday, a draft of the charge as well as again this morning, a slightly revised copy of the charge. They both have that. I realize that there are matters that both counsel are likely to request following the delivery of the charge which may lead to an exception being taken. And they can certainly do that after the charge has been delivered."

After closing arguments, the trial court gave general instructions to the jury on common-law negligence but

omitted the requested propensity instruction. With respect to count one of the plaintiff's complaint, the court instructed in relevant part: "The question is whether a reasonably prudent person in the [hospital's] position, knowing what the [hospital] knew or should have known, would anticipate that harm of the same general nature as that which occurred here was likely to result." With respect to count two, the court instructed in relevant part: "A duty to use [care] exists when a reasonable person, knowing what the [hospital] . . . either knew or should have known at the time of the alleged conduct, would foresee that harm of the same general nature as that which occurred here was likely to result from that conduct." The court continued: "[T]o prove that an injury is a reasonably foreseeable consequence of negligent conduct, a plaintiff need not prove that the [hospital] actually foresaw or should have foreseen the extent of the harm suffered or the manner in which it occurred. Instead, the plaintiff must prove that it is a harm of the same general nature as that which a reasonably prudent person in the [hospital's] position should have anticipated in view of what the [hospital] knew or should have known at the time of the negligent conduct."

The hospital's counsel took exception to the trial court's omission of the requested propensity instruction, arguing that the court's proposed instruction on common-law negligence "fail[ed] to apprise the jury of the notice of propensity, which is required for [the jury] to find that [the hospital has] any duty to the plaintiff." The hospital's counsel repeated the objection to the court's proposed instruction on reasonable care, stating: "Again, the key issue is notice of propensity, not just a reasonable care." With respect to the court's instruction on proximate cause, the hospital's counsel objected a third time: "The issue is not harm of the same general nature, again, but notice of the propensity to abuse children."

Thereafter, the trial court gave the jury a series of general interrogatories that did not mention knowledge of propensity or the foreseeability of harm but were directed to the jury's potential findings on general negligence and the special duty of care. The principal interrogatory on the plaintiff's negligent supervision claim simply asked: "Do you find by a fair preponderance of the evidence that [the hospital] was negligent in one or more of the ways alleged in count one of the plaintiff's complaint and that this negligence was a substantial factor in causing the plaintiff's injuries and damages?" The corresponding interrogatory on the plaintiff's breach of a special duty of care to children similarly asked: "Do you find by a fair preponderance of the evidence that [the hospital] owed a special duty of care to [the plaintiff] and that [the hospital] breached this special duty of care in one or more of the ways alleged in count two of the plaintiff's complaint and that this

breach was a substantial factor in causing the plaintiff's injuries and damages?"

Considering the hospital's request to instruct the jury, its objections to the instructions that were given, the fact that the trial court and the parties acknowledged throughout the trial proceedings that knowledge of Reardon's propensity to sexually abuse children was a critical issue in the case, and, significantly, the testimony at trial that the presence of pedophiles in trusted institutions such as churches and hospitals was not a matter of common knowledge during the 1960s and 1970s, I would conclude that a propensity instruction was required under both counts of the plaintiff's complaint and that the trial court's failure to give the instruction was improper.

The question remains as to whether the trial court's failure to give the instruction constituted harmful error, thus requiring a new trial. This court has repeatedly recognized that "not every error is harmful. . . . [B]efore a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict. . . . In determining whether an instructional impropriety was harmless, we consider not only the nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury, but the likelihood of actual prejudice as reflected in the individual trial record, taking into account (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (Internal quotation marks omitted.) *Allison* v. *Manetta*, 284 Conn. 389, 400, 933 A.2d 1197 (2007).

With respect to the first factor, the plaintiff presented no evidence that the hospital had ever received any complaints about Reardon. Beverly Faulds, who worked as Reardon's secretary from 1964 to 1981, specifically testified that she had never received a single complaint from a patient or a parent of a patient. On the contrary, she had consistently received positive feedback from patients regarding Reardon. It is also undisputed that the plaintiff presented no evidence that the hospital had actual or constructive knowledge of Reardon's propensity to sexually abuse children. Instead, the plaintiff contends that certain facts known to the hospital should have "raised red flags." Among these purported facts were that (1) Reardon saw many children in his office, (2) he was photographing them naked, (3) he was manipulating the children's genitalia, (4) boys were unchaperoned during these sessions,[15] (5) Reardon had not published anything based on the growth study during the relevant time period, 1964 to 1972, (6) Reardon did not use the hospital photographer, either to take or develop his photographs, and (7) Rear-

don had ordered a few books on sexual topics, including one about the juvenile homosexual experience.[16] The plaintiff does not contend, however, that these facts would be sufficient to demonstrate that the hospital had actual or constructive knowledge of Reardon's propensity to sexually abuse children. Nor is it likely that the plaintiff could prevail on such a claim. Nothing in these facts demonstrates that the hospital should have known of Reardon's sexual proclivities.

The harmfulness of the error is further demonstrated by the numerous, facially innocent explanations for most of the plaintiff's purported red flags. For example, the fact that Reardon had many children coming into his office was explained by the growth study itself. The fact that the children were naked and that he handled their genitalia was hardly irregular. The plaintiff's own expert, Maria New, a pediatric endocrinologist and geneticist, and professor of pediatrics at Mount Sinai School of Medicine in New York, testified that she handled children's genitalia during examinations. Thomas Godar, a pulmonologist and head of the department of pulmonary physiology at the hospital in the late 1960s, testified that the physical examination performed by an endocrinologist to assess growth and sexual development would involve measuring genitalia, which apparently would require manipulation. As for Reardon's failure to publish for the eight year period between 1964 and 1972, the plaintiff does not dispute that Reardon used growth study slides during his many lectures and that the slides depicted children without their clothing. Although the plaintiff relied heavily on the fact that Reardon failed to use the hospital photographer, that practice was not unique to Reardon. Several witnesses, including the hospital photographer, testified that other hospital physicians also took their own photographs.

Moreover, ample evidence placed these so-called red flags in context. Reardon was respected and well liked by his colleagues, and was considered to be a skilled lecturer and teacher at Yale University School of Medicine, Newington Children's Hospital, and the University of Connecticut School of Medicine. Residents sought him out as a teacher, and colleagues referred their family members and pediatric patients to Reardon. Finally, no one had ever seen Reardon do anything that would lead them to believe that he had a propensity to abuse children. Faulds testified that, although her office immediately adjoined Reardon's office and examination room, she never heard or saw anything that caused her concern and had no idea that he was sexually abusing children.

The lack of a jury instruction on propensity was not ameliorated by the trial court's other jury instructions because those instructions were general in nature, and no other instruction focused the jury's attention on whether the hospital owed a duty to the plaintiff based

on knowledge of Reardon's propensity to sexually abuse children before he abused the plaintiff. Nor did the parties' arguments present the notice of propensity issue to the jury in an equivalent form. The trial court rejected the requests of both parties to give a more specific instruction on actual and constructive knowledge of Reardon's propensity to engage in misconduct before closing arguments, and, therefore, neither party's argument specifically focused on knowledge of propensity. Instead, both parties argued extensively as to what the hospital knew or should have known that would have rendered Reardon's misconduct *foreseeable*. This question differed from whether the hospital had knowledge of Reardon's propensity to engage in criminal conduct because the difficulty of reasonably foreseeing the criminal behavior of Reardon more than forty years ago, when the existence of pedophilia in churches and hospitals was not a matter of common knowledge, required a more specific and stringent inquiry than a general foreseeability analysis. Moreover, the jury interrogatories were not designed to focus attention on the elements of negligence or on the issue of foreseeability but were general in scope and merely asked whether the hospital was negligent in one of the ways alleged and, if so, whether the negligence was a substantial factor in causing the plaintiff's injuries. Accordingly, in view of the lack of evidence demonstrating that the hospital had actual or constructive knowledge of Reardon's propensity to abuse children, the inadequacy of the trial court's other instructions, the lack of focus in the jury interrogatories, and the parties' failure to bring the issue of propensity to the jury's attention during closing arguments, I would conclude that the trial court's failure to give the requested instruction was unquestionably harmful, thus warranting a new trial.

C

Majority's Improper Application of Restatement Provisions and the Standard of Review

Even assuming that count one of the plaintiff's complaint does not allege negligent supervision, the majority's analysis improperly relies on principles in § 302 B of Restatement (Second) that (1) neither party has pleaded or argued, (2) were not articulated in the trial court's instructions to the jury, and (3) the majority incorrectly portrays as applying to claims of general negligence. According to the majority, there are two ways to establish that the criminal misconduct of a third party is "foreseeable" to a defendant. The first, which occurs in the "great majority of cases," is by "proof of actual or constructive knowledge of propensity . . . ." The second is by adducing "other evidence" that the misconduct was foreseeable. The majority thus reasons that, when there is no evidence that the defen-

dant knew or should have known of the third party's criminal propensity but there is "other evidence" that the third party's criminal misconduct was foreseeable, it is improper to give the jury an instruction on knowledge of propensity because "such an instruction would foreclose the jury from returning a verdict for the plaintiff predicated on the other evidence adduced by the injured party on the issue of foreseeability." The majority explains that the "other evidence" to which it refers includes facts demonstrating negligence under § 302 B, which recognizes liability when the defendant's own conduct creates or increases the foreseeable risk that another person will be harmed by a third party's criminal misconduct. Applying this logic to the present case, the majority concludes that the trial court properly declined to give the requested propensity instruction because there was no evidence that the hospital had knowledge of Reardon's propensity to sexually abuse children, and, accordingly, the plaintiff was entitled to a jury determination based on "other evidence" in the record that the hospital's own conduct created or increased the foreseeable risk that Reardon would harm the plaintiff. I disagree.

1

I first note that neither the plaintiff nor the hospital has argued, including on appeal to this court, that count one alleges negligence under § 302 B, and, therefore, to the extent the majority concludes that count one of the plaintiff's complaint is predicated on, or "implicates," the principles contained in § 302 B; footnote 38 of the majority opinion; it mischaracterizes count one. As previously discussed in part I A of this opinion, the parties and the trial court repeatedly described, in the proceedings leading up to this appeal, count one as sounding in negligent supervision. Furthermore, in its preliminary request to charge, the hospital sought an instruction on negligent supervision and duty that allowed the jury to find the hospital liable only if it had actual or constructive notice of Reardon's propensity to sexually abuse children before he abused the plaintiff. The plaintiff likewise sought an instruction in his preliminary request to charge allowing the jury to find the hospital liable if it had actual or constructive notice of "Reardon's activity and failed to act." There is no express or implied reference in *any* of the parties' proposed instructions to the need for an instruction under § 302 B.

