Golden Gate University Law Review

Volume 6 | Issue 1 Article 8

January 1975

Tarasoff v. Regents of the University of California: Psychotherapists, Policemen and the Duty to Warn - An Unreasonable Extension of the Common Law?

Robert B. Kaplan

TARASOFF v. REGENTS OF THE UNIVERSITY OF CALIFORNIA: PSYCHOTHERAPISTS, POLICEMEN AND THE DUTY TO WARN—AN UNREASONABLE EXTENSION OF THE COMMON LAW?

In recent years, the California Supreme Court has expanded the liability of a defendant for physical harm which a third party has actually inflicted on a plaintiff.[1] In *Tarasoff v. Regents of the University of California*,[2] the court continued this trend by holding that the special relationship that existed between a psychotherapist and his patient could support a duty for the psychotherapist to use reasonable care to give threatened persons such warnings as are necessary to avert foreseeable danger arising from a patient's condition or treatment. The court's decision precipitated a nationwide public reaction, most of which was critical of the creation of legal duties which were felt to be unworkable and detrimental to a stable and peaceful society.[3] Perhaps in

1. *See, e.g.*, Weirum v. RKO Gen., Inc., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975); Hergenrether v. East, 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964).

In *Hergenrether*, the court found that a defendant who left his truck parked in a "skid row" area with the key in the ignition could be held liable to a plaintiff injured after an unidentified thief stole the truck and injured the plaintiff by his negligent driving. The court believed that the special circumstances of this situation, namely the fact that the vehicle was left unattended for a long period of time in a lawless and rowdy neighborhood heavily populated by drunkards, required the imposition of a duty on the defendant. For an earlier similar decision see Richardson v. Ham, 44 Cal. 2d 772, 285 P.2d 269 (1955).

In *Weirum*, a radio station with an extensive teenage audience conducted a contest which awarded a cash prize to the first contestant to locate a disc jockey traveling in a conspicuous automobile. Two minors, driving in separate automobiles, negligently forced a car off the highway while in pursuit of the disc jockey. The court held that the radio station owed a duty of care to the decedent, and affirmed a judgment for the decedent's wife and children. The unanimous decision found that the defendant's affirmative act in generating a highly competitive pursuit on public streets created an undue risk of harm; consequently the defendant owed a duty of care toward all third persons foreseeably endangered by the risk of harm.

2. 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974), *rehearing granted*, Cal. Sup. Ct., March 12, 1975. For discussions of the first *Tarasoff* opinion see 12 SAN DIEGO L. REV. 932 (1975); 6 SETON HALL L. REV. 536 (1975); 28 VAND. L. REV. 631 (1975).

3. *See* N.Y. Times, Dec. 25, 1974, § 1, at 15, col. 1; S.F. Chronicle, Dec. 24, 1974, § 1, at 1, col. 4; TIME, Jan. 20, 1975, at 56.

response to this widespread criticism, the court granted a rehearing of the case some three months after its initial decision, thus placing the final outcome of *Tarasoff* in doubt at the time of this writing. In spite of this action by the court, a comment on the case seems apropos at the present time in light of the unusual public reaction and prophesies of doom for the viability of the psychiatric profession which accompanied the decision.

This Comment will examine and evaluate the legal duties set forth by the court in *Tarasoff* in order to determine whether the court's holdings represent a harmful and unreasonable extension of the limited common law duty to warn. Although the subject of governmental immunity is discussed extensively in the court's opinion, it bears no useful relationship to the primary focus of this Comment, and will therefore be treated only briefly.

I. THE TARASOFF DECISION

Tarasoff originated from a 1969 murder case in which Prosenjit Poddar stabbed Tatiana Tarasoff to death with a knife.[4] Tatiana's parents instituted the present suit in which they alleged that two months prior to the murder, Poddar had confided his intention to kill Tatiana Tarasoff to Dr. Moore, a psychologist employed by Cowell Memorial Hospital at the University of California in Berkeley. Her parents claimed that at Dr. Moore's request the campus police briefly detained Poddar, but then released him because he appeared rational and promised to stay away from Tatiana Tarasoff.[5] Subsequently, it was alleged, the director of the Department of Psychiatry at Cowell Memorial Hospital directed that Dr. Moore's letter requesting Poddar's detention and all the notes that Dr. Moore had taken in the course of therapy be destroyed. At no time did any of the parties involved warn Tatiana or her parents of Poddar's threats.

In separate but identical complaints predicated on two theories, Tatiana's parents alleged: (1) that the defendants were negligent in failing to warn them that their daughter was in grave danger; and (2) that the defendants were negligent in failing to

4. For a discussion of the facts of the case see People v. Poddar, 10 Cal. 3d 750, 518 P.2d 421, 111 Cal. Rptr. 910 (1974).

5. Poddar's confinement was ordered pursuant to California Welfare and Insitutions Code sections 5000 to 5401 (the Lanterman-Petris-Short Act) which allows persons to be detained in a state treatment facility for up to 72 hours if they present a threat to the safety of others. CAL. WELF. & INST'NS CODE § 5150 (West Supp. 1975).

detain a dangerous patient.[6] The superior court sustained demurrers to the complaints on the grounds that the defendants owed no duty of care to Tatiana Tarasoff, and that they were immune from liability under the California Tort Claims Act.[7] The California Supreme Court agreed to hear plaintiffs' appeal from these demurrers.

In an opinion by Justice Tobriner, the court overruled the demurrers and held that although the pleadings asserted

> no special relationship between Tatiana and defendant therapists, they did 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.[8]

In the process of reaching this result, the court recognized two grounds for liability and responded to contentions that liability was precluded by either the psychotherapist-patient privilege or governmental immunity statutes.

