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Torts - The Dangerous Psychiatric Patient - The Doctor's Duty to Warn - Tarasoff v. Regents of the University of California

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CASE NOTES

TORTS—The Dangerous Psychiatric Patient—The Doctor's Duty to Warn. Tarasoff v. Regents of the University of California, 118 Cal. Rptr. 129, 529 P.2d 553 (1974).

In the summer of 1969, Prosenjt Poddar, a student at the University of California at Berkeley, consulted with Dr. Lawrence Moore, a University psychotherapist. During the course of therapy, Podder stated his intention to murder an unnamed, but readily identifiable girl—Tatiana Tarasoff.

After consultation with other staff doctors, Moore notified the campus police and requested their assistance in confining Poddar so that he could be committed to a mental hospital for observation. Although the police complied with Moore's request, they released Poddar after he was found to be rational. Moore's superior then ordered that no action be taken in an attempt to commit Poddar.[1] Poddar subsequently[2] discontinued treatment, and, in accordance with his stated intent, on October 27, 1969, stabbed Tarasoff to death.[3]

Tarasoff's parents filed a wrongful death action naming Moore as a defendant and alleging a duty on Moore's part to

1. Tarasoff v. Regents of the University of California, 118 Cal. Rptr. 129, 130-32, 529 P.2d 553, 554-56 (1974) (hereinafter referred to as Tarasoff v. Regents II); People v. Poddar, 10 Cal. 3d 750, 111 Cal. Rptr. 910, 518 P.2d 342, 344-45 (1974); Tarasoff v. Regents of the University of California, 33 Cal. App. 3d 275, 108 Cal. Rptr. 878, 880 (Ct. App. 1973) (hereinafter referred to as Tarasoff v. Regents I).

2. The point at which Poddar broke off treatment appears to be in doubt. The statement of facts by the California Supreme Court in its review of Poddar's conviction for murder reveals that Dr. Moore notified the police after Poddar discontinued treatment. People v. Poddar, 10 Cal. 3d 750, 111 Cal. Rptr. 910, 912-13, 518 P.2d 342, 344-45 (1974). This statement is supported by the fact that Dr. Moore's superior, in addition to revoking Moore's request for detention, ordered that all notes taken by Moore during Poddar's treatment be destroyed. Tarasoff v. Regents I, 33 Cal. App. 3d 275, 108 Cal. Rptr. 878, 880 (Ct. App. 1973). If Poddar was still undergoing therapy it does not seem likely that all notes with regard to his case would be destroyed. However, in the instant case, the California Supreme Court wrote: "The record in People v. Poddar (citations omitted) indicates, and plaintiffs' complaints could be amended to assert, that following Poddar's encounter with the police, Poddar broke off all contact with the hospital staff and discontinued psychotherapy." Tarasoff v. Regents II, 118 Cal. Rptr. 129, 135, 529 P.2d 553, 559 (1974). As will be seen, this particular interpretation was essential to one of the bases for assigning a duty to the defendant.

3. People v. Poddar, 10 Cal. 3d 750, 111 Cal. Rptr. 910, 912-13, 518 P.2d 342, 344-45 (1974); Tarasoff v. Regents II, 118 Cal. Rptr. 129, 132, 529 P.2d 553 (1974); Tarasoff v. Regents I, 33 Cal. App. 3d 275, 108 Cal. Rptr. 878, 880 (Ct. App. 1973).

warn Tarasoff or her parents of the danger she faced.[4] Asserting that the plaintiffs had failed to state a cause of action, the defendant demurred. The demurrer was sustained without leave to amend and the case was dismissed. The California Court of Appeals, First District affirmed the trial court's action, holding that the defendant owed no duty to Tarasoff or her parents as a result of the relationship between the psychotherapist and Poddar.[5] The California Supreme Court reversed, setting forth two bases for liability: (1) "[W]hen a doctor or a psychotherapist, in the exercise of his professional skill and knowledge, determines, or should determine, that a warning is essential to avert danger arising from the medical or psychological condition of his patient, he incurs a legal obligation to give that warning";[6] and (2) "if a defendant's prior conduct has created or contributed to a danger, even if that conduct itself is non-negligent . . . the defendent bears a duty to warn affected persons of such impending danger."[7]