There is also no reference to, or reliance on, § 302 B in count one of the plaintiff's complaint or in the parties' appellate briefs. The hospital cites §§ 315 and 320 in arguing that, when there is a special relationship of custody or control, a defendant has only a limited duty to protect against a third person's sexual abuse of another person, which arises when the defendant knows or should know of the third person's propensity

for sexual abuse. The plaintiff now disavows the need for an instruction on actual or constructive notice and argues on appeal that count one is "a claim of ordinary negligence" and that general principles relating to foreseeability, not notice of propensity, determine duty in Connecticut. Thereafter, in discussing "the controlling law governing foreseeability in Connecticut negligence cases," the plaintiff argues that the trial court properly instructed the jury on the theory of duty and general negligence articulated in Connecticut Civil Jury Instruction 3.6-7. The plaintiff thus contends that foreseeability means exactly what the trial court instructed that it means, and that the relevant question is whether the ordinary person in the defendant's position, knowing what he knew or should have known, should have anticipated that harm of the general nature of that suffered was likely to result in the absence of due care. Accordingly, the majority's assertion that "the principles underlying § 302 B inform the arguments that the parties make on appeal" is a gross misstatement of the record. Footnote 26 of the majority opinion.

2

As noted in part I B of this opinion, the trial court's jury instructions on duty of care also were based on principles of general negligence. The court first instructed that, "[u]nder our common law, negligence is the failure to use reasonable care under the circumstances. Reasonable care is the care that a reasonably prudent person would have used in the same circumstances. In determining the care that a reasonably prudent person would use in the same circumstances, you should consider all of the circumstances which were known or should have been known to the [hospital] at the time of the conduct in question. Whether care is reasonable depends upon the dangers that a reasonable person would perceive in those circumstances."

The court next instructed the jury on general negligence in accordance with Connecticut Civil Jury Instruction 3.6-7, stating that "[a] duty to use care exists when a reasonable person, knowing what the [hospital] . . . either knew of should have known at the time of the alleged conduct, would foresee that harm of the same general nature as that which occurred here was likely to result from that conduct. If harm of the same general nature as that which occurred here was foreseeable, it does not matter . . . if the manner in which the harm that actually occurred was unusual, bizarre or unforeseeable. If you find that [the] [h]ospital was negligent in either its supervision of . . . Reardon or relative to a special duty it owed to the plaintiff as a child, you must next decide if such negligence was a legal cause of any of the plaintiff's claimed injuries."

From the foregoing, it is clear that the jury was not instructed to consider whether the evidence was sufficient to find the hospital liable for Reardon's criminal

misconduct under § 302 B of the Restatement (Second). Moreover, the majority agrees that "the trial court did not instruct the jury in the language of [§ 302 B] . . . . Rather, the court charged the jury in accordance with general negligence principles, without elaborating on any of the specific considerations that pertain to a claim of liability predicated on § 302 B . . . ." Footnote 26 of the majority opinion.

3

Given these undisputed facts, the majority's assertion that count one of the plaintiff's complaint "is predicated on general negligence principles, *as set forth more particularly in § 302 B of the Restatement (Second)*" makes no sense. (Emphasis added.) Footnote 29 of the majority opinion. Count one cannot be predicated on *both* the rule of general negligence and an exception to the rule. Although the majority accepts the plaintiff's argument on appeal that count one alleges general or "ordinary" negligence, even a cursory examination of § 302 B indicates that it does not describe "ordinary" negligence but, rather, refers to the far from ordinary circumstance in which liability may be imposed on a defendant for a third party's intentional or criminal misconduct. The majority thus conflates general or "ordinary" negligence with the negligence that may be found in circumstances involving criminal misconduct that are not, by any definition, ordinary.

This distinction is expressly recognized in comment (d) to § 302 B, which provides in relevant part: "*Normally* the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence. *In the ordinary case* he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true particularly where the intentional conduct is a crime, since *under ordinary circumstances* it may reasonably be assumed that no one will violate the criminal law." (Emphasis added.) 2 Restatement (Second), supra, § 302 B, comment (d), p. 89. In other words, the actor *normally*, or *ordinarily*, has no reason to expect that a third party will engage in criminal misconduct. Consequently, only in certain limited circumstances that cannot be deemed normal or ordinary will the actor be found to have a duty of care that would subject him to liability for conduct that results in harm to another person because of a third party's criminal misconduct. Some of these circumstances are described in other comments to § 302 B. Accordingly, in order to determine whether the jury could have found the hospital liable under that provision, it must be examined in more detail.

As the majority explains, § 302 B is not only closely related to, but is derived from, § 449 of the Restatement (Second);[17] see footnote 21 of the majority opinion; which also addresses the tortious or criminal conduct

of a third person, the probability of which causes the actor's conduct to be deemed negligent. See 2 Restatement (Second), supra, § 449, p. 482. I thus begin with that provision.

Section 449 of the Restatement (Second) provides: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." Id. Comment (a) further explains that § 449 "should be read together with § 302 B, and the [c]omments to that [s]ection, which deal with the foreseeable likelihood of the intentional or even criminal misconduct of a third person as a hazard which makes the actor's conduct negligent. As is there stated, the mere possibility or even likelihood that there may be such misconduct is *not* in all cases sufficient to characterize the actor's conduct as negligence. It is only where the actor is under a duty to the other, because of some relation between them, to protect him against such misconduct, or where the actor has undertaken the obligation of doing so, *or his conduct has created or increased the risk of harm through the misconduct, that he becomes negligent.*" (Emphasis added.) Id., comment (a), pp. 482–83. It is the provision's last reference to conduct that creates or increases the risk of harm that, the majority maintains, is applicable in the present case.

Section 302 B discusses more specifically the risk of the intentional or criminal conduct to which § 449 refers. Section 302 B provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." Id., § 302 B, p. 88. As to the determination of whether an actor "realizes or should realize" the risk of harm so created; id.; comment (d) to § 302[18] provides the following guidance: "If the actor's conduct has created or continued a situation which is harmless if left to itself but is capable of being made dangerous to others by some subsequent action of a human being . . . *the actor's negligence depends upon whether he as a reasonable man should recognize such action or operation as probable. The actor as a reasonable man is required to know the habits and propensities of human beings . . . in the locality in which he has intentionally created such a situation or in which he knows or should realize that his conduct is likely to create such a situation. . . . In so far as such knowledge would lead the actor as a reasonable man to recognize a particular action of a human being . . . as customary or normal, the actor is required to anticipate and provide against it.* The actor is negligent if he intentionally creates a situation, or if his conduct involves a risk of creating a situation, which he should

realize as likely to be dangerous to others *in the event of such customary or normal act or operation.*" (Citation omitted; emphasis added.) Id., § 302, comment (d), p. 83. It thus may be concluded that, to the extent a third party acts in a manner that is not customary or normal, such as by engaging in criminal misconduct, the actor *generally* has no duty to anticipate that misconduct or to provide another person with protection against it. See id., § 302 B, comment (d), p. 89.

In subjecting an actor to liability for the criminal acts of third persons who do not, by definition, comport with the recognized "habits and propensities of human beings"; id., § 302, comment (d), p. 83; comments to § 302 B of the Restatement (Second) articulate a foreseeability test indicating that an actor must have knowledge of the third party's attributes or propensities in order to anticipate that the actor's own conduct will create the risk of harm to another through the third party's criminal misconduct.[19] For example, comment (f) to § 302 B provides that, among the factors to be considered in deciding whether an actor is required to take precautions to protect another person against a third party's intentional or criminal misconduct are the "known character, past conduct, and tendencies *of the person whose intentional conduct causes the harm*"; (emphasis added) id., § 302 B, comment (f), p. 93; thus indicating that express knowledge of the third party's character and personal traits is an important factor in determining whether the actor has a duty in any particular case.

This point is clarified in the illustration following comment (f) to § 302 B. A, a convict serving a state prison sentence for forging a check, has exhibited no tendency for violence while in prison and tests indicate that he is mentally normal. Id., illustration (16), p. 93. A is thus permitted to do "outside work" on the prison farm with other prisoners, but he is not properly guarded and escapes. Id., pp. 93–94. During his escape, he stops a vehicle, threatens the driver, B, with a knife, and takes B's car. Id., p. 94. The state is nonetheless not deemed negligent toward B, who suffers from severe emotional distress and a stroke as a result of the incident; id.; because A's known character, past conduct and tendencies gave no warning to the state that A might engage in further criminal misconduct if he was allowed to participate in the outside work. See id. Although comment (f) also refers to several other factors that merit consideration,[20] it is significant that the first three factors listed, as well as the illustration, refer to the importance of specific knowledge regarding the third party's character and past conduct for purposes of determining liability based on negligence. Accordingly, those factors cannot be ignored.

Moreover, comment (f) is not the only provision that refers to knowledge of the third party's potentially dan-

gerous character as a significant factor in determining duty. As previously discussed, comment (e) to § 302 B provides that "situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others . . . arise where . . . the actor's own affirmative act has created or exposed the other to *a recognizable high degree of risk of harm* through such misconduct, which a reasonable man would take into account." (Emphasis added.) Id., comment (e), p. 90. In other words, if the high degree of risk of harm must be "recognizable" by "a reasonable man"; id.; then it must be within the awareness or knowledge of a reasonable man because a reasonable man could not take "a recognizable high degree of risk" into account, as required by the rule, without being aware of the harm that might arise from his affirmative act. Id.

To assist in understanding this interpretive rule, comment (e) lists numerous examples and illustrations of situations in which an actor would be subject to liability, *all* of which presume that he has specific knowledge of the highly probable risk of harm. Of those that apply in the present context, example (D) in comment (e) posits a factual scenario "[w]here the actor has brought into contact or association with the other *a person whom the actor knows or should know to be peculiarly likely* to commit intentional misconduct, *under circumstances which afford a peculiar opportunity or temptation* for such misconduct." (Emphasis added.) Id., comment (e), example (D), p. 91. The two illustrations following this example discuss actors who created situations involving a high degree of risk and who knew or should have known, because of *generally recognized* characteristics associated with the environment or with the third party wrongdoer, that harm would very likely occur because of the actor's conduct. See id., illustrations (9) and (10), pp. 91–92. Thus, A, the landlord of an apartment house who employs B as a janitor, "*knowing that B is a man of violent and uncontrollable temper*" and "*has attacked those who* [*have*] *argue*[*d*] *with him*" *in the past*, may be found negligent toward C, an apartment tenant, who is attacked by B after complaining to B of inadequate heat. (Emphasis added.) Id., illustration (9), pp. 91–92.[21]

In light of these examples and illustrations, it seems entirely clear to me that, in order to subject an actor to liability for the criminal misconduct of a third party under § 302 B, a jury must be instructed to consider whether the actor has actual or constructive knowledge, or some type of explicit realization, awareness or recognition, that his conduct is highly likely to create a risk of harm by the third party, whose known character, past conduct and tendencies suggest that he or she is likely to engage in the criminal misconduct at issue. This is a very different standard from the foreseeability standard applied in cases of general negligence under

Connecticut law and the Restatement (Second), which requires only that a defendant "anticipate . . . harm of the [same] general nature" as that which occurred was likely to result from the defendant's own conduct; (internal quotation marks omitted) *Sic* v. *Nunan*, supra, 307 Conn. 407; and is based on the actor's ability to anticipate harm arising from the "qualities and habits of human beings and animals and the qualities, characteristics, and capacities of things and forces *in so far as they are matters of common knowledge at the time and in the community* . . . ." (Emphasis added.) 2 Restatement (Second), supra, § 290 (a), p. 47. Indeed, the two concepts of foreseeability are grounded in diametrically opposed views, with foreseeability in general negligence cases being premised on the actor's knowledge that his conduct may lead to certain expected consequences flowing from the generally recognized "habits and propensities of human beings"; id., § 302, comment (d), p. 83; and foreseeability under § 302 B being premised on the actor's knowledge of the third party's characteristics because criminal conduct is *not* expected or consistent with the ordinary "habits and propensities of human beings" that normally govern the foreseeability test under principles of general negligence.[22] Id.; see id., § 302 B, p. 88.

