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Duty to Warn: The Mental Health Practitioner's Legal Responsibility

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DUTY TO WARN: THE MENTAL HEALTH PRACTITIONER'S LEGAL RESPONSIBILITY

by

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VITA

The author, Madeleine Mary Sharko, is the daughter of Donald Theodore Sharko and Lorraine (Supert) Sharko. She was born May 27, 1963.

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CHAPTER I

INTRODUCTION

This thesis is prepared as a means for reviewing the literature concerning mental health professionals' duty to warn third-party individuals of potentially-dangerous clients. It is intended to present the tension between law and psychology, specifically where the responsibilities of the therapist as a citizen and as a mental health practitioner impose on him/her conflicting expectations. The review of literature is meant to illustrate the struggle in maintaining strict confidentiality (a major tenet of therapeutic work) while at the same time recognizing the obligation to dissolve any confidence for the purpose of precluding clients' possible illegal actions. It is hoped that this paper will demonstrate the need for further discussion and litigation which will allow the practitioner's method of procedure in sensitive cases to be routinely decided, rather than personally deliberated.

The information for this paper was located through use of professional journals, books, case law and computer systems. Examples of professional journals include the Mental Disabilities Reporter and Behavioral Sciences and the Law. Examples of books include Psychotherapy, Confidentiality, and Privileged Communications (1966) by Ralph Slovenko, and The Potentially Violent Patient and the Tarasoff Decision in Psychiatric Practice (1985),

edited by James Beck. Case law includes that of the California state courts along with federal cases found in the Federal Reporter and the Federal Supplement. The LUIS computer searches at the Loyola University Library yielded journal articles such as "From Tarasoff to Hopper: The Evolution of the Therapist's Duty to Protect Third Parties" (Goodman, 1985). The LEXIS system provided approximately 19 cases at the federal district level and 17 cases at the federal appeal level within the past nine years.

As an attempt will be made to show all those involved in the mental health field who are affected by the duty to warn, an examination of what is considered to be a mental health practitioner will be explored first in the next chapter. Because this legal duty is intrinsically tied to the therapists' behavior, it is important to consider the expectations and roles of these professionals. In this way, one might be able to see the extent to which this duty is a help as well as a hindrance. The development of new fields in psychology is a paradox in that while the breadth of professions makes more services available (for reasons of convenience, lower expense, etc.), each of these specialties presents some difficulty in assessing the limit to which the professional may be held liable for negligence. Unlike traditionally-recognized careers such as psychiatrist or psychologist, many areas of counseling are not shaped by specific definition. A brief examination of licensing requirements will show the structure of these professions and their ability to absorb the characteristics which are intrinsic to traditional fields in psychology and psychiatry. Because the

counseling areas are very similar to these two professions, the reader will be able to understand how important it is that clarification be made of the duty to warn, not only for the sake of psychologists and psychiatrists, but for all involved with clients in a helping capacity.

The duty to warn is an ancient legal duty extending back to the traditional law of England on which the United States founded their own laws. The third chapter of this thesis provides the reader with historical background in law, specifically the inception of the duty to warn. While presenting the structure of the law and its interpretations, effort is also made to set forth values that led courts to create a duty to protect third parties involved. Emphasis is also placed on later arguments against the duty to protect. These anticipate ramifications that could inflate liability and allow people to be held accountable beyond their capabilities. Many of these arguments are made with the support of Section 315 of the Restatement of Torts that confirmed the lack of duty where no relationship between the defendant and third-parties existed. It is not surprising then that therapists and many others representing the mental health fields faithfully maintain adequate, longstanding rationales for rejecting imposition of this duty.

The quintessential case and the first to comment on the confrontation between law and psychology is Tarasoff v. Regents of the University of California at Berkeley (529 P. 2d 553 (1974)). As explained in Chapter IV, the Tarasoff precedent rests on two civil cases, the original Tarasoff decision rendered in 1974 (also called

"Tarasoff I") and the 1976 rehearing requested by professional behavioral and health organizations, among them the American Psychiatric Association (Tarasoff v. Regents of the University of California, 551 P. 2d 334 (1976)).