The first ground on which liability might have been based was the negligent failure to warn. Just as a doctor treating a patient with a contagious disease bears a duty to use reasonable care to warn others of the danger of the illness,[9] the court reasoned that a psychotherapist treating a mentally ill patient bears a similar duty to warn those whose safety is threatened by his patient's condition. It is, of course, difficult to determine when a patient's condition threatens another's safety. Accordingly, the reasonableness of a psychotherapist's determination of whether or not a duty to warn exists will be tested by the same standard to which all professionals are held:

---

6. The therapist defendants included Dr. Moore, the psychologist who examined Poddar, as well as those who concurred in his decision to commit, and the head of the Department of Psychiatry at Cowell Hospital. The police defendants included those policemen who detained Poddar, as well as those who received Dr. Moore's written and oral recommendation to detain him. 13 Cal. 3d at 182 n.2, 529 P.2d at 555 n.2, 118 Cal. Rptr. at 131 n.2.

7. *See* note 11 *infra*.

8. 13 Cal. 3d at 187, 529 P.2d at 558, 118 Cal. Rptr. at 134 (citation and footnote omitted).

9. Davis v. Rodman, 146 Ark. 385, 227 S.W. 612 (1921); Hofmann v. Blackmon, 241 So. 2d 752 (Fla. App. 1970); Skillings v. Allen, 143 Minn. 323, 173 N.W. 663 (1919); Edwards v. Lamb, 69 N.H. 599, 45 A. 480 (1899); Wojcik v. Aluminum Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (Sup. Ct. 1959); Jones v. Stanko, 118 Ohio St. 147, 160 N.E. 456 (1928).

> A professional person is required only to exercise "that reasonable degree of skill, knowledge and care ordinarily possessed by members of [his] profession under similar circumstances." . . . But within that broad range in which professional opinion and judgment may differ respecting the proper course of action, the psychotherapist is free to exercise his own best judgment free from liability; proof, aided by hindsight, that he judged wrongly is insufficient to establish liability.[10]

As a separate basis of liability, the court stated that a duty to warn could be imposed on the therapists and the police as a result of their voluntary acts which increased the danger faced by Tatiana Tarasoff. It noted that the record in the criminal case against Poddar indicated that following his detention and release by the police, he broke off all contact with the hospital staff and discontinued therapy. From these facts, the court felt that it could reasonably be inferred that the defendants' actions led Poddar to terminate treatment which, if continued, might have led him to abandon his plan to kill Tatiana Tarasoff. The court determined that the police and defendant therapists had contributed to the danger faced by Tatiana Tarasoff, and therefore assumed the duty to warn her of that danger. Thus, *Tarasoff* held that one's acts can give rise to a duty to warn even when a psychotherapist could reasonably decide that a patient's condition does not, in the absence of such acts, threaten another's safety.

Having established the existence of a duty to warn, the court proceeded to deal with the issue of governmental immunity. It found that while specific statutory provisions of the California Tort Claims Act sheltered the police and therapist defendants from liability for their failure to *confine* Poddar, their failure to *warn* Tatiana was not protected by any provision of the Act.[11]

10. 13 Cal. 3d at 190, 529 P.2d at 560, 118 Cal. Rptr. at 136 (citations omitted).

11. *Tarasoff* held that California Government Code section 856 protected defendant therapists against liability for failing to confine Poddar, since that section affords public entities and their employees absolute protection for any injury resulting from deciding whether to confine a person for mental illness in accordance with an applicable enactment. *Id.* at 195-97, 529 P.2d at 563-65, 118 Cal. Rptr. at 139-41. Similarly, defendant police officers were also immune for a failure to confine, since they qualified as peace officers under section 5154 of the Welfare and Institutions Code, which affords immunity to peace officers responsible for the detention of a person placed in a 72 hour treatment center. *Id.*

Thus, the court concluded that the plaintiffs' complaints could be amended to state a cause of action against the defendants for breach of their duty to warn Tatiana Tarasoff.[12]

Tarasoff also determined that the psychotherapist-patient privilege, codified in sections 1010 to 1028 of the California Evidence Code, was not sufficient cause to sustain the demurrer. Although in section 1014 of the Evidence Code the Legislature established a broad privilege to protect confidential communications between psychotherapist and patient, section 1024 specifically states that:

> There is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

Hence, the court felt that public policy mandated disclosure of a patient's confidential communications in certain cases, and that the psychotherapist-patient privilege did not protect communications between Poddar and his therapists in such cases.[13]

However, the court did not view the defendants' failure to warn as a "discretionary" decision afforded governmental immunity under section 820.2 of the Government Code. In Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968), the court determined that section 820.2 granted immunity only for basic policy decisions; in this case the defendants' failure to warn did not rise to the level of a basic policy decision. 13 Cal. 3d at 193-94, 529 P.2d at 561-63, 118 Cal. Rptr. at 137-38.

12. The court concluded that the complaints could be amended to state a cause of action against the defendants for breach of their duty to warn Tatiana Tarasoff, even though the original complaints only alleged that the defendants failed to warn Tatiana's parents. 13 Cal. 3d at 184 n.3, 529 P.2d at 556 n.3, 118 Cal. Rptr. at 132 n.3.

13. The court utilized much the same reasoning in *In re* Lifschutz, 2 Cal. 3d 415, 431-33, 467 P.2d 557, 567-68, 85 Cal. Rptr. 829, 839-40 (1970). In *Lifschutz*, a psychiatrist was imprisoned for contempt for refusing to obey an order of a trial court instructing him to answer deposition questions about a former patient. The court stated that the substantial state interest of facilitating the ascertainment of truth in legal proceedings would override the interest of the patient in the confidentiality of the psychotherapist-patient relationship, and hence it held that the psychotherapist had no statutory authority to refuse to respond to the requested disclosures.