Other jurisdictions interpreting § 302 B also have concluded that an actor must have knowledge of a third party's criminal propensities or a specific awareness that his own conduct will create an unreasonably high risk of harm to another by the third party wrongdoer in order to be deemed negligent. See, e.g., *James* v. *Meow Media, Inc.*, 300 F.3d 683, 695 (6th Cir. 2002) (defendant purveyors of allegedly violent video games, movies and Internet sites were not liable under § 302 B for distributing products to person who subsequently committed violent act because, "[i]n *every case* that this court has discovered in which defendants have been held liable for negligently creating an unreasonably high risk of third-party criminal conduct, *the defendants have been specifically aware of the peculiar tendency of a particular person to commit a criminal act with the defendants' materials*" [emphasis added]), cert. denied, 537 U.S. 1159, 123 S. Ct. 967, 154 L. Ed. 2d 893 (2003); *Fedie* v. *Travelodge International, Inc.*, 162 Ariz. 263, 266, 782 P.2d 739 (App. 1989) (finding no evidence to support conclusion that defendants should have foreseen criminal activity of third party under § 302 B, in part because *defendants did not know third party had dangerous propensities*), review denied, Arizona Supreme Court, Docket No. CV-89-0272-PR (Ariz. November 21, 1989); *Waldon* v. *Housing Authority*, 854 S.W.2d 777, 779 (Ky. App. 1991) (defendant's failure to evict or otherwise discourage third party's presence at housing complex, *despite knowledge of frequent criminal activity at complex and third party's repeated threats to kill tenant*, "put its conduct within the param-

eters of . . . [§] 302 B"); *Jupin* v. *Kask*, 447 Mass. 141, 149, 849 N.E.2d 829 (2006) (defendant should have foreseen under § 302 B that *third party*, *whom defendant knew had history of violence*, *had recent problems with law*, *and had been under psychiatric observation* might use his unsupervised access to house to take unsecured weapon from basement gun cabinet and subsequently use weapon to commit violent crime); *Newton* v. *Tinsley*, 970 S.W.2d 490, 494 (Tenn. App. 1997, appeal denied) (evidence insufficient to support finding of liability against defendant because § 302 B requires that defendant expose plaintiff to person whom actor *knows or should know to be peculiarly likely to commit intentional misconduct*); *Golden Spread Council*, *Inc.*, *No. 562 of the Boy Scouts of America* v. *Akins*, 926 S.W.2d 287, 291 (Tex. 1996) (plaintiff had duty under § 302 B not to recommend third party as scoutmaster because plaintiff was *aware of allegations that third party had molested children*); *Tae Kim* v. *Budget Rent A Car Systems*, *Inc.*, 143 Wn. 2d 190, 194–96, 15 P.3d 1283 (2001) (evidence insufficient to support liability against defendant under § 302 B after third party stole unlocked car with keys in ignition from parking lot at defendant's administrative facility and committed vehicular assault of plaintiff, in part because *no vehicle previously had been stolen* from parking lot); *Schwartz* v. *Elerding*, 166 Wn. App. 608, 620, 270 P.3d 630 (distinguishing "usual duty of ordinary care" from "heightened" duty of care under § 302 B, which required that parents who gave shotgun to child have "special knowledge" that they might have "reasonable cause for concern" that child would use shotgun to assault another person), review denied, 174 Wn. 2d 608, 281 P.3d 686 (2012); *Miller* v. *Whitworth*, 193 W. Va. 262, 266–68, 455 S.E.2d 821 (1995) (evidence insufficient to hold landlord of mobile home park liable to tenant for failing to protect tenant from criminal activity of third party under § 302 B, despite landlord's general knowledge of prior, unrelated incidents of criminal activity on premises, because landlord never received complaints about third party attacker before he committed crime that led to tenant's injuries); see also *Anderson* v. *Bushong Pontiac Co.*, 404 Pa. 382, 384–90, 171 A.2d 771 (1961) (defendant liable under predecessor to § 302 B in First Restatement for injuries to pedestrian caused by boy who drove stolen car upon proof that boy stole keys from vehicle displayed for sale on defendant's used car lot and habitually played with other boys in and around cars on lot, and that *defendant knew key was stolen and that boys used lot for recreational purposes*, *but defendant failed to remove car from lot* or take other precautions to prevent its operation). As at least one noted treatise has stated in this context, "[i]t would be unjust to require one to anticipate that a crime will be committed unless there has been a warning or unless a previous criminal act occurred [on] the same premises." (Internal quotation marks omitted.) W. Keeton et al.,

supra, § 33, p. 201 n.78.

In sum, the majority's assertion that the jury could have found the hospital liable under the general negligence principles articulated in § 302 B not only fails to recognize that § 302 B does not describe general negligence but directly conflicts with the majority's corresponding assertion that § 302 B represents an *exception* to the theory of general negligence that one is ordinarily not responsible for the criminal misconduct of a third party. Furthermore, neither the parties nor the trial court relied on, or acknowledged, § 302 B during the trial proceedings. This logical inconsistency has significant consequences for the majority's conclusion that the trial court properly declined to give the requested propensity instruction. Without an instruction advising the jury, in accordance with § 302 B, to consider all of the factors described therein, including Reardon's character, the jury could not have conducted a proper risk utility balancing analysis and found "other evidence" unrelated to Reardon's character or propensities sufficient to subject the hospital to liability for Reardon's criminal misconduct, as the majority claims the jury was entitled to do.[23]

Turning to count two of the plaintiff's complaint, the majority provides no logical explanation for its reasoning with respect to how the Restatement (Second) supports its determination that a propensity instruction was not required with regard to the plaintiff's claim alleging breach of the hospital's special duty of care to children. The majority first concedes that "there is no duty to control the conduct of the third party unless, in light of the facts, the defendant knows or should know of the necessity and opportunity for exercising such control." (Internal quotation marks omitted.) It then states that this determination "is not materially different from the determination to be made under count one of the plaintiff's complaint, namely, whether, in light of the relevant facts and circumstances, the hospital should have anticipated the harm of the kind that the plaintiff suffered at the hands of Reardon and have taken reasonable precautions to prevent it." Footnote 31 of the majority opinion. I disagree because this reasoning is internally inconsistent.

As in its analysis under count one, the majority fails to apply the proper Restatement provisions, which impose a different standard for finding negligence when the defendant has a custodial relationship with the victim than the standard required for a finding of general negligence. In the present case, the trial court did not instruct the jury that it should consider the "necessity and opportunity" for exercising control over Reardon, as the majority concedes is required when a custodial relationship exists, but gave the following abbreviated instruction: "[Y]ou should know that, except in limited circumstances, a person has no duty to take actions in

order to control the conduct of a third person to prevent harm to another person. One of the exceptions to this general rule is when there's a special relation between the actor and the other which gives a right to protection. In this case, there must be a special relation between [the plaintiff] and [the] hospital in order for the exception to apply. The relation between a hospital and a child obligates the hospital to protect the child from harm, if you find that the hospital had custody of the child at the time that the harm occurred." The court then continued: "A duty to use [care] exists when a reasonable person, knowing what the [hospital] . . . either knew or should have known at the time of the alleged conduct, would foresee that harm of the same general nature as that which occurred here was likely to result from that conduct. If harm of the same general nature as that which occurred here was foreseeable, it does not matter if . . . the manner in which the harm that actually occurred was unusual, bizarre or unforeseeable." The trial court referred at least five times to the harm in question as "harm of the same general nature as that which occurred," and never referred to the more specific "necessity and opportunity" for exercising control, as directed by § 320 (b) of the Restatement (Second), which the majority acknowledges is the relevant governing language. I thus view the trial court's instruction on foreseeability as grossly deficient and rely on my previous discussion to explain why I believe a propensity instruction was also required in order for the jury to adequately address the claim raised in count two of the plaintiff's complaint.

4

I finally disagree with the majority's analysis of the propensity instruction claim because it fails to apply the proper standard of review. The issue on appeal is whether the trial court was required to give the requested instruction because the knowledge by the hospital of Reardon's propensity to sexually abuse children was necessary in order to find that the hospital had a duty to protect the plaintiff from harm. The jury instruction challenge thus presents a question of law over which our review is plenary. See, e.g., *State* v. *Santiago*, 305 Conn. 101, 191, 49 A.3d 566 (2012) ("[a] challenge to the validity of jury instructions presents a question of law over which [we have] plenary review" [internal quotation marks omitted]); *State* v. *Terwilliger*, 294 Conn. 399, 412, 984 A.2d 721 (2009) (same).

Ordinarily, this court reviews a jury instruction claim to determine whether the charge is correct in the law, adapted to the issues and sufficient to guide the jury. E.g., *Archambault* v. *Soneco/Northeastern, Inc.*, supra, 287 Conn. 42. In the present case, the majority concludes, on the basis of the evidence, that "the plaintiff sought to persuade the jury . . . that there was a foreseeable risk that the children who had been volunteered

to participate in the study . . . would be sexually exploited or abused in some manner, such that the hospital was required to take at least *some* precautions to protect this highly vulnerable group of subjects. Consequently, unless this evidence was insufficient as a matter of law to support a verdict for the plaintiff, an issue that . . . the hospital has elected not to pursue on appeal, the plaintiff was entitled to a jury determination of whether, under all of the circumstances, the hospital's complete failure to supervise Reardon's activities exposed the plaintiff to an undue risk of sexual exploitation *even though* the hospital was unaware of Reardon's criminal propensities." (Emphasis in original; footnotes omitted.) The majority thus concludes that it would have been improper for the trial court to instruct the jury that the plaintiff must prove that the hospital had either actual or constructive notice of Reardon's propensity to abuse children before he abused the plaintiff.

I disagree with this analysis because it is based on two irreconcilable premises, namely, that count one falls within the "exception," set forth in §§ 302 B and 449 of the Restatement (Second), to the general rule that one has no legal obligation to aid or protect another party, and that "the trial court did not instruct the jury in the language of [§ 302 B] . . . . Rather, the court charged the jury in accordance with general negligence principles, without elaborating on any of the specific considerations that pertain to a claim of liability predicated on § 302 B . . . ." Footnote 26 of the majority opinion. This reasoning is not only confusing but leaves one wondering why the majority spends so much time explaining the relevance of § 302 B if it does not ultimately matter that the jury was not instructed to find negligence under that provision.