The 1974 Tarasoff case concerned the death of a young woman who was attending the University of California, Berkeley in 1969. She was killed by a graduate student of the same university after she rebuffed his advances. The graduate student, Prosenjit Poddar, had been seeing a psychologist at the school's clinic prior to the murder, and had disclosed intentions of killing an unnamed but identifiable girl. The crux of the issue was whether the therapist had a legal duty to warn the victim or her family. The state's district court found no duty on the part of either the psychiatrist or the police to warn. Plaintiffs appealed and the next court looked to both common law principles and the Restatement of Torts in order to try to ascertain liability. The court also stated that it weighed the policy reasons of nondisclosure by therapists. Its first decision was to hold that the complaint could be amended to show a cause of action for the failure to warn. A rehearing requested by the American Psychiatric Association and other mental health organizations confused the duty further, and expanded it past a warning.

Tarasoff had profound impact on California. Other cases considering a similar duty to warn were heard in the state's courts almost immediately. Also, there has been a substantial amount of duty cases filed in the federal courts of the ninth judicial circuit

since Tarasoff. Chapter V traces these cases, along with setting forth the relevant studies that have been conducted concerning California therapists.

Although Tarasoff remained within the state courts of California, it had tremendous impact on other state and federal courts that were required to examine similar suits for the first time. The sixth chapter of this thesis demonstrates the influx of duty to warn cases in federal districts across the country. Through synopses of these cases, it is shown how courts deliberate in implementing such a duty based on the state's approval or rejection of the Tarasoff rationales. What is also available from this chapter is the identification of those few cases subsequent to Tarasoff which had similar notoriety within a certain region and acted as new precedent. The final chapter of this thesis looks to recent articles of the APA Monitor and similar resources in the field of psychology to show the impact of Tarasoff and its progeny. Among these are the recent studies showing therapists' inability to predict dangerousness, the measurable effects that the threat of liability has had on various therapists and clients and psychologists' recommendations for a reasonable standard of care which would ultimately protect them from negligence suits.

CHAPTER II

DEFINITION OF MENTAL HEALTH PRACTITIONER

Black's Law Dictionary (1983) describes a "practitioner" as one "who is engaged in the exercise or employment of any art or profession as contrasted with one who teaches such" (p. 611). In determining who is a mental health practitioner, then, it seems logical to include all those who provide a form of therapy and are considered clinicians not academicians. Although this thesis may sometimes focus on particular obligations belonging to physicians and psychologists, an effort will be made to comment on all mental health professionals.

Some illustrations of this kind of practitioner can be drawn from authors in the field. Several of them define the mental health profession as a "helping" profession. For example, according to Brammer and Shostrum (1982), "help" in a mental health field means "providing conditions for people to fulfill their needs for security, love and respect, self-esteem, decisive action, and self-actualizing growth" (p. 3). It also means "providing resources and skills that enable people to help themselves" (p. 3). Although Brammer and Shostrum differentiate among the clinical and counseling practices, the above limited interpretation seems to include the characteristics intrinsic to all mental health professions.

Cormier and Cormier (1982) define a helping professional as

"someone who facilitates the exploration and resolution of issues and problems presented by a helpee or a client" (p. 2). They continue in saying that a helping relationship has four components: someone seeking help, someone willing to give help, a helper who is capable of treating, and a setting in which effective treatment might occur. They also state that the relationship involves a series of stages. For example, four stages might include forming the relationship, setting goals, selecting strategies, and evaluating/terminating.

Finally, Cavanagh (1982) defines counseling as "a relationship between a trained helper and a person seeking help in which both the skills of the helper and the atmosphere that he or she creates help people learn to relate with themselves and others in more growth-producing ways" (p. 1). Cavanagh emphasizes that a professional counselor needs both counseling skills and a helpful personality. Cavanagh believes a helpful personality to be the sum of individual characteristics which enable a therapist to create a special environment. Within this unique setting, the therapist confidently uses the skills for the client's interest and the client trusts the therapist.