A recent California court of appeal case also reflects a similar view. In People v. Hopkins, 44 Cal. App. 3d 669, 119 Cal. Rptr. 61 (1975), the court held that a defendant could not suppress a confession to his psychotherapist that he had burglarized the apartment of an 89 year old woman and then assaulted her with a salami. The court concluded that the psychotherapist's revelation was permitted by section 1024 of the Evidence Code, which represented only a reasonable state interference with the psychotherapist-patient privilege.

II. HISTORICAL EVOLUTION OF THE DUTY TO WARN

The common law recognizes the principle that, as long as one does not control the threatening force, no duty to aid another exists even though one may realize that one's action is necessary for the endangered person's protection.[14] This is so even if the most insignificant and effortless of acts would preclude the gravest risk of harm.[15] Consequently, a person has no duty to control the conduct of another, or to warn those endangered by such conduct.[16] These rules originate from the old common law distinction between action and inaction, more generally known as misfeasance and nonfeasance. Early courts were preoccupied with finding liability for injuries caused by a person's affirmative acts and, therefore, could not justify involving themselves with the question of whether liability could be imposed against a person who, by simply doing nothing, contributed to the injury of another. Also, the individualistic philosophy prevalent at the time did not make it difficult for early courts to deny any legal duty to aid and rescue, since it was felt that one person should not be legally compelled to help another.[17] The practical application of the common law rule by the courts has led to a number of morally reprehensible decisions which find no liability against persons who intentionally fail to come to the aid of a stranger who is in danger.[18]

The courts have departed from this common law standard, perhaps in an attempt to limit the application of a morally questionable doctrine, in situations where "special relations" exist between the parties. A duty of care to control the conduct of third persons or warn those endangered by such conduct has been imposed in situations where a special relationship exists between

14. *See* Richards v. Stanley, 43 Cal. 2d 60, 65, 271 P.2d 23, 27 (1954); Schauf v. Southern Cal. Edison Co., 243 Cal. App. 2d 450, 461, 52 Cal. Rptr. 518, 525 (1966); Wright v. Arcade School Dist., 230 Cal. App. 2d 272, 277, 40 Cal. Rptr. 812, 814 (1964); RESTATEMENT (SECOND) OF TORTS § 314 (1965).

15. *See* Toadvine v. Cincinnati, N.O. & T.P. Ry., 20 F. Supp. 226 (E.D. Ky. 1937); Allen v. Hixson, 111 Ga. 460, 36 S.E. 810 (1900); Hurley v. Eddingfeld, 156 Ind. 416, 59 N.E. 1058 (1901).

16. W. PROSSER, LAW OF TORTS § 56, at 341 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS, *supra* note 14, § 314, comment *c*.

17. J. FLEMING, LAW OF TORTS 149 (2nd ed. 1961); W. PROSSER, *supra* note 16, § 56, at 339.

18. *See* Handiboe v. McCarthy, 114 Ga. App. 541, 151 S.E.2d 905 (1966); Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928); Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959).

the actor[19] and the third person or the actor and the person harmed, and in situations where the actor has previously undertaken some affirmative act to control the third person's conduct which has increased the risk of harm to the person threatened by such conduct.[20] The affirmative acts or special relationships necessary to establish such a duty of care have been liberally construed by the courts and, as a result, an ever increasing number of such relationships or acts have been found to justify the imposition of a duty to warn.[21]

A similar and parallel duty to warn has been imposed on the medical profession. The origin of the ethical duty not to disclose information acquired in the course of treatment derives from the ancient Hippocratic Oath, which states that:

> All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, *which ought not to be spread abroad*, I will keep secret and will never reveal.[22]

The oath itself inferentially demonstrates that a doctor's ethical duty not to divulge information to third persons is not absolute, and indicates that information which should be "spread abroad" need not be kept secret.

More recent ethical and legal indications of a doctor's duties reflect the same principle. Today, any medical or ethical advantage gained by maintaining the confidentiality of a patient's disclosures to a doctor must be tempered with an awareness of the best interests of society as a whole. Many states have enacted statutes making communications between physician and patient privileged from disclosure in court,[23] and yet have acknowledged that the privilege is not absolute by enacting laws which require that physicians disclose to police authorities the name of any

---

19. The term "actor" will hereinafter be used to denote the individual who is in a position to act in a way which will preclude the injury which would otherwise occur.

20. RESTATEMENT (SECOND) OF TORTS, *supra* note 14, §§ 315, 324A.

21. *See* Ellis v. D'Angelo, 116 Cal. App. 2d 310, 253 P.2d 675 (1953); Sylvester v. Northwestern Hosp., 236 Minn. 384, 53 N.W.2d 17 (1952); Taylor v. Slaughter, 171 Okla. 152, 42 P.2d 235 (1935); Gurren v. Casperson, 147 Wash. 257, 265 P. 472 (1928). For a more exhaustive list of cases advancing this trend see W. PROSSER, *supra* note 16, § 56, at 348 & nn.35-48.