In my view, if the jury had determined that the hospital was negligent pursuant to an instruction that was consistent with the principles set forth in § 302 B, this court would have been free to conclude that there was no need for an instruction on knowledge of propensity because, among the requisite factors to be considered under § 302 B are the "known character, past conduct, and tendencies" of the third party wrongdoer. 2 Restatement (Second), supra, § 302 B, comment (f), p. 93. In light of the majority's recognition, however, that the trial court gave an instruction "in accordance with general negligence principles" and did *not* give an instruction on the "specific considerations that pertain to a claim of liability predicated on § 302 B"; footnote 26 of the majority opinion; it cannot conclude that there was no need for a propensity instruction on the ground that the jury was entitled to find negligence against the hospital under § 302 B. It is simply not possible to know whether the jury would have deemed the evidence sufficient to find negligence against the hospital under § 302 B—as the majority has explicitly concluded that it

did[24]—in the absence of a specific instruction predicated on that provision because it is the jury's function to make credibility and other determinations on the basis of the instructions that are given.[25] See, e.g., *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 22, 60 A.3d 222 (2013) (jury is presumed to have followed instructions given "unless the contrary appears" [internal quotation marks omitted]). The majority cannot take that function away from the jury and make its own sufficiency determination, as it has done in the present case.

A proper instruction under § 302 B would have advised the jury to follow the directive in comment (f) that requires a "balancing [of] the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it." 2 Restatement (Second), supra, § 302 B, comment (f), p. 93.

Lacking an instruction based on this language, the jury could not have conducted the risk utility analysis necessary to determine whether the hospital had been negligent because such an analysis requires consideration of character and conduct.[26] As previously noted, the jury in this case found the evidence sufficient only to support a finding of general negligence because that was the theory on which it was instructed; it did not find that the hospital was negligent under the standard articulated in § 302 B for failing to anticipate that its own conduct would create a risk of harm to the plaintiff because of Reardon's character or criminal propensities. The hospital's failure to challenge the sufficiency of the evidence under § 302 B is thus both irrelevant and understandable because the jury could not have made a finding of negligence under § 302 B without an appropriate instruction in accordance with that provision.[27] Consequently, given the present record and the trial court's instructions on general negligence, the majority applies the incorrect standard of review and incorrectly concludes that no propensity instruction was required. The requested propensity instruction would have remedied the trial court's instructions on general negligence and provided the jury with sufficient guidance for determining whether the hospital could be found negligent for Reardon's criminal misconduct.

II

APPLICABLE STANDARD OF CARE INSTRUCTION

I also disagree with the majority's conclusion that the trial court properly declined to give the hospital's requested instruction regarding the use of its bylaws to establish the legally applicable standard of care in the relevant community. The hospital had requested an instruction based on this court's decision in *Petriello* v. *Kalman*, 215 Conn. 377, 386, 576 A.2d 474 (1990), that the "[h]ospital bylaws, including the bylaws of the medical staff that the plaintiff put into evidence, do not themselves establish the standard of care." The court nonetheless declined this request.

The majority concludes that no such instruction was necessary because one of the plaintiff's expert witnesses, Arthur Sidney Shorr, testified that the hospital's bylaws reflected the legally applicable standard of care. The majority explains that, "[w]hen . . . the plaintiff adduces otherwise admissible expert testimony that [an] institution's bylaws do, in fact, reflect the standard of care, there simply is no need for the requested instruction." Text accompanying footnote 45 of the majority opinion. The majority, however, misconstrues Shorr's testimony and misunderstands Connecticut law regarding the effect of hospital bylaws on the legally applicable standard of care in the relevant community.

Turning first to the expert testimony, Shorr did *not* testify that the hospital's bylaws "coincide with the legally applicable standard of care in the relevant community," as the majority maintains. Shorr initially explained that the bylaws were created jointly by the hospital medical staff and its governing board, and were "*the rules of the road by which the . . . physicians in the hospital will conduct their business*. . . . [T]he . . . bylaws [constitute] the document that defines . . . what they are supposed to do, how they're supposed to be organized, what officers they're going to elect from within their own organization, and how they're going to conduct the business of the medical staff in the hospital." (Emphasis added.) When the plaintiff's attorney introduced the bylaws into evidence, Shorr again testified that they were "the rules of the road for how the medical staff will govern itself, its committees, its activities, and its duties and responsibilities that are assigned to it by the governing body." Shorr then described in greater detail how the bylaws governed the daily operations of the hospital, including the work of its research committee.

The term "standard of care" was not used by anyone to describe the bylaws until direct examination of Shorr resumed following a recess. At that time, the plaintiff's attorney asked Shorr: "What does the term 'standard of care' mean?" Shorr responded: "[*The*] [*s*]*tandard of care or the synonym for that community standard is the minimally accepted behavior or action that is*

expected of personnel and hospitals discharging their duties and responsibilities, whether they're medical, clinical, or administrative." (Emphasis added.) The plaintiff's attorney then asked: "And was there a standard of care required at [the] [h]ospital with regard to having approval before . . . Reardon began any growth study?" When Shorr responded in the affirmative, the attorney asked where that standard came from. Shorr replied that "[i]t comes from their own bylaws." Shorr further explained that the bylaws represented "[t]he standard that [the hospital] set for itself" to govern the conduct of its business operations and research. Thereafter, the plaintiff's attorney repeatedly asked Shorr questions that characterized the bylaws as the hospital's standard of care, and Shorr continued to testify regarding the rules established in the bylaws that governed the operations of the hospital.[28] On cross-examination, Shorr acknowledged that he had not reviewed the present or past policies and procedures of any other hospitals in connection with his work in the present case.

On the basis of these facts, it is clear that Shorr's *only* testimony regarding the principles that define the legally applicable standard of care in the relevant community was extremely brief and made no reference to the bylaws. He merely stated: "[The] [s]tandard of care or the synonym for that community standard is the minimally accepted behavior or action that is expected of personnel and hospitals discharging their duties and responsibilities, whether they're medical, clinical, or administrative." Moreover, Shorr's original lengthy and detailed testimony regarding the hospital's bylaws did not equate them with the legally applicable standard of care. Rather, it was the plaintiff's attorney who initially used the term "standard of care" in referring to the bylaws as the *rules of governance for the hospital*. Accordingly, insofar as the majority concludes that the trial court properly declined to give the hospital's requested jury instruction because Shorr testified that the hospital's bylaws coincided with the legally applicable standard of care in the relevant community, its conclusion is contradicted by Shorr's actual testimony and, therefore, cannot stand.[29]

Notwithstanding this defect, the trial court's failure to give the requested instruction misled the jury and constituted harmful error because it permitted the plaintiff's legally flawed theory that the hospital's internal bylaws established the legally applicable standard of care to remain uncorrected. In other words, the trial court's failure to give the instruction very likely caused the jury to believe that Shorr's testimony that the bylaws were the "rules of the road" defined the legally applicable standard of care in the relevant community and the hospital's legal duty to the plaintiff.

The hospital bylaws established the hospital research

committee and provided in relevant part that "the [c]ommittee shall require and receive periodic reports of the progress of investigations which have been approved and initiated. On the basis of such reports, it shall recommend continuance or discontinuance." Bylaws, Rules and Regulations of the Medical and Dental Staff of Saint Francis Hospital (1969 Rev.) § 13, para. 4, p. 30. The plaintiff relied in part on this provision of the bylaws to argue that the hospital had a duty to supervise and monitor Reardon's research activities, a duty that it owed to the plaintiff, and that the hospital's failure to require reports from Reardon on the growth study constituted a breach of that duty.[30] The plaintiff thus argued that, if the hospital had required reports from Reardon, as the bylaws required, it would have discovered that the growth study was a sham and the plaintiff would have been spared.[31]

This court has stated that, "[a]lthough a violation of an employer's work rules can be viewed as evidence of negligence . . . hospital rules, regulations and policies do not themselves establish the standard of care." (Internal quotation marks omitted.) *Petriello* v. *Kalman*, supra, 215 Conn. 386. The rule is well established and is consistent with the general principle that the standard of care in a negligence action is an objective one, determined by external standards, and not a rule derived from individual practices.[32] See W. Keeton et al., supra, § 33, pp. 195–96. Indeed, a rule to the contrary would create a disincentive for hospitals and other institutions to establish aspirational guidelines by penalizing those that do. See *Titchnell* v. *United States*, 681 F.2d 165, 173 (3d Cir. 1982) (to treat hospital's internal, aspirational guidelines and procedures as applicable standard of care regardless of deviation from "the recognized standard of care of the medical profession . . . would unfairly penalize health care providers who strive for excellence in the delivery of health care and benefit those who choose to set their own standard of care no higher than that found as a norm in the same or similar localities at the time").

I further conclude that the error was harmful. In the absence of an instruction that the bylaws do not themselves establish the legally applicable standard of care, the jury was free to interpret Shorr's testimony as the plaintiff's counsel urged it to do and erroneously conclude that the hospital's bylaws were the "rules of the road" that did, in fact, establish the legally applicable standard of care. Moreover, it is likely that the jury was misled into doing so because Shorr's testimony was the *only* testimony that the plaintiff offered on this issue.[33] Shorr admitted that, in arriving at his conclusion that the bylaws established the rules by which the hospital conducted its business, he had not reviewed the policies or procedures of any other hospitals. Moreover, the plaintiff did not offer any testimony or submit any evidence regarding the legally applicable standard of

care other than that allegedly established by the hospital's bylaws.

The plaintiff's counsel exacerbated the problem during closing argument by claiming that the question before the jury was simply a matter of whether the hospital had abided by its bylaws, arguing that, if the jury concluded that the hospital did not, the jury should find for the plaintiff. The plaintiff's counsel also highlighted Shorr's misleading testimony during closing argument, reminding the jury during his discussion of the applicable standard of care that Shorr had "said nothing other than a hospital needs to follow its own rules . . . [and] when [the hospital] makes a promise, [it has] to keep it," and asserting that the bylaws state "in black and white what the hospital was supposed to do . . . ." In one of his final references to Shorr's testimony, the plaintiff's counsel similarly argued that, "what [Shorr] told you is that the bylaws are the rules of the road and they have to be followed. . . . I would suggest that the first way you could find the hospital responsible is they didn't follow their own rules regarding . . . research." The requested limiting instruction was therefore necessary to prevent the jury from relying on the bylaws as the legally applicable standard of care in the relevant community in determining whether the hospital breached a duty owed to the plaintiff, in direct contradiction to what is required by law.[34]

In conclusion, I am concerned that the effect of the majority opinion will be to expose employers in Connecticut to an unreasonable risk of liability. As previously discussed, liability for the intentionally tortious or criminal misconduct of a third party has always been extremely limited under Connecticut law and the law of other jurisdictions. Even when an actor creates conditions, under the principles described in § 302 B of the Restatement (Second), that would afford a third party the opportunity to engage in criminal misconduct, the majority fails to recognize the protections to which the actor is entitled under that rule. This means that, contrary to the law of the overwhelming majority of other jurisdictions, every claim alleging a sexual attack or other intentional tort or crime by a third party against a prisoner, employee or any other person with whom the employer has a special relationship could be compensable without proof that the employer had actual or constructive knowledge, or any awareness whatsoever, of the third party's propensity to engage in the misconduct at issue. I am also concerned that the majority has established a single foreseeability standard that rejects the distinctions articulated in the Restatement (Second), which are followed by the overwhelming number of other jurisdictions, and that Connecticut courts may now be persuaded to apply in all cases of negligence, thus failing to accommodate the different considerations that necessarily arise in the wide variety of circumstances that give rise to claims of negligence.

Finally, the majority effectively overrules the legal principle articulated in *Petriello* that hospital bylaws do not themselves establish the standard of care. See *Petriello* v. *Kalman*, supra, 215 Conn. 386.