According to Cavanagh, there are many components in a counseling personality. Among these are warmth, patience, and sensitivity. Three other aspects, more specific to the topic of this thesis, are trustworthiness, honesty, and strength. Cavanagh defines trustworthiness as the ability of the counselor to assure the client that confidentiality is absolute. A trustworthy

counselor does not cause his/her client to regret having confided in the therapist. Similarly, a counselor who employs honesty appears genuine. A counselor listens to what the patient says and, in not distorting or judging the patient's plight, tries only to understand the client's feelings in relation to the facts told. The counselor's honesty encourages the client to be equally as honest, as the counseling experience rests on the counselor's clear interpretation of the situation and unconditional benevolence toward the patient. The patient should begin to experience, perhaps for the first time, a freedom to be honest without the fear of rejection. Finally, a counselor exhibiting strength is able to keep himself/herself separate from the person in counseling. Flexibility (according to Cavanagh) is also a sign of professional strength.

These are just some of the views held by mental health scholars and authors in regard to the role of the mental health practitioner. To be fair in authority, it is also necessary to consult legal documents defining the titles of various mental health professionals according to education and skill, rather than characteristics. Many of these are found in state statutes or codes. For example, the Mental Health and Developmental Disabilities Code of Illinois describes a "clinical psychologist" as a psychologist registered with the Illinois Department of Registration and Education who holds either a doctoral degree or graduate degree in psychology from a regionally accredited school and has a specified minimum amount of education (Ill. Dept. of Mental Health and Dev. Dis., 1987, Sec. 1-103(a)(b)). A "psychiatrist" is a "physician...who has at least 3

years of formal training or primary experience in the diagnosis and treatment of mental illness" (Sec. 1-121). A "clinical social worker" means "a person who (1) has a Master's or doctoral degree in social work from an accredited graduate school of social work and (2) has at least 3 years of supervised postmaster's clinical social work practice which shall include the provision of mental health services for the evaluation, treatment and prevention of mental and emotional disorders" (Sec. 1-122.1).

In its December 1984 report, the National Clearinghouse on Licensure, Enforcement and Regulation, along with the Council for State Governments, prepared a report on the state credentialing of the behavioral science professions. The professions under study included psychology, social work, counseling and marriage and family therapy. The report is careful to indicate that a state's regulation (registration, certification, licensure) is a newly-developed method of controlling the mental health professions.

Relying on a dictionary definition of behavior, the report formulates its own definition of the behavioral sciences and says that they are "the scientific study of persons' behaviors as the people exist in their environments" (p. 1). Thus, despite the different regulatory histories and current standards of each of the behavioral sciences, perhaps all can be described as having an interest in human interactions.

The major thrust of the Clearinghouse report is to demonstrate the discrepancies in regulation of the behavioral sciences across the states. Unlike the licensure of psychiatrists as physicians,

mental health practitioners are subject to different requirements and titles according to their education, experience and residency. For example, depending on the state, a practitioner in any given behavioral science field may be subject only to registration (minimum reporting standards), or to more stringent state agency standards of certification, or, finally, to the most strict requirements of licensure, which make it illegal for a non-licensed person to perform the specified services.

A study of this report for the purposes of this thesis provides an overall understanding of the differences among the mental health professions and, subsequently, a succinct definition of each. Perhaps this was part of the report's purpose as well. One idea therein expressed is that state professional regulation serves to delineate the scope of practice for a regulated profession. Those responsible for the report state that in identifying the required knowledge and skill of the profession, the limitations of the practice are outlined. What is included constitutes the function of the profession.

In the initial comparisons of the behavioral science professions, the authors point out that marriage/family therapy seems the narrowest practice under the title but that each of the professions can be tied together through the skills of counseling or psychology subsumed by each. As Cormier and Cormier (1982) imply, these skills may be understood as those abilities to clarify, interpret, and summarize the information presented to the therapist by the client.