THE LAW OF DUTY

The common law distinguished between misfeasance and non-feasance and, in its reluctance to assign liability for the latter, established a general rule that no one owes a duty to control the conduct of others or to warn those imperiled by such conduct.[8] Thus, liability was not imposed for "non-

4. Tarasoff v. Regents II, 118 Cal. Rptr. 129, 132, 529 P.2d 553, 556 (1974). The Tarasoffs actually sued the Regents of the University of California, naming Dr. Moore, Dr. Stuart Gold (the doctor who initially examined Poddar and with whom Moore consulted when he instructed the police to apprehend Poddar), Dr. James Yandell (assistant director of the department of psychiatry and the doctor who initially authorized Moore's instruction to the police), Dr. D. Harvey Powelson (director of the department of psychiatry and the doctor who countermanded Moore's instruction to the police), Chief William Beall, and Officers Gary L. Brownrigg, Joseph P. Halleran, Everett D. Atkinson and Johnny C. Teal of the campus police. Plaintiffs predicated liability for all defendants upon their failure to advise the plaintiffs of the impending peril and upon their failure to confine Poddar. The supreme court held that the plaintiffs' complaint could be amended to state a cause of action against all named defendants. A detailed examination of all issues in this case is obviously beyond the scope of a note and will be confined to the action against Dr. Moore, the therapist who treated Poddar.

5. Tarasoff v. Regents I, 33 Cal. App. 3d 275, 108 Cal. Rptr. 878, 880, 886 (Ct. App. 1973).

6. Tarasoff v. Regents II, 118 Cal. Rptr. 129, 131, 529 P.2d 553, 555 (1974).

7. *Id.* at 135, 529 P.2d at 559.

8. Harper & Kine, *The Duty to Control the Conduct of Another*, 43 YALE L. J. 886, 887 (1934); RESTATEMENT (SECOND) OF TORTS § 314, comment *c* at 116

feasance" except in those cases in which there existed "some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act."[9] Once that special relationship had been established, it required not only reasonable precautions for the safety of others (a warning for example) but also that one control the conduct of third persons.[10]

While there was no duty to aid a third person in the absence of a special relationship, the common law concept of misfeasance imposed a duty to avoid affirmative acts which increased the possibility of harm to another.[11] If one undertook such an affirmative act, he was seen as voluntarily entering a relationship which imposed upon him responsibility for the resulting harm to the third party.[12]

The doctor-patient relationship has often been construed by the courts as imposing duties to safeguard third parties. Thus the failure of a doctor to advise his patient of the dangerous side effects of prescribed medication resulted in the doctor's liability to third persons for injuries which they received as a result of those side effects.[13] A doctor was held liable to a third person for his failure to advise his patient that the patient's illness made it dangerous for him to drive an automobile when the patient, as a result of his illness caused harm to that third person.[14] The doctor's duty to third parties is particularly evident when he treats an individual afflicted with a contagious or infectious disease. In such cases, the doctor has a duty "to exercise reasonable care to advise members of the family *and others,* who are liable to

§ 315 at 118 (1965); W. PROSSER, TORTS § 56, at 338-41 (4th ed. 1971); Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23, 27 (1954); Wright v. Arcade School District, 230 Cal. App. 2d 272, 277, 40 Cal. Rptr. 812, 814 (Ct. App. 1964).

9. W. PROSSER, *supra* note 8, at 339; RESTATEMENT (SECOND) OF TORTS §§ 315-20 (1965).
10. W. PROSSER, *supra* note 8, at 348; RESTATEMENT (SECOND) OF TORTS §§ 315-20 (1965).
11. W. PROSSER, *supra* note 8, at 343; RESTATEMENT (SECOND) OF TORTS §§ 321-24a (1965).
12. W. PROSSER, *supra* note 8, at 343.
13. Kaiser v. Suburban Transp. Sys., 65 Wash. 2d 461, 398 P.2d 14, 16, *modified*, 401 P.2d 350 (1965).
14. Freese v. Lemmon, 210 N.W.2d 576, 580 (Iowa 1973)); RESTATEMENT (SECOND) OF TORTS § 311, comment *b* at 106 (1965).

be exposed thereto, of the nature of the disease and the danger of exposure" (emphasis added).[15]