22. STEDMAN'S MEDICAL DICTIONARY 579 (3d ed. 1972) (emphasis added).

23. CAL. EVID. CODE § 994 (West 1966); ILL. ANN. STAT. ch. 51, § 5.1 (Smith-Hurd 1966); N.Y. CIVIL PRAC. L. § 4504 (McKinney 1963).

person whom they treat for an injury caused by a deadly weapon.[24] The courts have recognized that a "doctor's duty does not necessarily end with the patient for . . . the malady of his patient may be such that a duty may be owing to the public and . . . other particular individuals."[25]

This duty to disclose was initially observed with respect to contagious diseases,[26] as the majority in *Tarasoff* points out. Later cases have made it clear that the confidential nature of the doctor-patient privilege would be subject to the "exceptions prompted by the supervening interests of society . . . where the public interest or private interest of the patient so demands."[27] Courts have been quick to find that physicians also have a duty to issue appropriate warnings to those persons who are endangered by a patient's mental condition.[28] From the preceding it should be evident that physicians have always had an ethical and legal obligation to disclose confidential information about the physical and mental conditions of their patients if the interests of society outweighed the interest of protecting patients from any harm that might result from such a divulgence.

The psychiatric profession itself has taken notice of this obligation in its Code of Medical Ethics, which states that:

> Psychiatrists at times may find it necessary, in order to protect the patient or the community

---

24. CAL. PENAL CODE § 11161 (West 1970); ILL. ANN. STAT. ch. 38, § 206-3.2 (Smith-Hurd 1973); N.Y. PENAL L. § 265.25 (McKinney 1967).

25. Simonsen v. Swenson, 104 Neb. 224, 227, 177 N.W. 831, 832 (1920).

26. *See* note 9 *supra*.

27. Hague v. Williams, 37 N.J. 328, 336, 181 A.2d 345, 349 (1962) (physician's knowledge of an infant patient's heart condition was not of such a confidential nature that the physician was barred from disclosing that fact to an insurer to whom the parents of the infant had applied for life insurance); *see* Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1973) (duty of a doctor not to make extrajudicial disclosures of information acquired in the course of the doctor-patient relationship is subject to the supervening interests of society, as well as of the patient himself); Clark v. Geraci, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960) (doctor had right, if not duty, to disclose to an employer that his patient's absences were due to alcoholism, where the cause of his illnesses had not been stated in prior medical certificates issued by the doctor on behalf of the patient to the employer); Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (1958) (doctor may disclose information acquired in the course of treating his patient where the life, safety or well-being of another is in jeopardy).

28. *See* Hicks v. United States, 511 F.2d 407 (D.C. Cir. 1975); Merchants Nat'l Bank & Trust Co. v. United States, 272 F. Supp. 409 (D.N.D. 1967); Vistica v. Presbyterian Hosp. 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967); Stake v. Woman's Div. of Christian Service, 73 N.M. 303, 387 P.2d 871 (1963); Bullock v. Parkchester Gen. Hosp., 3 App. Div. 2d 254, 160 N.Y.S.2d 117 (1957).

> from imminent danger, to reveal confidential information disclosed by the patient.[29]

It should be noted that the Code of Medical Ethics creates an affirmative ethical duty for the psychiatrist to act when he feels action is necessary to protect the welfare of the patient or the community at large. The Code merely formalizes a long-standing practice of the psychiatric community.[30] Hence, it seems apparent that the holding of *Tarasoff* is essentially a legal recognition of an ethical principle that has always been tacitly observed by the psychiatric profession. The revelation of a communication under circumstances where the safety of the community or an individual is at stake is not a breach of trust or violation of professional ethics, but is simply an acknowledgment that

> the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield in instances in which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.[31]

The California Supreme Court's holding that the psychotherapist-patient relationship fell within the exception to the common law rule of no duty to warn was immediately and widely criticized. Most of the criticism directed toward the ruling, both in the strongly worded dissenting opinion and in the professional psychiatric community, was based on the fact that the very existence of the psychotherapist-patient relationship depends upon confidential personal revelations by the patient which would not normally be disclosed to anyone outside the confines of that relationship.[32] It was felt that any violation of the confidentiality of such communications would undoubtedly

---

29. *Principles of Medical Ethics*, 130 AM. J. PSY. 1063 (1973).

30. N.Y. Times, Dec. 25, 1974, § 1, at 15, col. 1. *See* Foster, *The Conflict and Reconciliation of the Ethical Interests of the Therapist and Patient*, 3 J. PSY. & L. 39, 51 (1975); Messinger, *Malpractice Suits–The Psychiatrist's Turn*, 3 J. LEGAL MED. 31 (April 1975); Sadoff, *Informed Consent, Confidentiality, and Privilege in Psychiatry, Practical Applications*, 2 BULL. AM. ACAD. PSY. & L. 101, 105 (1974); Sidel, *Confidential Information and the Physician*, 264 NEW ENG. J. MED. 1133, 1135-37 (1963).

31. 13 Cal. 3d at 191, 529 P.2d at 561, 118 Cal Rptr. at 137.

32. *See, e.g.*, Goldstein & Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 36 CONN. B.J. 175, 178-79 (1962); Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1040 (1974); Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 184-92 (1960).

> cripple the use and effectiveness of psychiatry; many people, potentially violent—yet susceptible to treatment—will be deterred from seeking it; those seeking aid will be inhibited from making the self-revelation necessary to effective treatment; finally, requiring the psychiatrist to violate the patient's trust by forcing the doctor to disseminate confidential statements will destroy the interpersonal relationship by which treatment is effected.[33]

Many of the court's critics prophesied that the decision would bring about a net increase of violence in society, since it was predicted that fewer people would seek psychiatric treatment and that treatment, even if sought, would not be as effective as beforehand.