The mental health field can be said to comprise counselors, social workers, psychologists and psychiatrists. The authors argue that a difficulty in the regulatory process is that each profession may include such a diverse set of tasks that any given member may be regulated by different standards, according to the assigned job. For example, although the layman may conjure one image of the "counselor," the report points out that the states, in regulatory procedures, discriminate among six different kinds of counselors. These are professional counselors, pastoral counselors, drug counselors, alcoholism counselors, substance abuse counselors, and marriage and family therapists (p. 42).

The report reveals that all professional counselors seeking licensure have at least a Masters-level degree requirement with 1-3 years of internship experience. Those states reporting age requirements insist on counselors being at least 18-19 years of age. Six states in the survey have continuing education requirements, averaging 12-15 hours per year. Not much information is available on pastoral counselors other than the fact that a Master's is usually required with some internship experience.

New Hampshire requires continuing education for pastoral counselors but does not specify type. Similarly, not much is revealed for alcoholism or drug counselors other than Virginia requiring a 500-hour drug program from an accredited college for the drug counselor and completion of a 400-hour alcoholism program for alcohol counselors. Each of these counselors in Virginia is required to complete 60 hours of continuing education every two

years. Maine requests 30 semester hours in college-level work and a two-year substance abuse internship. It does not require additional continuing education courses. It appears that marriage and family therapists need Master-level degrees or licensure. Florida and Georgia request continuing education in this area.

As of 1985, five states (Arkansas, Florida, Georgia, North Carolina, and Texas) employ a scope of practice declaration to define the practice of professional counseling, certainly the broadest class of counselors. The practice includes "rendering or offering to render to individuals, groups, organizations or the general public any service involving the application of principles, methods, or procedures of the counseling professions which include but are not restricted to 'counseling,' 'appraisal activities,' 'consulting,' 'referral activities,' or 'research activities`` (p. 43). It is necessary to explain here what each of these means. According to the report, "counseling" is assistance in understanding problems, developing plans and goals, and utilizing talents to meet needs. "Appraisal activities" concern the use of educational tests to determine an individual's potential, including his/her aptitudes, abilities and interests. "Consulting" occurs when scientific theory is researched to provide further understanding of problems. "Referral activities" are those that analyze data to determine problems and consider referrals. "Research activities" include constructing and reporting research on human subjects. Marriage therapy, on the other hand, is a "specialized service afforded to individuals and married couples which centers primarily upon the

relationship between husband and wife" (p. 43). The paper cites New Jersey law because it is most representative of states' scope of practice:

> The practice of marriage counselor consists of the application of principles, methods, and techniques of counseling and psychotherapy for the purpose of resolving psychological conflict, modifying perception and behavior, altering old attitudes and establishing new ones in the area of marriage and family life.

Alternatively, 33 states regulate at least one category of social worker in some way (see Table 1). The majority of the states (23) license or certify at least one level of social worker. Regulation is probably prevalent in this field due to the type of work, level of responsibility, and type of supervision that the social worker may receive. The authors note that there are many different roles which individual social workers perform, but nonetheless attempt to characterize the field through reprinting Alabama's scope of practice which they believe is representative of the majority of states:

> Social work [is] the professional activity of helping individuals, groups, or communities enhance or restore their capacity for social functioning and of preventing or controlling social problems altering societal conditions as a means toward enabling people to attain their maximum potential.

These objectives are reached through referrals, counseling, research and administration of organizations engaging in such practice. The authors also cite the National Association of Social Workers' Model Scope of Practice in showing that the profession is guided toward "enhancing, protecting, or restoring people's capacity for social functioning, whether impaired by physical, environmental, or emotional factors" (p. 91). This Act also touches on the

clinical aspect of social work in that this field has the potential for the "application of social work methods and values in the diagnosis and treatment of mental and emotional conditions and in providing psychotherapy" (p. 91).