The duty to third parties arising out of a special relationship that exists between the defendant and another is illustrated by the numerous cases involving mental institutions. "[W]here the hospital has notice or knowledge of facts from which it might reasonably be concluded that a patient would be likely to harm himself *or others,* unless preclusive measures were taken, then the hospital must use reasonable care in the circumstances to prevent such harm." (emphasis added).[16] Mental institutions have been held liable when an outpatient left the admitting room and assaulted a third person: (1) for their doctor's failure to inform other staff doctors of the patient's dangerous mental condition and (2) for their doctor's failure (when the information was communicated) to commit the individual.[17] Releasing a mental

15. Davis v. Rodman, 147 Ark. 385, 227 S.W. 612, 614 (1921). *See also:* Skillings v. Allen, 143 Minn. 323, 173 N.W. 663 (1919) where the attending physician advised the parents of a child infected with scarlet fever that there was no danger of contagion in seeing their daughter at the hospital or in taking her home during the "peeling" stage. The doctor was held liable when both parents contracted the disease. Davis v. Rodman, 147 Ark. 385, 227 S.W. 612, 614 (1921) where the treating physician failed to advise his patient's parents (with whom he lived) and his brothers and sisters (who lived nearby and by whom he was cared for) as to the dangers of contagion and the precautions to be taken and was held liable to the parents and three others when they contracted typhoid fever. Despite the the existence of a state law requiring notification of local health authorities by doctors, aware of contagious or infectious diseases, the court held that the duty imposed "was incumbent upon the appellees regardless of the rules and regulations of the State Board of Health on the subject." Jones v. Stanko, 118 Ohio St. 147, 160 N.E. 456, 457 (1928) where the doctor's patient, afflicted with black smallpox, lived next door to the decedent. When the doctor was approached by the decedent and questioned as to the danger if he cared for his neighbor, the doctor advised him there was no danger. The doctor was held liable when the decedent contracted black smallpox and expired. Wojcik v. Aluminum Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351, 358 (Sup. Ct. 1959) where defendant's doctor x-rayed and examined the plaintiff, but failed to advise him or his wife that he had tuberculosis. The doctor was held to be negligent for his failure to warn the wife when she contracted tuberculosis.

16. Vistica v. Presbyterian Hospital & Medical Care Center, 67 Cal. 2d 465, 62 Cal. Rptr. 577, 580, 432 P.2d 193, 196 (1967). Patient in a psychiatric ward of a hospital was known to have suicidal tendencies yet in spite of that fact and in spite of the attending physician's express instructions to watch her closely, she was left unattended. While so unattended she leaped to her death through an unsecured window.

17. Greenberg v. Barbour, 322 F. Supp. 745, 747 (E.D. Pa. 1971). Defendant Barbour, knowing of Hall's homicidal tendencies decided to admit him to the hospital and so contacted Hamann. Before Hall could be admitted, he left the hospital and assaulted the plaintiff. The court did not speak of a duty to warn but held Barbour's inadequate communication to Hamann to be negligent. The court stated that Hamann would be guilty of negligence

patient for a work leave program without communicating a warning to the farmer with whom he was placed as to the dangerous mental condition of the patient was held to be negligence.[18] Failing to pass on to a patient's commanding officer information as to his mental condition so that he would be denied access to firearms was also declared negligence.[19] However, the mental institution cases are not directly in point since the court in each case appeared to find negligence conduct *within* the hospital and not vis-a-vis a third person. Although the courts held the defendants liable for the harm done a third person, such a liability flowed not from a duty to warn, but from a duty to act in a non-negligent manner in treating a mental patient, so as to prevent potential harm to a third person.

THE *Tarasoff* DECISION

The California Supreme Court propounded two possible bases for imposing liability upon the defendant: (1) the voluntary undertaking by the defeendant of alerting the police, and

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if, while aware of Hall's condition, he failed to secure his admittance. *See also* Fair v. United States, 234 F.2d 288 (5th Cir. 1956), where the Burns Detective Agency was hired to protect a nurse threatened by a Captain in the United States Armed Forces. The Provost Marshal Office (PMO) had assured the Agency that it would be advised if and when the Captain was released. The PMO failed to so advise and the Captain killed the nurse, two Burns detectives and then himself.