For the foregoing reasons, I respectfully dissent.

[1] I hereinafter refer to the hospital's 1969 "Bylaws, Rules and Regulations of the Medical and Dental Staff" as the bylaws.

[2] Although the plaintiff uses the term "ordinary negligence" in describing Connecticut's basic negligence law, I use the term "general negligence" to be consistent with the majority opinion.

[3] As discussed more fully in part I B of this opinion, the parties and the trial court referred numerous times throughout the proceedings to notice of propensity as a central issue in this case, including in the parties' proposed jury instructions, during the hearing on the hospital's motion to sever, during arguments on the plaintiff's motion to preclude testimony by the hospital's expert witness and during the voir dire of a witness who was to testify regarding possible notice to the hospital.

[4] The majority's assertions that count one did not allege negligent supervision are unsupported by the record and in no way diminish the validity of the documents, statements and testimony on which I rely.

[5] Recognizing the problems of proof posed by a negligent supervision claim, the plaintiff on appeal recasts count one as a "negligent supervision of research" claim, apparently hoping to circumvent the basic, black letter principle of tort law that, in the absence of a special relationship, there is no duty to control the conduct of another party. The plaintiff, however, cannot, on the one hand, seek to hold the hospital liable for failing to control Reardon's conduct toward the children who participated in his research study and, on the other hand, seek to benefit from rules that would have applied only if the *hospital's* conduct in supervising Reardon's research had directly harmed the plaintiff. See 2 Restatement (Second), Torts § 315, p. 122 (1965). The plaintiff's attempt to disguise the true nature of this claim by arguing that it simply is a matter of supervision of research relies on a fiction, namely, that, by framing the issue without reference to the researcher; i.e., the *employee*, the plaintiff can escape the more stringent requirements of proof that we historically have applied when a plaintiff seeks to impose liability on a party for its failure to control the conduct of a third person.

In this connection, I note the plaintiff's disingenuous claim that, because he did not allege in his complaint that the hospital should have known of Reardon's propensity to abuse children, he should not have been required to prove it. We never have adopted such a rule, and with obvious good reason.

[6] The majority is absolutely incorrect in claiming that there is no difference between a negligent supervision claim and a general negligence claim because proof of foreseeability is required in both cases, and, therefore, "the issue is precisely the same . . . ." Footnote 37 of the majority opinion. As discussed more fully in part I B 1 of this opinion, proof of foreseeability in cases alleging negligent supervision requires that an employer have knowledge of the necessity and opportunity for exercising control over the employee's conduct, which may include criminal acts, whereas proof of foreseeability in cases alleging general negligence does not require a special relationship and does not apply to the criminal acts of a third party but, rather, requires only that the actor anticipate "harm of the [same] general nature" as that which occurred. (Internal quotation marks omitted.) *Sic* v. *Nunan*, 307 Conn. 399, 407, 54 A.3d 553 (2012). The proof required to establish foreseeability thus depends on the specific legal and factual context, and a foreseeability instruction on general negligence will be inadequate for a jury to determine an employer's liability for harm caused by an employee's criminal misconduct, which is not foreseeable under a theory of general negligence. Indeed, *no* jurisdiction of which I am aware that has considered a claim of negligent supervision in a similar context agrees with the majority's apparent conclusion that the evidence required to prove foreseeability in such cases is the same type of evidence required to prove foreseeability under a theory of general negligence. See, e.g., *Belmont* v. *MB Investment Partners, Inc.*, 708 F.3d 470, 491 (3d Cir. 2013); *Doe* v. *New York*, United States District Court, Docket No. 09-Civ. 9895 (SAS) (S.D.N.Y. March 4, 2013); *Spicer* v. *District of Columbia*, United States District Court, Docket No. 10-1576 (BJR) (D.D.C. January 2, 2013); *Finley* v. *Kondaur Capital Corp.*, United States District Court, Docket No. 12-02197-WGY (W.D. Tenn. December 19, 2012); *Petersen* v. *Stanislaus*, United States District Court,

Docket No. 1:12-cv-00933-AWI-BAM (E.D. Cal. October 12, 2012); *Svacek* v. *Shelley*, 359 P.2d 127, 131–32 (Alaska 1961); *Saine* v. *Comcast Cablevision of Arkansas, Inc.*, 354 Ark. 492, 497–500, 126 S.W.3d 339 (2003); *Keller* v. *Koca*, 111 P.3d 445, 448–49 (Colo. 2005); *Matthews* v. *Booth*, Delaware Superior Court, Docket No. 04C-09-219MJB (Del. Super. May 22, 2008); *Malicki* v. *Doe*, 814 So. 2d 347, 361–62 (Fla. 2002); *Novare Group, Inc.* v. *Sarif*, 290 Ga. 186, 190–91, 718 S.E.2d 304 (2011); *Wong-Leong* v. *Hawaiian Independent Refinery, Inc.*, 76 Haw. 433, 444–45, 879 P.2d 538 (1994); *Rausch* v. *Pocatello Lumber Co.*, 135 Idaho 80, 86, 14 P.3d 1074 (App. 2000); *Hills* v. *Bridgeview Little League Assn.*, 195 Ill. 2d 210, 233–38 and n.3, 745 N.E.2d 1166 (2000); *Sandage* v. *Board of Commissioners*, 897 N.E.2d 507, 511–14 (Ind. App. 2008); *Estate of Harris* v. *Papa John's Pizza*, 679 N.W.2d 673, 680 (Iowa 2004); *Kansas State Bank & Trust Co.* v. *Specialized Transportation Services, Inc.*, 249 Kan. 348, 362, 819 P.2d 587 (1991); *Dragomir* v. *Spring Harbor Hospital*, 970 A.2d 310, 317 (Me. 2009); *Hersh* v. *Kentfield Builders, Inc.*, 385 Mich. 410, 412, 189 N.W.2d 286 (1971); *Oslin* v. *State*, 543 N.W.2d 408, 415 (Minn. App. 1996), review denied, Minnesota Supreme Court, Docket Nos. C1-95-1579 and C8-95-1580 (Minn. April 1, 1996); *Jones* v. *Alden Mills*, 150 Miss. 90, 104–105, 116 So. 438 (1928); *Dibrill* v. *Normandy Associates, Inc.*, 383 S.W.3d 77, 87–88 (Mo. App. 2012); *Farr* v. *Cambridge Co-Operative Oil Co.*, 164 Neb. 45, 47, 49–53, 81 N.W.2d 597 (1957); *Medlin* v. *Bass*, 327 N.C. 587, 590–91, 398 S.E.2d 460 (1990); *Clinton* v. *Faurecia Exhaust Systems, Inc.*, Ohio Court of Appeals, Docket No. 2012-CA-1 (Ohio App. October 5, 2012); *N.H.* v. *Presbyterian Church (U.S.A.)*, 998 P.2d 592, 600 (Okla. 1999); *Broadley* v. *State*, 939 A.2d 1016, 1022 (R.I. 2008); *Degenhart* v. *Knights of Columbus*, 309 S.C. 114, 116–17, 420 S.E.2d 495 (1992); *Kelsey-Seybold Clinic* v. *Maclay*, 466 S.W.2d 716, 720 (Tex. 1971); *Jackson* v. *Righter*, 891 P.2d 1387, 1392 (Utah 1995); *Bradley* v. *H.A. Manosh Corp.*, 157 Vt. 477, 480–83, 601 A.2d 978 (1991); *Niece* v. *Elmview Group Home*, 131 Wn. 2d 39, 51–52, 929 P.2d 420 (1997); *L.L.N.* v. *Clauder*, 209 Wis. 2d 674, 699–700, 563 N.W.2d 434 (1997); *Shafer* v. *TNT Well Service, Inc.*, 285 P.3d 958, 962, 964–67 (Wyo. 2012). Accordingly, to the extent the majority declares that the evidence required to prove foreseeability in negligent supervision and general negligence cases will now be the same, Connecticut's rules on negligence will be inconsistent with the rules adopted in every other jurisdiction that has addressed this issue.

[7] In *Murdock* v. *Croughwell*, supra, 268 Conn. 560–61, 567, this court considered whether the trial court properly set aside a jury verdict for the plaintiff, a Hartford police officer, for personal injuries he suffered during an off-duty, physical altercation with a fellow police officer. The plaintiff alleged that the defendants city of Hartford and chief of police had a duty to protect the plaintiff or to control the off-duty conduct of the other police officer under the special relationship exception to §§ 315 and 317 of the Restatement (Second). See id., 561, 567–70. In deciding for the defendants, the court first noted that an employer has a duty to control the conduct of an off-duty employee under these Restatement provisions "when the conduct complained of occurs on the employer's premises or utilizes a chattel of the employer's, *if* the employer knows or has reason to know that he can control the employee and recognizes the necessity of doing so." (Emphasis altered.) Id., 570. The court concluded, however, that the facts did not establish a special relationship between the plaintiff and the defendants because the altercation had not occurred on police premises and had not involved any of the defendants' chattels. Id. Thus, although the court clearly noted the Restatement's requirement of knowledge of propensity to engage in wrongful conduct in order to subject the defendants to liablility, it did not reach that question.

[8] The majority claims that there is nothing in the language of § 317 "to suggest that the liability of an employer under § 317 is conditioned on proof that the employer had actual or constructive knowledge of the employee's propensity to engage in criminal misconduct. Rather, § 317 is cast in broader terms, requiring proof that the employer knew or should have known of the need to exercise control over its employee. . . . If the drafters of § 317 had intended to limit recovery only to those cases in which the evidence established that the employer had actual or constructive knowledge of its employee's criminal propensity, they would have used such language instead of the more encompassing language that they did use." (Citation omitted; emphasis omitted.) Footnote 37 of the majority opinion. I disagree.

Section 317 provides that the master has a duty to control the conduct of his servant so "as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm

to them, if . . . the master . . . knows or should know of the necessity . . . for exercising such control." 2 Restatement (Second), supra, § 317 (b) (ii), p. 125. On the basis of this language, it is self-evident that the words "knows or should know" refer to actual or constructive knowledge because "know" means actual knowledge and "should know" means the knowledge that a reasonable person would have acquired in the exercise of due care, which is the same as constructive knowledge. Furthermore, the reference in § 317 to the "necessity" for exercising control over the employee describes the employer's understanding that the employee is capable of harming others or conducting himself in a way that would create an unreasonable risk of harm to others. Accordingly, read in its entirely, § 317 describes a master's duty to control his servant if the master has identified a need to do so because of actual or constructive knowledge that the servant might intentionally harm or create an unreasonable risk of harm to others. This is not the broad, "encompassing language" described by the majority. Footnote 37 of the majority opinion. In order to reach its conclusion, the majority disregards the plain meaning of the language in § 317 and claims that only if the actual words, "knowledge of [an] employee's criminal propensity," had been used would recovery have been limited in this way. Id. The majority thus relies on an excessively narrow reading of the provision, with which I strongly disagree, and with which numerous other jurisdictions that have considered the question also disagree. See, e.g., *Svacek* v. *Shelley*, 359 P.2d 127, 131 (Alaska 1961); *Keller* v. *Koca*, 111 P.3d 445, 448–49 (Colo. 2005); *Malicki* v. *Doe*, 814 So. 2d 347, 361–62 (Fla. 2002); *Wong-Leong* v. *Hawaiian Independent Refinery, Inc.*, 76 Haw. 433, 444–45, 879 P.2d 538 (1994); *Rausch* v. *Pocatello Lumber Co.*, 135 Idaho 80, 86, 14 P.3d 1074 (App. 2000); *Hills* v. *Bridgeview Little League Assn.*, 195 Ill. 2d 210, 233–38 and n.3, 745 N.E.2d 1166 (2000); *Sandage* v. *Board of Commissioners*, 897 N.E.2d 507, 511–14 (Ind. App. 2008); *Dragomir* v. *Spring Harbor Hospital*, 970 A.2d 310, 317 (Me. 2009); *Farr* v. *Cambridge Co-Operative Oil Co.*, 164 Neb. 45, 47, 49–53, 81 N.W.2d 597 (1957); *Degenhart* v. *Knights of Columbus*, 309 S.C. 114, 117, 420 S.E.2d 495 (1992); *Kelsey-Seybold Clinic* v. *Maclay*, 466 S.W.2d 716, 720 (Tex. 1971).