According to this report, states which regulate (whether by licensure, certification, or registration) reserve regulation for persons with Master-level degrees in social work and several years

Table 1

State Regulation of the Behavioral Sciences

State	Counselor Pastoral, Family	Psychologist	Social Worker
AL.	L	L	L
AK.		L	
AZ.		C	
AR.	L	L	L
CA.	L	L	L
CO.		L	L/L/R*
CN.	C	L	
DE.		L	L
FL.	L	L	L
GA.	L	L	L
HA.		L	
ID.	L	L	L
IL.		C	R
IN.		C	
IA.		L	L
KS.		C	L
KY.		L	L
LA.		C	L
ME.	R	L	R
MD.	C	L	L
MA.		L	L
MI.	R	L	R
MN.		L	
MS.		L	
MO.		L	
MT.	L	L	L
NE.		L	

Table 1 (continued)

State	Counselor Pastoral, Family	Psychologist	Social Worker
NV.	C	L	
NH.	C	C	C
NJ	L	L	
NM		C	
NY		L	L
NC	C	L	C
ND		L	L
OH	L	L	L/R**
OK		L	L
OR		L	R
PA		L	
RI		C	R
SC	L	L	R
SD		L	L
TN	C	L	L
TX	L	L	L/C**
UT	L	L	L
VT		L	
VA	L/C**	L	L
WA		L	
WV		L	L
WI		L	
WY		L	
DC		L	

Key: L=Licensure; C=Certification; R=Registration

Cited as Table II-1 in State Credentialing of the Behavioral Science Professions: Counselors, Psychologists and Social Workers. Prepared by the National Clearinghouse on Licensure, Enforcement and Regulation and the Council of State Governments, reprinted with permission. See Appendix A.

Source: Health Professions Licensure Information System, September 1985.

*Three levels of social work practice are requested.
**Two levels of social work practice are requested.

of supervised work experience. States that have two categories either distinguish between Bachelor and Master's degrees with appropriate work experience, or between a social worker with a Master's degree and one who is licensed for independent practice which require additional supervised work experience. States having three categories usually combine the three distinctions above and regulate: a) social workers with a bachelor's degree, b) social workers with an advanced degree in social work, and c) social workers with an advanced degree in social work and several years of supervised work experience. The states that have four categories ordinarily recognize an associate degree in addition to the categories above.

Citing Perspectives on Health Occupational Credentialing (1979), the committee of the National Clearinghouse shows that while the medical profession reflects uniform scopes of practice, the field of psychology reveals even greater diversity among the states than does social work.

According to this report, all the states, including Puerto Rico and the District of Columbia, regulate psychologists. Most of the states (47) regulate through licensure while the rest (five), employ certification methods. The authors rely on the Model Practice Act prepared by the American Psychological Association to represent most states' statutes. This states:

> The practice of psychology includes, but is not limited to, psychological testing and evaluation or assessment of personal characteristics such as intelligence, personality, abilities, interests and aptitudes; counseling, psychotherapy, hypnosis, biofeedback training and behavior therapy; diagnosis and treatment of mental and emotional disorder or disability,

> alcoholism and substance abuse, and the psychological aspects of physical illness or disability, psychoeducational evaluation, remediation, and consultation. Psychological services may be rendered to individuals, families, groups, and the public (Cited in State Credentialing of the Behavioral Sciences, 1986, p. 66).

The authors go on to say that what seems to be the real demarcation for the factions of scopes of practice is whether the state's focus is on health services or whether it leans toward a wider range of activities which may mean consultations and/or organizational counseling. In a health-services approach, terms such as "assessment," "diagnosis," "treatment," or "organic" (as relating to brain dysfunctions) may be found in the state statutes.

If a state regulates its psychologists through licensure, then either a Ph.D. or a Master-level degree integrated with 3-5 years of work experience is required. Most states require good moral character and half the states have a minimum age requirement.

According to the authors mentioned previously, namely Brammer and Shostrum, Cormier and Cormier, and Cavanagh, what seems especially important to the therapeutic process is the existence of the helping relationship itself. A situation in which one person is to professionally help another during a time of emotional crisis/stress would undoubtedly have to rest on a foundation of trustworthiness, honesty, and good faith. On its face, this seems a fair expectation.