18. Merchants National Bank & Trust Co. v. United States, 272 F. Supp. 409 (D.N.D. 1967). Newgard was committed to a Veteran's Administration Hospital after threatening to kill his wife. Released on a work leave program without a warning to the farmer of his dangerous condition, he was given the privilege of visiting his wife. On such a visit, Newgard murdered her.

19. Underwood v. United States, 356 F.2d 92, 98 (5th Cir 1966). An airman, believed to be dangerous by the non-commissioned officer in charge of the psychiatric ward, was released without a warning to his commanding officer to deny him access to firearms. The airman secured a firearm and killed his wife. Like Greenberg v. Barbour, 322 F. Supp. 745 (E.D. Pa. 1971), and Merchants National Bank & Trust Co. v. United States, 272 F. Supp. 409 (D.N.D. 1967), the warning that was deemed necessary was not to the one actually injured but to the one who might, when so advised, be capable of preventing harm to a third person.

It should be noted that a mental hospital which censors letters from patients to those outside the institution may be subject to the duty imposed by the *Tarasoff* decision. If such an institution were to censor and thus fail to send a letter containing a threat to the individual threatened and the patient writing the letter, after his release, carried out his threat, liability could be imposed. Since the obligation of such institutions to control their patients for the safety of third persons has been imposed consistently, the rationale of the *Tarasoff* decision would seem particularly applicable.

(2) the existence of a special relationship between the defendant and Poddar.[20]

When a defendant acts, even though he acts in a non-negligent manner, and in so doing creates or contributes to a danger, he has a duty to warn those affected.[21] This is in accordance with the general rule of the common law with regard to misfeasance and represents no radical step for the court.[22] The court saw the notification of the police and the resultant discontinuance of Poddar's treatment as an affirmative act which increased the likelihood that Poddar would carry out his threats. It held, therefore that the defendant had a duty to warn the Tarasoffs of the potential danger.[23] While the dissent would not have assigned a duty to the defendant based upon the special relationship between the defendant and Poddar, it did agree with the majority that "when a psychiatrist, in terminating treatment to the patient, increases the risk of his violence, the psychiatrist must warn the potential victim."[24]

Recognizing that there existed no special relation between the defendant and Tarasoff, the court held that a duty to warn arose as a result of the relation between the defendant

20. Tarasoff v. Regents II, 118 Cal. Rptr. 129, 134-35, 529 P.2d 553, 558-59 (1974).
21. *Id.* at 135, 529 P.2d at 559; RESTATEMENT (SECOND) OF TORTS § 321 (1965).
22. *See* notes 11, 12 *supra.*
23. Tarasoff v. Regents II, 118 Cal. Rptr. 129, 134-35, 529 P.2d 553, 558-59 (1974). *See also* Johnson v. State, 69 Cal. 2d 782, 73 Cal. Rptr. 240, 242-43, 447 P.2d 352, 354-55 (1968), where the parole authority placed a youth with known homicidal tendencies in the plaintiff's home without a warning. The court held that by its affirmative act of placing the youth in the plaintiff's home, the state had created a foreseeable peril and had a duty to warn the plaintiff.
24. Tarasoff v. Regents II, 118 Cal. Rptr. 129, 141, 529 P.2d 553, 565 (1974). It might be contended by some that the *Tarasoff* case fails to go as far as far as it would appear at first blush. Such an assertion would be based upon the fact that the psychotherapist indicated his actual knowledge of the danger Poddar posed by his call to the police and that in the absence of such a clear recognition of danger by an affirmative act the psychotherapist could not be held. This could, in part, at least by implication, be the basis for the dissent's position. Clearly the psychotherapist would have been held liable and the plaintiffs compensated by a holding as narrow as the dissent's. However, the majority rejected such a decision and found a duty to exist not only as a result of the defendant's affirmative act, but also as a result of the doctor-patient relationship and by an equation of the dangers of physical and mental illness. The court did not propound a subjective standard, but instead relied upon language typical of medical malpractice: "in the exercise of his professional skill and knowledge, determines, or *should determine* . . ." (emphasis added). Tarasoff v. Regents II, 118 Cal. Rptr. 129, 131, 529 P.2d 553, 555 (1974).