[9] The thirty-five jurisdictions are Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming. The majority claims that the cited cases have no bearing on the proper resolution of the present case because "there was either no claim that the nonpropensity evidence was sufficient to support a finding that the criminal misconduct was foreseeable or . . . the nonpropensity evidence was insufficient as a matter of law to permit such a finding." Footnote 39 of the majority opinion. The majority, however, fails to understand that, when a plaintiff in any of these thirty-five jurisdictions complains of being injured by the criminal act of an employee due to the employer's negligent supervision, it is incumbent on the plaintiff to prove that the employer had notice of the employee's violent or criminal propensities. Like the cited cases, the cause of action in the present case is one in which the plaintiff has alleged negligent supervision of an employee who committed criminal acts.

In addition, the majority repeats the mistake it makes with respect to its claim that the present case alleges general negligence under § 302 B of the Restatement (Second). See part I C 3 of this opinion. A claim that the defendant is negligent in failing to protect another from the criminal misconduct of a third party constitutes an exception to the rules on general negligence. See 2 Restatement (Second), supra, § 302 B, comment (d), p. 89. Consequently, a plaintiff must plead and prove negligence under a theory that permits liability to be imposed for such misconduct. The theory may vary depending, for example, on whether the defendant is in a position of custody or control; id., § 315, p. 122; id., § 317, p. 125; id., § 320, p. 130; or whether the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through the third party's criminal misconduct. Id., § 302 B, p. 88. As the majority concedes, however, there appears to have been no allegation in any of the cited cases from the thirty-five jurisdictions that nonpropensity evidence was sufficient to support a finding that the criminal misconduct of the third party was foreseeable or that the nonpropensity evidence was insufficient as a matter of law under general negligence principles. Rather, the plaintiff or plaintiffs in each case alleged that the defendant or defendants were liable for negligent

supervision, and the court treated the claim as a negligent supervision claim, not as a general negligence claim for which nonpropensity evidence might be sufficient to support a finding of liability. The thirty-five jurisdictions thus found evidence regarding notice of propensity to be a prerequisite to a determination of liability for the criminal misconduct of the third party because the Restatement (Second) clearly supports the conclusion that claims alleging negligent supervision and negligence under § 302 B require notice of propensity or other similar evidence. See part I C 3 of this opinion (discussing § 302 B of the Restatement [Second]).

To the extent the majority claims that "courts in other jurisdictions" do not require evidence of notice of propensity "when the evidence is otherwise sufficient to establish the foreseeability of the criminal misconduct"; footnote 39 of the majority opinion; it relies on two cases, namely, *Nelson* v. *Gillette*, 571 N.W.2d 332 (N.D. 1997), and *Kirlin* v. *Halverson*, 758 N.W.2d 436 (S.D. 2008), one of which is no longer persuasive. I agree that *Nelson* does not support the conclusion that propensity evidence is required to prove negligent supervision in North Dakota. *Nelson*, however, was decided nearly sixteen years ago, and North Dakota law has since been augmented by *Richard* v. *Washburn Public Schools*, 809 N.W.2d 288, 297–98 (N.D. 2011). In *Richard*, the North Dakota Supreme Court discussed the duty of care an employer owes to another person for an employee's criminal misconduct and cited to an Indiana case for the proposition that "[t]he master may subject himself to liability . . . by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others." (Internal quotation marks omitted.) Id., 297. The court then applied the foregoing principle to the facts and concluded that, because the defendant school district had received a report that one of its employees had sexually harassed another employee after three alleged incidents, there was sufficient evidence to demonstrate that material questions of fact existed regarding the employer's negligent supervision as to the fourth and last claimed incident, which occurred following the employer's receipt of the report. Id., 297–98. Accordingly, the court determined that the trial court's dismissal of the claim had been improper as a matter of law. Id., 298. A comparison of *Nelson* and *Richard* suggests, at most, that North Dakota law remains ambiguous and that clarification will be necessary to settle the issue of whether propensity evidence is required in all negligent supervision cases.

The majority contends that *Richard* cited *Nelson* with approval and that *Richard* "casts not the slightest doubt on *Nelson* and contains not the slightest suggestion that, for purposes of a claim under § 317 [of the Restatement (Second)], the foreseeability of the employee's criminal misconduct can be established only by proof of knowledge of propensity." Footnote 39 of the majority opinion. I disagree. *Richard* referred to *Nelson* on a single occasion as a secondary citation for a broadly worded statement as to when a claim of negligent supervision may arise; *Richard* v. *Washburn Public Schools*, supra, 809 N.W.2d 297; and did not rely on *Nelson* in its analysis of notice or foreseeability. In addition, two cases decided after *Nelson* by the United States District Court for the District of North Dakota also deemed negligent supervision claims based on the existence of propensity evidence viable under North Dakota law. See *Nelson* v. *Wahpeton Public School District*, 310 F. Supp. 2d 1051, 1060 (D.N.D. 2004) (declining to grant motion for summary judgment on negligent supervision claim because defendant school district's failure to act after being informed of employee's allegedly inappropriate behavior created "a question of material fact as to whether [the defendant had] exercised ordinary care in preventing foreseeable misconduct"); *Cromp* v. *Greyhound Lines, Inc.*, United States District Court, Docket No. A1-02-92 (D.N.D. December 12, 2003) (declining to grant motion for summary judgment on negligent supervision claim because disputed factual issues existed as to whether defendant bus company exercised reasonable care in supervising employee after receiving complaints from passengers regarding his behavior while he was employed by defendant).

The majority also relies on a South Dakota case, namely, *Kirlin* v. *Halverson*, supra, 758 N.W.2d 436. I disagree, however, with the majority's conclusion that, under *Kirlin*, knowledge of propensity to engage in the misconduct at issue is not necessary to establish duty. In conducting a duty analysis under § 317 of the Restatement (Second), the court did not expressly state that knowledge of propensity was required to find that the employer had a duty under § 317. Instead, it applied a "totality of the circumstances test" that included consideration of such knowledge. (Internal quotation marks omitted.) Id., 451. The court explained: "In the totality of the circum-

stances, knowledge of the prior day's conflict [between the employee and the victim] can be fairly imputed to [the employer]. It was foreseeable to [the employer] that [the employee] would confront [the victim] regarding [the employer's] property. Further, it was foreseeable that [the employee] would use force to reclaim his employer's property. Therefore, [the employee's] assault was foreseeable to [the employer] for the purposes of establishing a legal 'duty of control.' " Id. The South Dakota Supreme Court explained in a more recent case construing *Kirlin*: "This [c]ourt ultimately concluded [in *Kirlin*] that a duty existed under a negligent supervision claim because the possibility that a dispute could arise *based on the previous day's altercation* was foreseeable . . . ." (Emphasis added.) *Iverson* v. *NPC International, Inc.*, 801 N.W.2d 275, 283 (S.D. 2011). "In *Kirlin*, *conflict existed between the businesses' employees on consecutive days*, the employees were working in the same small area, and the environment was hostile. As a result, it was sufficiently foreseeable that some harm could follow." (Emphasis added.) Id. Thus, although the employee in *Kirlin* who engaged in the misconduct at issue had not been involved in the prior day's confrontation, he was part of the hostile workforce that had precipitated the confrontation, and, therefore, the court imputed the propensity of the first employee to engage in confrontational behavior to the employee who subsequently assaulted the victim. See *Kirlin* v. *Halverson*, supra, 451. Accordingly, the court found the employer potentially liable on the basis of prior, identifiable conduct that provided actual or constructive notice of the employee's future criminal misconduct. See id. Nevertheless, even if these two cases do not support my view, they also do not diminish the persuasive value of the cases from thirty-five other jurisdictions that have found that propensity evidence is required to hold an employer liable for the negligent supervision of an employee who engages in criminal misconduct.

[10] The majority declares that the cases on which I rely have "no bearing on the proper resolution of the present case" because, in all those cases, there was "no claim that the nonpropensity evidence was sufficient to support a finding that the criminal misconduct was foreseeable" and "proof of knowledge of propensity is *not* a prerequisite to recovery [against the employer for negligent supervision] when the evidence is otherwise sufficient to establish the foreseeability of the [employee's] criminal misconduct . . . ." (Citation omitted; emphasis in original.) Footnote 39 of the majority opinion. The majority thus suggests that whether the cited cases are relevant and whether a propensity instruction was required in this case depends on the existence of other evidence sufficient to establish the foreseeability of Reardon's misconduct. This court, however, has no authority to determine whether the evidence was sufficient to find negligence against the hospital under a legal theory never raised by the parties at trial or included in the trial court's instructions to the jury. Moreover, it is not possible to know whether there was sufficient evidence in the cited cases from which the fact finder could have deemed the defendant or defendants negligent without a propensity instruction because this court is not in a position to evaluate the record in each case, the entirety of which is not necessarily reflected in the courts' published decisions. Finally, I cite the cases in this opinion for the proposition that courts consistently have held, as a general principle, that actual or constructive knowledge of an employee's propensity to engage in the misconduct at issue is required in order to impose liability in sexual abuse cases. Accordingly, this court need not consider whether the evidence in this case was sufficient under some other theory that never was presented at trial or on appeal in order to subject the hospital to liability, thus rendering a propensity instruction unnecessary.

Furthermore, although the majority cites two Superior Court cases in which the defendants' summary judgment motions were denied when there was no evidence that the defendants had knowledge of the wrongdoers' propensity for sexual violence; see footnote 34 of the majority opinion; those cases are not precedential, and, in any event, they are far outnumbered by Superior Court cases in which knowledge of propensity has been recognized as essential to a finding of liability for negligent supervision in this context.