The creation of civil liability for a failure to warn does not realistically appear to threaten the effective practice of psychotherapy, for, as has been noted, psychotherapists have always had an ethical obligation to reveal confidential information in circumstances in which the mental health of their patients might pose a threat to others. This has never deterred patients from seeking help in the past, and it seems unlikely that the judicial recognition of this ethical duty will deter troubled persons from seeking psychiatric help. Furthermore, since *Tarasoff* does not require any *Miranda*-type[34] warnings to be given to a patient before a psychotherapist begins therapy,[35] the normal routine of patient-therapist interaction will not be upset.

Troubled persons may still seek treatment, secure in the knowledge that their revelations will be maintained in strict confidence, unless in the professional judgment of the psychotherapist the person's future conduct may harm another.

---

33. 13 Cal. 3d at 201, 529 P.2d at 567, 118 Cal. Rptr. at 143 (Clark J., joined by McComb J., dissenting).

34. Miranda v. Arizona, 384 U.S. 436 (1966).

35. Some commentators have argued that requiring psychotherapists to inform their patients that the confidentiality of their disclosures is limited is consistent with recent court decisions that a patient must give his "informed consent" to a physician's medical treatment. Since a patient's disclosures may eventually lead to incarceration in the form of commitment to an institution, these commentators have seen *Miranda* as reinforcing a requirement of "informed consent" in psychiatry. *See* Fleming & Maximov, *supra* note 32, at 1056-60.

The patient in any type of medical relationship must implicitly understand that the confidential nature of his relationship with his physician serves only to protect the privacy of his medical and psychological condition from unwarranted publication to persons outside that relationship, and that the right of confidentiality may never be paramount where another's safety is threatened by a patient's disease or violent condition. Without this implicit understanding, society could not continue to function smoothly, for it recognizes the principle that the individual right of privacy must yield to the overall interest of the society in protecting its members against physical harm.[36] "Our current crowded and computerized society compels the interdependence of its members."[37]

In addition to the societal interest advanced as a rationale for the duty to warn, *Tarasoff*'s holding in regard to psychotherapists appears to be a sensible and logical rule of law from the patient's point of view. A timely warning by a therapist to a person threatened by a patient may actually deter the commission of a criminal act by making it impossible for the patient to encounter his intended victim. Hence, in the final analysis, the imposition of a duty to warn will be beneficial to the patient as well as the intended victim. Although it may disrupt the patient's relationship with his therapist, it may also prevent him from suffering through the agonies of a prison sentence, as did Prosenjit Poddar in the present case.

III. DIFFICULTIES WITH THE PSYCHOTHERAPIST'S DUTY TO WARN

Although the general duty to warn set out in *Tarasoff* appears to be in the best interests of both society and the patients of therapists, some question still exists as to the manageability of the specific standard of care by which the actions of a psychotherapist are to be judged. The court, in imposing the familiar standard of comparing the psychotherapist's performance of his duties with the "reasonable degree of skill, knowledge, and care ordinarily possessed by members of [his] profession under similar circumstances,"[38] is to be commended for specifically precluding

36. *See* O. HOLMES, THE COMMON LAW 43 (1881).
37. 13 Cal. 3d at 192, 529 P.2d at 561, 118 Cal. Rptr. at 137.
38. *Id.* at 190, 529 P.2d at 560, 118 Cal. Rptr. at 136.

the application of a "hindsight test" in determining liability.[39] It should be noted, however, that the general standard of care (*i.e.*, the comparative standard) is not used in *Tarasoff* as it is, for example, in the medical malpractice field.

In the area of medical malpractice, the comparative standard is used to determine whether there has been a breach of the general duty of care which all physicians owe to their patients. Since professional judgments vary, the comparative standard can encompass a wide variety of reasonable acts, thus making breach difficult to prove. In situations like the one in *Tarasoff*, however, the comparative standard is not used to determine *breach*, but, rather, is used to determine whether the *duty* to warn exists. Since *Tarasoff* specifically requires a warning if such a duty exists, the comparative standard will not be used to determine breach—the mere failure to warn will constitute breach.

Several problems are created by the unconventional role the *Tarasoff* majority has created for the comparative standard. First, psychotherapists will find it too vague to be of practical value. With breach so easy to detect if the existence of a duty to warn is found, therapists will want and need a surer method of ascertaining when the duty exists. Second, since liability can be avoided by simply issuing warnings in every questionable case, a phenomenon analogous to "defensive medicine" could easily develop. Third, using the vague comparative standard to establish the existence of a duty to warn seems to unnecessarily invite the so-called "battle of the experts"[40] in all cases which go to trial. It will be useful to briefly discuss these last two problem areas.

---

39. A consumer hindsight test has been suggested to establish the defectiveness of manufactured products in the products liability area of tort law. According to section 402A of the Restatement (Second) of Torts, a product is defective if it is "unreasonably dangerous." The consumer hindsight test would classify a product as "unreasonably dangerous" at the time of sale if a reasonable man with knowledge of the product's condition and appreciation of all the risks found to exist in the product by the jury at the time of trial, would not now market the product. *See* Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacturing and Design of Products*, 20 SYR. L. REV. 559, 568 (1969).

The *Tarasoff* court could have easily adapted this test to the present situation. A psychotherapist could have been held liable for failure to warn if a reasonable professional person with knowledge of the patient's condition at the time of trial would have given a warning to a person threatened by the patient at the time of treatment. However, as noted above, this standard of care was rejected by the California Supreme Court in favor of the usual standard of care to which all professional persons are held. *See* note 10 *supra* and accompanying text.