and Poddar.[25]. The court placed reliance, in part, upon the case law involving mental institutions and their care of the mentally ill.[26] In addition, the court held that the psychotherapist's duty to warn was well within the limits of previous case law involving the doctor's duty to warn others of contagious diseases of which the doctor has knowledge.[27] The court saw no difference between the danger from a patient afflicted with a contagious disease and the danger from a patient suffering from a severe mental illness.[28]

While the law has traditionally imposed upon a physician treating a patient afflicted with a contagious or infectious disease a duty to warn those endangered, courts have never placed a similar duty upon the psychotherapist. While it may be a natural extension of tort law to place such a duty upon the psychotherapist, the step is not as easily made as would at first appear. The doctor or psychotherapist is not dealing with a disease as readily ascertainable as smallpox, scarlet fever or tuberculosis. Instead he is asked to judge

25. "Although plaintiffs' pleadings assert no special relation between Tatiana and defendant therapists, they establish as between Poddar and defendant therapists the special relation that arises between a patient and his doctor or psychotherapist. Such a relationship may support affirmative duties for the benefit of third persons." Tarasoff v. Regents II, 118 Cal. Rptr. 129, 134, 529 P.2d 553, 558 (1974).
The court cited with approval the Fleming and Maximov article which read in part: "Hospitals and the medical sciences, like other public institutions and professions, are charged with a public interest. Their image of responsibility in our society makes them prime candidates for converting their moral duties into legal ones." Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CAL. L. REV. 1025, 1031 (1974).

26. *See* notes 16-19 *supra*. Fleming & Maximov, *supra* note 25, at 1029 states:
> The rationale behind these cases, however, does not support a distinction between inpatients and outpatients. Admittedly, the degree of control over the latter may well be much less than over the former, and this would certainly be relevant in determining what protective measures could reasonably be expected, but it would not justify a complete negation of duty. A right to control might be a prerequisite to any duty to detain or physically restrain the patient. It would not, however, necessarily determine whether the therapist should have reported the matter to those with authority to commit or should have warned a person threatened by the patient.

While such language is persuasive it is not totally in keeping with the holdings in the mental institution cases. As previously stated, the concern of the courts in these cases seemed to be with the negligence of the institution in the handling of mental patients deemed to pose a danger to themselves or to others. The negligence in these cases appears based upon the concept of misfeasance and the rendering of services. RESTATEMENT (SECOND) OF TORTS §§ 319, 320, 323 (1965). The court appears on stronger ground in basing its decision in the instant case upon the duty of the doctor to warn others of contagious diseases.

27. *See* note 15 *supra*.

28. Tarasoff v. Regents II, 118 Cal. Rptr. 129, 135, 529 P.2d 533, 559 (1974).

and evaluate the mysterious and empirically elusive diseases of the mind. He must determine which ones suffered by which patients will lead to violent assaults.

Legal duties, according to the California court, are not "discoverable facts of nature,"[29] but rather are "the sum total of these considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[30] While the court listed the principal considerations in assigning liability, it entered into no extended discussion of these matters.[31] The four most important considerations are as follows: the foreseeability of harm to the plaintiff, the consequences to the community, the extent of the burden upon the defendant and the prevalence of insurance for such a risk.

FORESEEABILITY

The defendant objected to the imposition of liability in the instant case, claiming that to require a psychiatrist or psychotherapist to ascertain from all the expressed thoughts of violence he hears in therapy sessions those posing a real danger is to require "a decision involving a high order of expertise and judgment."[32] The court found the argument unconvincing since a professional would be held only to "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [his] profession under similar circumstances."[33] The court further stated that as a

29. *Id.* at 133, 529 P.2d at 557.

30. W. PROSSER, TORTS § 53, at 332-33 (3d ed. 1964).

31. Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 100, 443 P.2d 561, 564 (1968). The considerations as listed by the court in *Rowland* are:

> [T]he foreseeabiilty of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Rowland v. Christian, *supra*. The court cited a line of California cases as revealing "an evolution from a rule of no duty to a rule in which imposition of duty of care depends upon the foreseeability of serious injury and the burden of precautions." Tarasoff v. Regents II, 118 Cal. Rptr. 129, 134, 529 P.2d 553, 558 (1974).