Nonetheless, it is exactly this understanding which, when juxtaposed with the therapist's legal responsibilities, changes the practitioner's role into an enigma. For example, a therapist who is held ethically to maintain the confidence of his/her client is also

expected, even mandated by law, to divulge that confidence when he/she knows or suspects that the client is dangerous to himself/herself and others. In effect, a third party, unknown to the therapist, may become the plaintiff in a lawsuit later brought against the same therapist, who has consistently tried to act in an ethical and trustworthy manner.

As the states vary in their regulations of mental health practitioners, so do they vary in protecting the client through privilege statutes. In their book, Privileged Communications in the Mental Health Professions, Knapp and Van DeCreek (1987, p. ix) differentiate between confidentiality and privilege in explaining that the former refers to laws or ethics that govern the privacy of information while the latter is a narrower term referring only to the legal right that patients may invoke for protection of their confidences and preclusion of these for evidence in court. The authors explain that Congress or state legislatures determine necessary privileged relationships. The process involves a careful balancing of benefit and potential harm to society. Also considered is the fact that a proper verdict in trial may not be reached if some evidence is withheld from the court.

Privilege statutes vary. All states include the attorney-client privilege. Most states include clergy, physicians and psychologists. Social workers, counselors, journalists, and nurses are protected in some states. Only a few states have privilege laws for detectives, trust companies, and accountants (pp. 3-4).

For a considerable time, psychotherapists (including

psychiatrists) did not have the protection of a physician-patient privilege. Early advocates for the protection of psychological interviews pressed for a statute not through reference to the physician-client privilege, but rather through showing an important difference. They argued that a psychotherapist needs even more privilege than a physician because of the nature of the problems presented and the social stigma attached to them.

The authors indicate that state legislatures began to protect these relationships only in the late 1940s. No state commented on psychotherapy before World War II. Afterwards, however, states began to recognize a need for the protection of psychotherapeutic communications with the increase of practitioners. Knapp and Van DeCreek's review, as of 1985, showed that 47 states and the District of Columbia have privileged communications statutes for psychologists. Twenty-eight states have privileged communication statutes for social workers. Twenty states specifically cover psychiatry while 30 other states and the District of Columbia protect psychiatrists under the physician-patient privilege.

Although Tarasoff does not concern privileges, some mention is needed in order to fully unveil disclosure problems. The privilege statutes are noteworthy because they are further indication of the importance that society places on confidentiality. Although mentioned originally in the physicians' Hippocratic Oath in the 19th century, the idea of absolute privacy has expanded from ethical guidelines. This respect for privacy has grown as the mental health professions themselves have grown. Privacy is viewed as such a

crucial part of treatment that it can now be involved as a legal right on behalf of the patient.

Privilege communication statutes, like the regulations on the mental health profession, serve to further define the role of the mental health practitioner. Intrinsic to his/her code of professional ethics is an expectation to use reasonable care and to keep private what should remain private. The promise of absolute secrecy can be considered a genuine component of treatment, a special form of "help" not available to the client outside of these professional relationships.

Against this background of mental health practice, the problems of Tarasoff and the implications of their resolution will be studied. What follows is the birth of duty principles, an additional and different set of responsibilities which this kind of professional faces.

CHAPTER III

HISTORY OF THE DUTY TO WARN

This thesis concerns tort law. An historical overview is necessary to lay the groundwork and to unveil the implications of tort principles which ultimately shaped the Tarasoff decision. The thrust of Tarasoff revolved around the concept of duty, specifically the mental health practitioner's duty to warn third parties of potentially violent patients. This duty is difficult to qualify; perhaps it is best explained as emanating from what is commonly called negligence.

In his article "Evolution of the Duty of Care: Some Thoughts," Murphy (1981) traces the development of duties in the United States by beginning with traditional notions established in England during the early 19th century. What follows in this third chapter of the thesis is a summary of Murphy's construction of the duty to warn. The cases cited are those Murphy used to chronicle the development of the duty to warn.