40. This "battle" is discussed briefly at note 44 *infra*.

Defensive medicine is a practice which has been greatly stimulated by this country's growing medical malpractice crisis.[41] The practice has been described as

> the alteration of the modes of medical practice induced by the threat of liability, for the principal purpose of forestalling the possibilities of lawsuits as well as providing a good legal defense in the event such lawsuits are instituted.[42]

Defensive medical treatment of physical ailments of patients usually takes the form of preventive measures, such as additional laboratory tests or x-rays.[43] Although they undoubtedly add to the cost of health care, they certainly do not appear to threaten a patient's health. The situation is quite different with regard to the practice of defensive medicine in the field of psychotherapy. In order to avert civil liability, therapists may take it upon themselves to warn all persons threatened by their patients, even when they feel that the stated threat is part of the therapeutic process and in fact presents no danger to anyone. Widespread adoption of this practice will undoubtedly render accurate the ominous predictions of the dissent in *Tarasoff* since the trust which serves as the foundation of the personal psychotherapist-patient relationship will inveitably be destroyed.

It appears difficult, if not impossible, to set up a standard by which psychotherapists could be judged in order to eliminate the practice of defensive psychiatric medicine, especially when one considers the self-protective instincts of human nature and the complex and subtle problem of determining whether an oral threat to human life will ever be carried out. As intimated above, the most effective protection against any defensive abuse of the duty to warn lies in the training of psychotherapists who, as medical professionals, are dedicated to maintaining the health of their patients.

Under any standard, plaintiffs will have to convince a jury that a duty to warn existed. Under the comparative standard, plaintiffs will have to obtain one or more expert witnesses who

41. *See* NEWSWEEK, June 9, 1975, at 60; TIME, June 16, 1975, at 49-50.

42. HEW, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 14 (1973).

43. *Id.*

feel that, under the circumstances of the case, a psychotherapist exercising a reasonable degree of skill, knowledge and care would have issued a warning to the threatened person. The defendant, of course, will obtain expert witnesses to testify to the contrary. Although the undesirable consequences of this kind of conflict between experts have been well documented,[44] the *Tarasoff* majority avoids discussion of the problem. The problem has been partially alleviated by the establishment of neutral panels of outstanding specialists which offer evidence about the applicable standard of care in a particular medical situation, which evidence can be refuted by medical experts from either party to the malpractice action. While this approach would certainly work to eliminate some of the problems inherent in proving the existence of a duty to warn, a more immediate solution suggests itself.

In view of the overwhelming importance of confidentiality to the psychotherapist-patient relationship, it seems prudent to suggest that a therapist should always obtain a consulting opinion from another qualified psychiatric specialist before deciding whether to warn a person who has been threatened by his patient.[45] Confirmation of a psychotherapist's decision not to warn would serve a two-fold purpose: (1) it would work to protect a psychotherapist from the perfect hindsight of a jury by demonstrating the therapist's conformance to professional standards if he failed to warn, since he could offer into evidence the confirming opinion of the consulting psychotherapist; and (2) it would act to protect the patient from the embarrassment of unnecessary disclosure of a threat, in situations where both psychotherapists agreed a warning was unwarranted. Although this type of action by a psychotherapist would not be perfect insurance against liability for a failure to warn, it would seem advisable in view of the relative difficulty psychotherapists have

44. *See, e.g.*, Myers, *"The Battle of the Experts:" A New Approach To An Old Problem in Medical Testimony*, 44 NEB. L. REV. 539 (1965). In the so-called "battle of the experts," conflicting or contradictory testimony is presented by the expert witnesses which have been called by the plaintiffs and defendants.

This frustrating type of contradictory expert testimony undoubtedly acts to hopelessly confuse the jury, and probably leads to decisions which are based more on personality judgments than on conformance to medical standards. *See* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON MEDICAL EXPERT TESTIMONY PROJECT, IMPARTIAL MEDICAL TESTIMONY 6 (1956).

45. Obtaining an independent psychiatric opinion may also act to prevent psychotherapists from overpredicting the dangerousness of patients. *See* Fleming & Maximov, *supra* note 32, at 1044-45, 1065.

in predicting violence[46] and of the potentially far-reaching legal consequences involved.

IV. THE POLICE DUTY TO WARN

Any examination of the legal duties owed by the police to specific members of the general public is complicated by the existence of the governmental immunity statutes that are presently found in most states. The so-called governmental-proprietary test, which denies liability for the negligent performance of discretionary activities (*e.g.*, supplying police or fire protection), but acknowledges liability for the negligent performance of proprietary activities (*e.g.*, supplying gas or electricity), is still used in many jurisdictions.[47] Under this test, local governments are commonly immunized from responsibility for their torts in connection with the preservation of law and order, the enforcement of the law, and the apprehension of criminals.[48] Hence, in many jurisdictions there can be no liability for the failure of a municipal corporation to provide police protection to a citizen or to warn a citizen of an impending threat to his or her life.

In an increasing number of other jurisdictions, local governments are now being held generally liable for their torts, except when they engage in activities calling for the exercise of official judgment or discretion.[49] In states that have adopted these modern rules of governmental responsibility, local governments are customarily held liable for the torts of their police, as long as the basic elements of negligence are proved. Since courts have long held that the municipal duty to provide police protection runs only to the general public and not directly to any specific citizen,[50] any plaintiff bringing an action as a result of the wrongful failure of the police to provide protection or give warning will have great difficulty establishing the existence of a legal duty. However,

46. *See* Justice & Birkman, *An Effort to Distinguish the Violent From the Nonviolent*, 65 So. MED. J. 703 (1972); Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQUENCY 371 (1972).

47. W. PROSSER, *supra* note 16, § 131, at 979-83.

48. 1A C. ANTIEAU, MUNICIPAL CORPORATION LAW § 11.55, at 71 (1974).