32. Tarasoff v. Regents II, 118 Cal. Rptr. 129, 136, 529 P.2d 553, 560 (1974).

33. *Id.*; Bardessono v. Michels, 3 Cal. 3d 780, 91 Cal. Rptr. 760, 764, 478 P.2d 480, 484 (1970).

specialist the therapist would be "held to that standard of learning and skill normally possessed by such specialists in the same or similar locality under the same or similar circumstances."[34]

Yet there is serious question as to the ability of a psychiatrist or psychotherapist to ascertain the existence of dangerous tendencies in a patient. Numerous writers[35] have found therapists without any reliable ability to make such determinations. "When psychiatric predictions of future dangerous behavior have been surveyed empirically, there has been virtually no question about the lack of accuracy concerning those predictions."[36]

Perhaps it is that the profession is by and large incapable of making the decisions which the court demands by the imposition of liability for a failure to warn. Perhaps it is that the degree of skill possessed by the profession itself necessary for the prediction of dangerousness is so lacking that no one therapist could ever be held liable. Yet this case is not the first instance of society's demand and expectation of a predictive power by psychiatrists and psychotherapists. Forty-four jurisdictions presently have involuntary commitment statutes which in effect ask the profession to come forward and pronounce whether or not the individual is dangerous to himself or to others.[37] At least one authority contends that in some cases it is quite evident that the patient is likely to commit a dangerous act.[38] Some writers, apparent-

34. Tarasoff v. Regents II, 118 Cal. Rptr. 129, 136, 529 P.2d 553, 560 (1974); Quintal v. Laurel Grove Hospital, 62 Cal. 2d 154, 41 Cal. Rptr. 577, 580, 397 P.2d 161, 164 (1964).

35. Frederick, *Dangerousness and Disturbed Behavior* 2, Paper presented before the Law and Socialization Committee in Division 9, American Psychological Association Meetings, New Orleans (Sept. 2, 1974); S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME 314 (1967); Rubin, *The Prediction of Dangerousness in Mentally Ill Criminals*, ARCHIVES OF GENERAL PSYCHIATRY, LXXVII, 405 (Sept. 1972); Steadman, *Some Evidence on the Inadequacy of the Conceptual Determination of Dangerousness in Law and Psychiatry*, 1 JOURNAL OF PSYCHIATRY AND LAW 409, 409-10 (1973); Roth, Dayley & Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 SANTA CLARA LAW. 400, 402-03, 411 (1973); Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways*, 4 TRIAL 29, 32 (Feb.-Mar. 1968).

36. Frederick, *supra* note 35.

37. Roth, Dayley & Lerner, *supra* note 35, at 412.

38. S. HALLECK, *supra* note 35, at 314. "Yet upon psychiatric examination it is often surprisingly clear that some offenders are quite likely to commit a

ly believing such evaluations are possible, feel that the decision to warn is an ethical one and must be made by the individual therapist without the imposition of a duty.[39]

Certainly if the profession can make the determination which the court demands for liability, then a duty must be imposed.[40] Perhaps such liability will be limited to those extreme cases where there could have been no question as to the danger posed. Ultimately liability for a failure to warn will require a finding of fact as to whether the therapist exercised the requisite skill demanded by his profession.

CONSEQUENCES TO THE COMMUNITY

The defendant argued that imposition of such a duty would have a devastating effect on the treatment of mental illness with resulting ramifications on society at large.[41] The duty to warn would entail a breach of trust by the violation of confidential communications.[42] While recognizing "the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy . . . and the consequent public importance of safeguarding the confidential character of psychotherapeutic communications," the court found "the public interest in safety from violent assault" to be more demanding of judicial endorsement.[43] The court's job in this difficult balancing was made somewhat easier by the exceptions written into California's psychotherapist-patient privilege statute,[44] as well as the Principles of Medical Ethics of the American Medical Association.[45] Both provide for disclosing privileged communications in the light of dangers to society. In the words of the court: "The protective privilege ends where the public peril begins."[46] While

dangerous act. Too often, when medical advice is ignored, the offender's subsequent violence provides gruesome evidence of the psychiatrist's skills."

39. Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 197-98 (1960); Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 633 (1964).
40. *See* note 15 *supra*.
41. Tarasoff v. Regents II, 118 Cal. Rptr. 129, 136, 142, 529 P.2d 553, 566, (1974).
42. *Id.* at 136, 529 P.2d at 560.
43. *Id.* at 136-137, 529 P.2d at 550-61.
44. *Id.* at 136, 529 P.2d at 560.
45. *Id.* at 137, 529 P.2d 561.
46. *Id.*

the California legislature, by the exceptions enacted into the psychotherapist privilege statute, may have engaged in a balancing process it is important that the court balance anew, given the duty which it contemplates assigning.

The success of psychotherapy depends to a large extent upon the sanctity of the communications between physician and patient.[47] Doubts as to the confidential nature of his treatment by a prospective patient could seriously affect his ability to seek and to receive therapy by inhibiting: (1) his willingness *to try* therapy, (2) his willingness *to tell* all that he should to the therapist, and (3) his willingness *to trust* the therapist.[48] Small scale disclosures by psychiatrists and psychotherapists of communications made by patients undergoing therapy would seem unlikely to have a significant effect on the overall mental health of the society.[49] Perhaps it is as one writer contends that: "The general public and putative patients will not lose faith in the doctor as a keeper of secrets when, in cases of emergency, he acts contrary to strict confidentiality. Sooner or later, the patient himself will come to realize that the doctor has acted in his interest . . . ."[50] This analysis is complicated by the tendency of psychiatrists and psychotherapists to overpredict when determining dangerousness—that is, to predict anti-social behavior in instances in which it would not occur.[51] The holding in *Tarasoff* combined with this tendency of overprediction may result in massive disclosures of confidential communications and a general, widespread knowledge of the likelihood of violation of the privileged communications between patient and therapist.

47. Fisher, *supra* note 39; Slovenko, *supra* note 39; M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 272-73 (1952); Note, *Psychiatrist-Patient Privilege—A Need for the Future Crime Exception*, 52 IOWA L. REV. 1170, 1178 (1967); Goldstein & Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 36 CONN. B.J. 175, 178-79 (1962).

48. *See* note 47 *supra*.

49. However, Goldstein and Katz point out: "If it should become known that there is no privilege, and it would take only one sensational case to accomplish this, it is probable that a great many patients will be deterred from coming to treatment or from participating effectively in treatment." Goldstein & Katz, *supra* note 47, at 179

50. Slovenko, *supra* note 39, at 198.

51. Dershowitz, *supra* note 35.

The therapist's argument of the devastating impact of *Tarasoff* upon the field of mental health is weakened by the realization that therapists now have the power in forty-four jurisdictions to involuntarily commit a patient on the basis of privileged communications between patient and physician.[52] Despite this limitation on privileged communications, the practice of psychotherapy has remained a healthy one.[53] It has been contended that the very limits that the law places upon confidentiality have attracted those feeling a need, through therapy, to "cry out for help."[54]

Given the success of group therapy, especially among such volatile groups as troubled families, perhaps confidentiality is not as essential to effective treatment as some believe.[55]

THE BURDEN UPON THE DEFENDANT

The duty which the court imposes subjects the doctor to the possibility of suit by the patient for the violation of his right to the sanctity of the communications between him and his therapist. There can be no question that such rights exist. Numerous cases have upheld causes of action by patients against their doctors for wrongful disclosure of privileged communications.[56] Yet in all cases, a recognized

52. Fleming & Maximov, *supra* note 25, at 1036; Roth, Dayley & Lerner, *supra* note 35, at 412-13.

53. Fleming & Maximov, *supra* note 25, at 1039.

54. *Id.*

55. *Id.* at 1041-43.