[11] The majority contends that § 317 of the Restatement (Second) does not provide the sole basis for an employer's liability arising out its negligent supervision of an employee and that there is nothing in § 317 that forecloses a negligent supervision claim against an employer under § 302 B. See footnote 37 of the majority opinion. I disagree. If negligent supervision claims were not intended to be brought pursuant to §§ 315 and 317, there would have been no need to include those provisions in the Restatement (Second)

and to give them such a prominent place in the Restatement's discussion of an actor's duty to control the conduct of third persons. Correspondingly, if negligent supervision claims were intended to be brought pursuant to § 302 B, as well as §§ 315 and 317, the three provisions would cross-reference each other, just as § 442 B refers to §§ 448 and 449; 2 Restatement (Second), supra, § 442 B, comment (c), p. 471; §§ 302 and 449 refer to § 302 B; id., § 302, comments (b) and (j), pp. 82, 86; id., § 449, comment (a), p. 482; and § 315 refers to §§ 316 through 320. Id., § 315, comment (c), p. 123. Furthermore, it is clear from the language in §§ 315 and 317, which address the actor's duty to control the conduct of third persons to prevent them from causing harm; see id., § 315, p. 122; id., § 317, p. 125; that they describe the rules to be applied in resolving the plaintiff's negligent supervision claim, which refers to the hospital's duty to "monitor and supervise" Reardon. There is no language in § 302 B even remotely suggesting that the provision applies to negligent supervision claims because that section does not address the actor's duty to control the conduct of third persons who also are the actor's employees. To the extent comment (e) to § 302 B refers to the employer-employee relationship, it addresses the employer's duty to protect the *employee* from harm by "anticipat[ing] and guard[ing] against the intentional, or even criminal, misconduct" of a third person that may be directed against the employee. 2 Restatement (Second), supra, § 302 B, comment (e), p. 90. Furthermore, I have uncovered *no similar case in this or any other jurisdiction*, nor has the majority identified any such case, in which a negligent supervision claim was brought pursuant to § 302 B. It also is significant that neither the plaintiff nor the hospital makes reference to § 302 B in its appellate brief. Accordingly, the majority's suggestion that § 302 B is proper authority for bringing such a claim is out of step not only with the language of § 302 B and the law of every other jurisdiction that has applied the Restatement provisions in a similar context, but with the arguments of the parties.

I nonetheless note that, although §§ 315 and 317 apply to claims of negligent supervision, the foreseeability tests required under §§ 317 and 302 B, unlike the foreseeability test applied in cases of general negligence, are similar, in that liability under both provisions requires actual knowledge or awareness of the third person's potential for engaging in the criminal misconduct at issue. I contrast this with the majority's assertion that §§ 317 and 302 B are similar because both provisions purportedly describe only a general foreseeability test that does *not* require actual knowledge or awareness of the third person's potential for criminal misconduct; see footnote 37 of the majority opinion; a view that ignores the plain language of the provisions and the comments thereto.

[12] I disagree with the majority's assertion that a foreseeability analysis under § 320 of the Restatement (Second) is "not materially different from the determination to be made under count one of the plaintiff's complaint, namely, whether, in light of the relevant facts and circumstances, the hospital should have anticipated the harm of the kind that the plaintiff suffered at the hands of Reardon and have taken reasonable precautions to prevent it." Footnote 31 of the majority opinion. The majority expressly recognizes elsewhere in its opinion that § 320 imposes a duty only when the actor knows, or should know, of the "necessity" and opportunity for exercising control over the conduct of the third party wrongdoer. In equating foreseeability under a theory of general negligence with foreseeability under §§ 302 B, 319 and 320, the majority appears to adopt the plaintiff's argument that there is only one foreseeability standard applicable to all claims of negligence, thus creating uncertainty as to the continued relevance in this jurisdiction of the Restatement provisions on negligence and leaving Connecticut trial and appellate courts with little guidance as to how they should consider foreseeability in the context of future negligence claims, many of which are likely to rely on special relationships of custody or control to establish liability.

[13] The majority claims that the statements and instructional language to which this discussion refers are "removed from their context" because, if knowledge of propensity was a critical issue in the case, the plaintiff would have conceded that the hospital was entitled to judgment as a matter of law on both counts of the complaint, there being no evidence, according to the majority, that the hospital had actual or constructive knowledge that Reardon was a pedophile. Footnote 40 of the majority opinion. The majority also claims that the hospital did not raise the issue of notice in the trial court, that the plaintiff's requested instruction on notice did not relate to knowledge of propensity and that the hospital did not note in its memoranda

in support of its motion for a directed verdict that the plaintiff agreed that he was required to establish knowledge of propensity. See id. This is simply not the case.

A reading of the transcripts from which the statements were taken unequivocally demonstrates that they are not "removed from their context . . . ." Id. As for the majority's other claims, none alters the fact that the statements were made and that they represented the parties' positions. Additionally, the majority's claim that the hospital did not raise the issue at trial is unsupported by the record. Counsel for the hospital asked its expert witness, Salter, if she had an opinion as to "whether [the] [h]ospital could have foreseen that Reardon had a propensity to abuse children." Salter, however, was not allowed to answer that question because the trial court sustained the objection of the plaintiff's counsel on the ground that it was the ultimate issue in the case.

The majority's contention that the plaintiff's requested instruction on notice "speaks in terms of the hospital's actual or constructive knowledge of Reardon's sexual abuse of the plaintiff, *not* in terms of its actual or constructive knowledge of Reardon's propensity to sexually abuse children"; (emphasis in original) footnote 40 of the majority opinion; and that "the plaintiff's requests to charge contain no reference whatsoever to propensity, proclivity, tendency or any other similar term"; id.; is completely unfounded. Moreover, the majority quotes certain portions of the proposed instruction but omits others that do not comport with its analysis, thus altering the meaning of the instruction beyond recognition.

More specifically, the plaintiff's proposed instruction on notice does not speak of actual or constructive knowledge of Reardon's sexual abuse of the plaintiff in particular, as the majority declares. The portion of the instruction on which the majority relies provides in relevant part: "The [hospital] is liable if it had notice of Reardon's activity and failed to act. Notice may be actual or constructive. *The* [*hospital*] *had actual notice if it actually knew of the unsafe condition long enough before the plaintiff's injury to have taken steps to correct the condition or to take other suitable precautions*. . . . The plaintiff may also prevail if you find that the [hospital] had *constructive notice* of Reardon's activity. That *means that the* [*hospital*], *using reasonable care*, *should have known of the unsafe condition in time to have taken steps to correct the condition or to take other suitable precautions*." (Emphasis added.) The instruction thereafter concluded: "In deciding the issue of notice, the subsidiary question is whether the dangerous situation had existed for such a length of time that the [hospital], in the exercise of due care, should have discovered it in time to have remedied it *prior to the plaintiff's injuries*." (Emphasis added.) The plaintiff's proposed instruction on notice thus asked the jury to consider whether the hospital had actual or constructive notice that Reardon was sexually abusing children such that, in the exercise of due care, it could have taken steps to prevent a reoccurrence of such abuse *before* Reardon abused the plaintiff. If this does not constitute a request for an instruction on notice of Reardon's propensities, tendencies or proclivities to abuse children prior to his abuse of the plaintiff, I cannot imagine what does.

I also note that the plaintiff's proposed instruction was expressly based on Connecticut Civil Jury Instructions 3.9-12 and 3.9-13, which were developed in the context of premises liability law, in which claims typically allege an "unsafe condition" on real property, and which accounts for the proposed instruction's frequent use of the term "unsafe condition." The plaintiff, however, supplemented the model instructions on premises liability with other language indicating that the terms "notice . . . of the unsafe condition" and "notice of Reardon's activity" were intended to be used interchangeably, and that the unsafe condition or the activity to which they referred was Reardon's sexual abuse of children. For example, the plaintiff's proposed instruction begins with the sentence, "[t]he [hospital] is liable if it had notice of *Reardon's activity* and failed to act"; (emphasis added); and explains in the third paragraph, which the majority disregards, that the "activity" to which the instruction refers throughout is that "the children were being sexually abused by Reardon . . . ." Accordingly, the majority's assertion that the parties and the court did *not* recognize that knowledge of propensity was a critical issue in the case and that the parties' instructions were based on "two completely different theories of notice . . . [that] reflect the parties' opposing positions" is belied by the record. Footnote 40 of the majority opinion.

[14] The first proposed interrogatory relating to the plaintiff's claim of negligent supervision asked: "Has the plaintiff proven by a fair preponderance

of the evidence that [the] [h]ospital was on notice of the propensity of . . . Reardon to engage in sexual abuse of children before he abused the plaintiff?"

The second proposed interrogatory relating to the plaintiff's claim of a special duty of care asked: "[H]as the plaintiff proven by a fair preponderance of the evidence that [the] [h]ospital knew or should have known of the propensity of . . . Reardon to engage in sexual abuse of children before he abused the plaintiff?"

[15] Faulds testified that Reardon used her as a chaperone when examining girls.

[16] The exhibits on which the plaintiff relies for this information are endocrinology department accounting logs, which do not appear to connect Reardon, specifically, with the publications.

[17] The majority also relies in part on §§ 442 B and 448 of the Restatement (Second), but both of those provisions are inapplicable in the present context because they presume antecedent negligence by the actor and speak solely to whether superseding cause is available as a defense to liability after consideration of whether (1) the actor's presumed negligence created or increased the risk of a subsequent harm brought about by a third person's misconduct, and (2) the negligence was a substantial factor in causing that harm. See 2 Restatement (Second), supra, § 442 B, comment (b), p. 470; id., § 448, comment (c), p. 482. In addition, § 442 B does not apply to intentionally tortious or criminal acts. See id., § 442 B, comment (b), p. 470. Consequently, §§ 442 B and 448 have no bearing on the finding of an initial legal obligation, or duty, by the hospital in this case.

[18] "[Section 302 B] is a special application of the rule stated in [c]lause (b) of § 302"; 2 Restatement (Second), supra, § 302 B, comment (a), p. 89; which concerns the risk of intentional or criminal conduct of others.

Section 302 of the Restatement (Second) provides: "A negligent act or omission may be one which involves an unreasonable risk of harm to another through either (a) the continuous operation of a force started or continued by the act or omission, or (b) the foreseeable action of the other, a third person, an animal, or a force of nature." Id., § 302, p. 82.

[19] Insofar as the majority disagrees with this conclusion because "nothing in the language of [§ 302 B]" supports it; footnote 31 of the majority opinion; the majority disregards language in § 302 B and its comments clearly suggesting otherwise.

[20] Comment (f) to § 302 B provides in relevant part: "It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence . . . it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it." (Citation omitted.) 2 Restatement (Second), supra, § 302 B, comment (f), p. 93.

[21] To the extent the majority relies on example (H) in comment (e), it misunderstands example (H) and the effect it would have on a jury instruction, if the example applied. The majority claims that the trial court's refusal to give a propensity instruction was proper because "the plaintiff was entitled to a jury determination as to whether the growth study and the manner in which it was conducted gave rise to 'peculiar conditions' of the kind contemplated by example (H) in comment (e) to § 302 B." Footnote 27 of the majority opinion. Example (H) recognizes liability "[w]here the actor acts *with knowledge of peculiar conditions* which create a high degree of risk of intentional misconduct." (Emphasis added.) 2 Restatement (Second), supra, § 302 B, comment (e), example (H), p. 93. The trial court in the present case, however, did not instruct the jury that liability could be imposed on the hospital only if it had knowledge of peculiar conditions but, rather, gave a general instruction on the foreseeability of harm. A jury is presumed to have followed the instructions that were given unless there is evidence to the contrary. See, e.g., *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 22, 60 A.3d 222 (2013). Accordingly, the jury could not have found the hospital liable under the principle described in example (H), as the majority suggests it was entitled to do, because the court gave no

instruction on actual "knowledge of peculiar conditions"; 2 Restatement (Second), supra, § 302 B, comment (e), example (H), p. 93; just as it gave no instruction on knowledge of propensity.