49. W. PROSSER, *supra* note 16, § 131, at 986-87.

50. *See* Massengill v. Yuma County, 104 Ariz. 51S, 456 P.2d 376 (1969); Tomlinson v. Pierce, 178 Cal. App. 2d 112, 2 Cal. Rptr. 700 (1960); Evett v. City of Inverness, 224 So. 2d 365 (Fla. App. 1969), *cert. denied*, 232 So. 2d 18 (1970); Huey v. Cicero, 41 Ill. 2d 361, 243 N.E.2d 214 (1968); Simpson's Food Fair, Inc. v. City of Evansville, 272 N.E.2d 871 (Ind. App. 1971).

courts have found that a duty exists when: (1) a special relationship between the police and some particular citizen exists; or (2) the police, by voluntarily assuming a duty that they are not required to undertake, increase the risk of harm to some particular citizen.[51]

The California Supreme Court's imposition of a police duty to warn in *Tarasoff* was predicated on the second exception to the common law rule stated above. In the past, the courts have applied this exception in two different factual situations. Of necessity, the invocation of this exception requires a case-by-case evaluation of the operative facts.[52]

One factual situation in which it has been found that a duty to warn occurs is when police authorities breach their express promise to warn an individual that a certain dangerous person is about to be released from police custody.[53] Courts have found

51. *See* Annot., 46 A.L.R.3d 1084, 1088-89 (1972). A special relationship has been found to arise between the police and a citizen when the citizen becomes an informer and supplies information to police authorities which leads to the arrest of a fugitive. *See* Swanner v. United States, 309 F. Supp. 1183 (N.D. Ala. 1970); Gardner v. Village of Chicago Ridge, 71 Ill. App. 2d 373, 219 N.E.2d 147 (1966); Schuster v. City of New York, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958). As a matter of public policy, in order to encourage citizens to assist law enforcement authorities in the apprehension of dangerous criminals, the police owe

> a special duty to use reasonable care for the protection of persons who have collaborated with ... [them] in the arrest or prosecution of criminals, once it reasonably appears that they are in danger as a result of their collaboration.

Id. at 80-81, 180 N.Y.S.2d at 269, 154 N.E.2d at 537. One case, Baker v. City of New York, 25 App. Div. 2d 770, 269 N.Y.S.2d 515 (1966), has even held that this special relationship arises if a citizen has been granted an order of protection by a court authorizing the police to arrest a particular person who had previously harassed and threatened the citizen. Failure of the police to enforce such an order can be seen as a breach of a duty owed to a particular citizen who has been singled out by the judicial process as a person in need of special protection.

The factual circumstances which have led to the application of the second exception to the rule of no duty are fully discussed in the text following this note.

52. Indeed, the issue of whether one owes a duty to another must always be decided on a case-by-case basis. *See, e.g.*, Weirum v. RKO Gen., Inc., 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr., 468, 471 (1975).

53. Fair v. United States, 234 F.2d 288 (5th Cir. 1966) (air force provost marshal failed to fulfill his promise to notify private policemen guarding a nurse threatened by a psychiatric patient of the release of the patient from a local hospital); Morgan v. County of Yuba, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964) (sheriff failed to notify plaintiff's decedent of the release from jail of a suspect arrested as a result of a complaint initiated by plaintiff's decedent, despite his promise to do so); Bloom v. City of New York, 78 Misc. 2d 1077, 357 N.Y.S.2d 979 (Sup. Ct. 1974) (police failed to carry out their promise

that if an individual reasonably relies on the promise to warn by refraining from securing other necessary assistance to protect his life, the police assume a duty to carry through their promise. The law has long recognized that the giving of a gratuity is not without its consequences, for

> one who represents that he will extend aid to a helpless person is responsible for the harm caused by the failure to receive the aid if, but for the defendant's conduct, aid would have been rendered by others.[54]

The other traditional fact pattern which leads to an exception to the no duty rule is when the police, although making no express promise to warn, do undertake to render some form of protection to a private citizen or the public and then suddenly withdraw that protection.[55] Courts have reasoned that the assumption of the partial protection of a citizen by the police carries with it the obligation not to terminate such protection if it appears that the citizen has been placed in greater danger as a result of such protection. Actions which might constitute an attempt at protection have been liberally interpreted by the courts. In one case,[56] the police accepted a gun for safekeeping from the father of an individual who had previously threatened others with the weapon. They were found liable to the individual's wife when they returned the gun to the individual who subsequently killed himself and injured his wife.

---

to store owners that their property would be protected during any civil disturbance). *See* Antique Arts Corp. v. City of Torrance, 39 Cal. App. 3d 588, 593, 114 Cal. Rptr. 332, 335 (1974). *Contra*, Henderson v. City of St. Petersburg, 247 So. 2d 23 (Fla. Dist. Ct. App. 1971).

54. Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 919 (1951) (footnote omitted).

55. *See* Schuster v. City of New York, 5 N.Y.2d 75, 87, 180 N.Y.S.2d 265, 274, 154 N.E.2d 534, 541 (1958) (McNally, J., concurring) (police only partially protected citizen who had supplied information leading to the arrest of a dangerous fugitive); Mentillo v. City of Auburn, 2 Misc. 2d 818, 150 N.Y.S.2d 94 (Sup. Ct. 1956) (police took into custody a violent former mental hospital patient after he had threatened various individuals with a firearm and then released him); Isereau v. Stone, 207 Misc. 941, 140 N.Y.S.2d 585 (Sup. Ct. 1955) (sheriff provided two deputy sheriffs to protect a wife who had been assaulted with a deadly weapon by her husband and then withdrew that protection). *See also* McCorkle v. City of Los Angeles, 70 Cal. 2d 252, 449 P.2d 453, 74 Cal. Rptr. 389 (1969); Bass v. City of New York, 61 Misc. 2d 465, 305 N.Y.S.2d 801 (Sup. Ct. 1969); Jones v. County of Herkimer, 51 Misc. 2d 130, 272 N.Y.S.2d 925 (Sup. Ct. 1966).