56. A cause of action has been allowed as a violation of a statutory or common law right of privacy (Hammonds v. Aetna Casualty & Surety Co., 243 F. Supp. 793, 805 (N.D. Ohio 1965); Horne v. Patton, 291 Ala. 701, 287 So. 2d 824, 830 (1973)), as a breach of the privileged or confidential relationship between the physician and patient (Clark v. Geraci, 29 Misc. 2d 791, 208 N.Y.S.2d 564, 567 (Sup. Ct. 1960); Alexander v. Knight, 197 Pa. Super. 79, 177 A.2d 142, 146 (1962); Horne v. Patton, *supra*, 287 So. 2d at 827; Schaffer v. Spicer, 215 N.W.2d 134, 136 (S.D. 1974)), and as a breach of an implied contract of confidentiality (Quarles v. Sutherland, 215 Tenn. 641, 389 S.W.2d 249, 252 (1965); Horne v. Patton, *supra*, 287 So. 2d at 832. Some jurisdictions have ruled that the absence of a physican patient privilege statute prevents the court from sustaining such a suit. Collins v. Howard, 156 F. Supp. 322 (S.D. Ga. 1957). However, other jurisdictions have seen the code of ethics of the medical profession, the state's privilege communications statute and the state's medical licensing statute as indicative of a policy of favoring the maintenance of such a cause of action (Hammond v. Aetna Casualty & Surety Co., *supra*, at 797, Horne v. Patton, *supra*, 287 So. 2d at 829).

defense was the existence of an overriding public interest.[57] Obviously the courts are aware of the importance of such public interests when balanced with the private rights of individuals. Clearly, in any balancing process the rights of a patient to privacy must give way to the rights of society to be free from violence.[58]

INSURANCE

Psychiatrists and psychotherapists have liability insurance and would be protected for the risk involved in the imposition of a duty to warn potential victims. Traditionally the argument runs that the cost of Tarasoff's death should not be borne by her parents but by the doctor (in actuality his insurance company) and in turn (through the insurance company) by all those who seek the help of a therapist and assist him in paying his premiums.[59] While insurance could cover the doctor's failure to communicate a warning, there is a possibility that it would not cover the doctor's intentional revelation of a privileged communications if such revelation

57. The courts have held that such disclosures could be justified when "prompted by the supervening interests of society . . . ." Horne v. Patton, 291 Ala. 701, 287 So. 2d 824, 829 (1973); Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831, 932 (1920); Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814, 817-18 (1958); Hammond v. Aetna Casualty & Surety Co., 243 F. Supp. 793, 799-800 (N.D. Ohio 1965); Clark v. Geraci, 29 Misc. 2d 791, 208 N.Y.S.2d 564, 567 (Sup. Ct. 1960). Such interests include a warning of a patient's contagious disease (Simonsen v. Swenson, *supra*), a warning of a former patient's mental instability (Berry v. Moench, *supra*) and a warning that an individual employed by the government was an alcoholic (Clark v. Geraci, *supra*). It would seem that the public interest of a warning given a potential victim of a possible violent assault would serve as a defense to an action by the patient against the doctor.

58. The doctor who communicates a warning to a potential victim could be subject to a suit from yet another source—the victim harmed emotionally by such a communication. Prosser, (W. PROSSER, TORTS § 54, at 327 (4th ed. 1971)) for one, has discussed the unsettled doctrine of the negligent infliction of mental injuries. The requisite negligence could be found if the doctor: (1) knows of the victim's precarious mental or physical health or (2) erroneously determines that the patient intended to carry out his threat.

59. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L. J. 499, 500, 501, 518-19 (1961). 2 F. HARPER & F. JAMES, LAW OF TORTS 762-63, 765 (1956). However, note should be made of the high cost of insurance as a direct result of malpractice cases and the possible effect it would have on this traditional approach. Linster, *Insurance View of Malpractice*, 38 INS. COUNSEL J. 528 (1971): "Many companies have discontinued writing medical malpractice insurance and most, if not all, of the forty companies which have continued to provide this type of protection for doctors have not found the decision to remain in business an easy one."

was found to be without justification.[60] If such is the case, the doctor, aware of the limitations of his insurance policy, may choose not to warn, risking liability and subsequent total indemnification (within the limits of his policy) rather than to risk being without defense in the revelation of a privileged communication and being forced to bear the entire judgment.

CONCLUSION

The California Supreme Court, by assigning to psychiatrists aware of the dangerous proclivities of their patients the same duty which the law has assigned to doctors aware of their patients' contagious diseases the court took what must be called a natural step. However, while the move was a logical progression of previous case law, it took the court one step beyond the relative certainty of medicine into the often uncertain world of psychiatry.

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60. *See* note 57 *supra.*