[22] The majority claims that § 302 B does not establish a different standard for proving liability because it "is founded on general negligence principles"; footnote 37 of the majority opinion; and comment (f) to § 302 B expressly provides that "[i]t is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal conduct," which "is a matter of balancing the magnitude of the risk against the utility of the actor's conduct." (Internal quotation marks omitted.) Id., quoting 2 Restatement (Second), supra, § 302 B, comment (f), p. 93. I disagree. For all of the reasons discussed herein, specifically with respect to the standard of review, the principles set forth in § 302 B are distinguishable from general negligence principles. Furthermore, the reference in comment (f) to the need for "balancing the magnitude of the risk against the utility of the actor's conduct" does not mean that comment (f) does not articulate a different standard for proving liability. The "balancing" described in comment (f) is merely a procedural recommendation that has no effect on the fact that *all* of the specified factors described in § 302 B must be considered and balanced, thus clearly establishing a different standard for proving liability than the standard required for proving general negligence.

[23] Insofar as the majority cites *Gutierrez* v. *Thorne*, 13 Conn. App. 493, 537 A.2d 527 (1988), to demonstrate how the criminal misconduct of a third party may be a foreseeable consequence of the manner in which a defendant conducts its activities, thus forming the basis for a finding of liability, *Gutierrez* is irrelevant because it (1) did not address the more specific question before this court of whether a jury instruction on knowledge of a third party's propensity to sexually abuse children was required in order to hold the defendant liable, (2) involved an appeal from the trial court's granting of the defendant's motion for summary judgment and was addressing whether there were issues of material fact regarding foreseeability that could support a reversal of the decision and allow the case to proceed to trial, (3) is an Appellate Court decision that is not precedential, and (4) contains serious errors in its legal analysis that should not be implicitly endorsed by this court. These errors included confusing the concept of foreseeability as applied to duty and proximate cause when the court stated that "[t]he matter of foreseeability is a question of proximate cause," even though the court had been speaking of the foreseeability of harm that would give rise to a *duty to use due care*, the breach of which might constitute negligence. *Gutierrez* v. *Thorne*, supra, 500.

[24] The majority states that (1) "an instruction would have prevented the plaintiff from establishing the foreseeability of Reardon's sexual misconduct on the basis of the other evidence of foreseeability on which the plaintiff had asked the jury to rely, and on which the jury did rely in reaching its verdict for the plaintiff"; text accompanying footnote 38 of the majority opinion; and (2) "[as] courts of this state have recognized . . . proof of knowledge of propensity is *not* a prerequisite to recovery [against the employer for negligent supervision] *when the evidence is otherwise sufficient* to establish the foreseeability of the criminal misconduct." (Emphasis altered.) Footnote 39 of the majority opinion.

[25] The trial court in the present case specifically advised the jury that it was not to follow any law or legal theory except that on which it had been instructed: "With respect to the law, what I say to you is binding upon you, and you must follow my instructions. . . . It is your duty to follow my instructions and conscientiously apply the law, as I give it to you, to the facts as you find them in order to arrive at your ultimate verdict. If you should have a different idea of what the law is or even what you feel it ought to be, you must disregard your own notations and apply the law as I give it to you. The parties are counting on having their claims decided according to particular legal standards that are the same for everyone, and those are the standards I will give you and that you must follow. If what counsel said about the law differs from what I tell you, you will dismiss from your minds what they may have said to you.

"You must decide this case based only on the law that I furnish to you and on the basis of all of the law as I give it to you regardless of the order of my instructions. You must not single out any particular instruction or give it more or less emphasis than any other but, rather, must apply all of my instructions on the law that apply to the facts as you find them."

[26] In claiming that I have disregarded factors other than the third party's "known character, past conduct and tendencies"; 2 Restatement (Second),

supra, § 302 B, comment (f), p. 93; see footnote 38 of the majority opinion; the majority fails to understand my point that a proper risk utility analysis under § 302 B cannot be conducted by a jury—even if the jury ultimately might determine that the character and conduct factors are outweighed by the other factors—without a proper instruction directing the jury to balance the risk and utility in light of *all* of the factors. The majority also incorrectly concludes that I believe "the requested instruction represents a fair and accurate statement of the law under § 302 B." Footnote 38 of the majority opinion. To the extent my views are misunderstood, I clarify that, insofar as the majority maintains that the trial court's instructions were correct because the jury was entitled to find the hospital negligent under factors in comment (f) to § 302 B unrelated to Reardon's known character and past conduct, its reasoning is legally flawed given that the trial court never gave an instruction on those factors, and, therefore, the jury could not have conducted the required balancing test. I further believe that, given the trial court's instruction on general negligence, the requested instruction on actual or constructive notice of propensity was required because the overwhelming majority of other courts that have considered liability in the context of sexual abuse cases similar to the present case have not applied a general negligence standard in finding proof of foreseeability and have required such an instruction on policy grounds, and this court should do the same in the present circumstances.

[27] The majority claims that the trial court's failure to give an instruction under § 302 B is "not an issue in this appeal" because neither party requested such a charge and the jury found liability under the general negligence principles described in the instructions that were given. Footnote 37 of the majority opinion. The majority, however, has made the trial court's failure to instruct on § 302 B an issue on appeal. Although I agree that § 302 B should not be considered in this appeal because neither of the parties relied on that provision at trial or in their arguments to this court, the majority inexplicably makes it a central part of its analysis. Accordingly, because the majority concludes that the jury could have found negligence against the hospital under the principles set forth in § 302 B, I am obligated to note that the jury never was instructed on that provision, and, accordingly, the majority's analysis has no basis in the record or the facts of this case.

The majority also incorrectly declares that the hospital did not challenge the instruction on common-law negligence. See footnote 38 of the majority opinion. As previously discussed, the hospital *did* object to the instruction on common-law negligence because it failed to apprise the jury of notice of propensity, which the hospital argued was required for the jury to find that the hospital owed a duty to the plaintiff. The hospital also objected to the instruction on reasonable care because the key issue was notice of propensity, and not simply reasonable care, and also to the instruction on proximate cause because the issue was not just harm of the same general nature but notice of Reardon's propensity to sexually abuse children.

[28] Shorr also more fully explained that the standard of care within the hospital to which the plaintiff's attorney had referred "came from the bylaws and the rules and regulations of the medical staff and developing the responsibilities and duties and authorities of the committees, the research committee in particular."

[29] The majority's representation of the record is incorrect. The majority states that, after Shorr defined the community standard of care, "[t]he plaintiff's counsel then asked [him] whether there was a standard of care applicable to a hospital's supervision of research and where it came from. Shorr responded that there was such a standard of care, and that '[i]t comes from their own bylaws.' The plaintiff's counsel thereafter requested that Shorr describe the standard of care governing the present case, which he did in some detail." Footnote 44 of the majority opinion.

Contrary to the majority's representation of Shorr's testimony, the plaintiff's counsel asked Shorr only *one* question about the legally applicable standard of care, otherwise referred to as the "community standard." After Shorr answered that question, counsel did *not* ask Shorr another general question as to "whether there was *a* standard of care applicable to *a* hospital's supervision of research and where it came from," as the majority maintains. (Emphasis added.) Footnote 44 of the majority opinion. The plaintiff's counsel instead asked Shorr several specific questions relating only to the hospital and its operations, which resulted in the following colloquy:

"Q. And *was there a standard of care required at* [*the*] [*h*]*ospital with regard to having approval* before . . . Reardon began any growth study?

"A. *Yes*.

"Q. Where does that standard come from?

"A. *It comes from their own bylaws*.

"Q. And what was that standard of care?

"A. *The standard that* [*the hospital*] *set for itself* was that no research projects would begin without approval, that approved projects would be approved by the governing body, or recommendations for approval would be sent to the governing body for approval, and once approved that the researcher would twice a year submit progress reports to the research committee.

"Q. Was there a *standard of care required of* [*the*] [*h*]*ospital with regard to monitoring . . . Reardon's growth study* once it began?

"A. *Yes*.

* * *

"Q. And where does that standard of care come from?

"A. *It . . . came from the bylaws and the rules and regulations of the medical staff and developing the responsibilities and duties and authorities of the committees*, the research committee in particular." (Emphasis added.)

[30] The plaintiff also relies on the hospital's 1967 Institutional Assurance on Investigations Involving Human Subjects Including Clinical Research (assurance), which provides that the hospital "agrees that review independent of the investigator is necessary to safeguard the rights and welfare of human subjects of research investigations and assures the [United States] Public Health Service that it will establish and maintain advisory groups competent to review plans of investigation involving human subjects, prior to initiation of investigations, to [e]nsure adequate safeguard[s]. Group reviews and decisions will be carried out in reference to (1) the rights and welfare of the individuals involved, (2) the appropriateness of the methods used to obtain informed consent, and (3) the risks and potential medical benefits of the investigations." Shorr, who testified for the plaintiff regarding the assurance, did not testify that the assurance established the standard of care, and the plaintiff offered no evidence that the assurance had been submitted to the federal government. Moreover, on cross-examination, Shorr admitted that he had not compared the assurance with any other assurance at any other hospital or institution. In the absence of any evidence that the assurance reflected an objective, external standard—evidence that the plaintiff did not produce—the assurance is simply another internal rule, which cannot itself establish the standard of care. See *Petriello* v. *Kalman*, supra, 215 Conn. 386.

[31] I note that the plaintiff produced no evidence to demonstrate that, if the hospital had received periodic reports from Reardon regarding the progress of the growth study, Reardon would have been discovered and the hospital would have prevented him from harming the plaintiff.

[32] Citing *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 137, 998 A.2d 730 (2010), *Petriello* v. *Kalman*, supra, 215 Conn. 386, and *Van Steensburg* v. *Lawrence & Memorial Hospitals*, 194 Conn. 500, 505–506, 481 A.2d 750 (1984), the majority states that "[w]e have articulated this general principle . . . only in cases in which there was no expert testimony that the hospital's bylaws, rules or regulations did coincide with the legally applicable standard of care in the relevant community." There is no indication in the cited cases, however, as to whether there was expert testimony that the bylaws, rules and regulations at issue in those cases represented the legally applicable standard of care. Nor does the majority cite any case indicating, contrary to *Petriello*, that bylaws, rules and regulations may represent the legally applicable standard of care if an expert testifies to that effect. Accordingly, the majority's analysis appears to be based on an unsubstantiated conclusion drawn from an incomplete examination of our precedent.

[33] The testimony of the plaintiff's expert, New, a pediatric endocrinologist and geneticist, concerned standards governing the practices of endocrinologists, not the standards governing a hospital's supervision of its medical staff.

[34] The hospital argued in its motion for directed verdict, which the trial court denied, that the plaintiff's failure to produce expert testimony regarding the legally applicable standard of care required the court to direct a verdict in its favor. The hospital has not pursued this claim on appeal.