56. Benway v. City of Watertown, 1 App. Div. 2d 465, 151 N.Y.S.2d 485 (1956).

V. DIFFICULTIES WITH THE POLICE DUTY TO WARN

The factual analysis which justified the imposition of a duty to warn in earlier cases was not evident in *Tarasoff*. The court discussed the police duty to warn in a single sentence, and did not state the facts on which the application of the exception was based. In the view of the court, the police actions with respect to Poddar increased the risk of violence faced by Tatiana Tarasoff; thus the police assumed the duty to warn her of the danger to her life. Responding to the majority opinion, the dissent aptly noted that:

> Although the police defendants get lost in the course of the majority's opinion, the holding concludes the officers may also be liable for failing to warn.
>
> The ground for imposing liability on the police officers is unclear. The holding is so broad it may be understood, in light of the facts of this case, as meaning the mere release of Poddar gave rise to the duty to warn. The majority not only imposes a new duty on police officers, but may also have held that jail and prison officials must now warn of potential violence whenever a prisoner is released pursuant to bail order, parole, or completion of sentence.[57]

Unlike the psychotherapist's duty, legal precedents do not support the type of police duty to warn found in *Tarasoff*.

Cases which have found a police duty to warn or to give protection can be distinguished from *Tarasoff* in two distinct areas. In all of the noted cases, police authorities either had entered into some sort of special relationship with a private citizen or had some evidence of the seriousness of a citizen's request for protection and had responded to that request in some manner. The facts set out in *Tarasoff* do not display either of those distinguishing features. The existence of these unifying characteristics throughout the various holdings is no coincidence, but is a general reflection of the courts' view of the role of police in society. The police, unlike psychotherapists, do not enter into close personal relationships with the public or with the suspects they arrest. The sheer

57. 13 Cal. 3d at 203, 529 P.2d at 596, 118 Cal. Rptr. at 145 (Clark, J., joined by McComb, J., dissenting).

volume of the general duties owed by police to the public[58] makes it impractical for police to individually investigate every request for assistance and every threat made to private citizens. The courts have been aware of the impossibility of fulfilling these enormous numbers of duties and have consequently found that the duty to provide police protection or the duty to warn persons threatened by suspects in police custody will be enforced only when the police have, or should have, a reasonable belief in the seriousness of a threat to a specific citizen. The gravity of the threat can be determined either by some special relationship the police have had with the citizen in the past or by some police conduct demonstrating that they initially believed the threat was serious.

The establishment of a police duty to warn in *Tarasoff* is unrealistic and ignores the principles that have been followed by the common law. In the present case, the police neither had any direct contact with Tatiana Tarasoff which could establish any special relationship, nor had they demonstrated by their conduct that they believed Poddar's threats were serious. The police simply acted to detain Poddar on the request of a state psychotherapist, and then released him when they decided he was not dangerous. They never made a decision to detain Poddar based on their own independent investigative information. There were no facts to indicate that the police should have had a reasonable belief of the gravity of Poddar's threats. With its holding, the court compels the police to function as a screening agency to determine the validity of the numerous threats which are undoubtedly made by suspects each day and at various stages of the police detentive process. The burden of this duty does not seem overly onerous for psychotherapists, since their professional training is directed toward making them competent to evaluate and analyze patients' spoken revelations during the course of an individual counseling session. To impose the same duty on the police however, who have had little or no formal training in such subtle psychological evaluation, not only appears unjust, but also ignores the impersonal nature of most of the police process.

---

58. *See* ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE URBAN POLICE FUNCTION 7 (Tentative Draft 1972). For a detailed analysis of the basic character of police work and its relation to the judicial system and local communities see E. BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY (1970).

CONCLUSION

Although there has been a recent judicial trend in California to increase the number of special relationships or affirmative acts which will justify a departure from the common law rule of no duty to warn,[59] this does not mean that courts should impose new legal duties on members of society without considering how burdensome these new duties will be. It is obvious that the courts should not refuse to adopt a legal duty solely because it is difficult to implement. However, before setting forth a new legal duty, the courts should consider whether the imposition of the proposed duty will be beneficial to society as a whole.

The legal duties that the California Supreme Court found arising out of the psychotherapist-patient relationship have ample precedent in the law and medical practice, and have been demonstrated to be clearly beneficial to the best interests of society. The standard of care imposed on the psychotherapist is a necessary consequence of his professional position and of the "growing importance of the psychiatric profession in our modern, ultra-complex society."[60] It therefore seems likely that the California Supreme Court will uphold the psychotherapist's duty to warn in its final decision.

With respect to the police duty to warn, however, it is hoped that the court will acknowledge the unfairness and impossibility of enforcing such a duty of care, and will either refuse to recognize the duty or enumerate additional guidelines for its application. Upholding the police duty to warn in the form in which it is articulated in *Tarasoff* will both hinder policemen attempting to carry out those activities that truly lie within the scope of their training and expertise and prove detrimental to society's interest in providing effective police protection to its citizens.

Robert B. Kaplan

59. *See* Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); Morgan v. County of Yuba, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964); Ellis v. D'Angelo, 116 Cal. App. 2d 310, 253 P.2d 675 (1953).

60. *In re* Lifschutz, 2 Cal. 3d 415, 421, 467 P.2d 557, 560, 85 Cal. Rptr. 829, 832 (1970).