The hallmark case, according to Murphy, was Heaven v. Pender (1983) Q.B.D. 503. The plaintiff in this case was a boat painter who sustained injuries when the stage next to the boat fell. He brought suit against the dock owner with whom he was not in relationship (privity of contract), but who nonetheless provided the stage so that the boat could be painted. This was first court to

consider duty as developing from foreseeability. Lord Esher used the Pender case to say that a duty is defined as the relation which becomes apparent in an inherently dangerous situation. He illustrated this by two ship captains who assume a duty toward each other at the realization that their individual ships may crash into one another. It has been said that Esher's theory was innovative because it was among the first to describe duty in terms of foreseeability and relationship, not solely privity. Privity, according to Black's Law Dictionary (1983), is the "mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right" (p. 626). Coined "the larger proposition," Esher's theory was said to be founded in humanism and natural law.

Pender may be thought to have been precedent for many ensuing American cases. Yet, Murphy is careful to point out that a case based on similar reasoning had already been decided in the States 30 years prior to Pender. Thomas v. Winchester (1852), held a manufacturer of poisonous pharmaceuticals liable despite the lack of contract or privity between the manufacturer and the consumer/plaintiff. Here, the duty of care was said to arise from the nature of the profession and the defendant's awareness of the possibility of illness or death after ingestion of defectively manufactured or improperly labeled drugs. Probably a major reason for the increase in finding liability was the fact that Winchester involved a toxic substance and that it would seem unconscionable to

allow liability to pass on technical grounds. Thus, at the beginning of the 20th century, both England and the United States were mutually affirming that duty need not be confined to the traditional context of privity, especially in terms of inherently dangerous situations. Rather, both courts were willing to rely on humanistic theories for anticipating liability.

Murphy explains that in 1916, New York courts expanded on the Winchester decision by finding a manufacturer of a defectively-designed wheel liable to subsequent accident and injury to the plaintiff/car buyer (MacPherson v. Buick Motor Co.). The court reasoned that such a product can be as dangerous to human life as the poison in the Winchester case. Winchester also relied on Pender that disregarded the need for formal privity relationships between the parties. Rather, as in Winchester, a duty evolved to those reasonably foreseeable victims, users of the product.

An interesting twist of events happened in this country in 1928 with the New York decision of H.R. Moch v. Rennselaer Water Co.. Here, Justice Cardozo had the opportunity to rely on above-named cases for allowing recovery to a plaintiff who suffered fire damage when the water company neglected to properly channel water to hydrants. The problem was clearly foreseeable. It seems that it could certainly have been said that the water company's obligation to the plaintiff was narrower than that of the company to humanity at large, and that there were identifiable victims. Genuine human interests were at stake.

Nonetheless, Cardozo's reasoning swung the decision in the

opposite direction, and liability was found not to exist based on the fact that there was no relationship similar to "privity." Instead of relying on MacPherson and Winchester precedent, Cardozo retreated by resorting to the clear, yet seemingly oversimplified rationale of the ancient English case of Winterbottom v. Wright (1842). In Winterbottom, a passenger of a stagecoach could not sue the manufacturer of the carriage for injuries sustained due to the lack of privity. Cardozo reasoned that a stage coach was not like a poison, or even a defective wheel; it was not dangerous by itself. Thus, Cardozo made a conscious effort in H.R. Moch to keep alive ancient notions of duty lest they die out with the incursion of foreseeability and relational concepts found in the line of cases beginning with Winchester.

Murphy explains that in 1928, then, there were two distinct but coexisting forms of tort law in the United States. For the next six years, courts had to choose between which of these was better law in individual circumstances. A major stance was finally taken in 1934 with the compilation of the Restatement of Torts. Following more the Winterbottom theory on duty, the Restatement said in Section 314 that "The actor's realization that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action" (p. 854). It also said in section 315 that there was no duty to control the conduct of another unless a special relationship existed between the first person and the one whose conduct needed to be controlled or if a special relationship existed between the first person and the potential victim where in

the latter situation, there would be a duty to protect. Section 319 stated that one who of his/her own volition took charge of another person known or likely to be dangerous is obliged to control the person from doing harm. Section 320 made clear that one exercising custody over another is obliged to protect that person from harm by others if the custodian knows or should know that he/she has ability to control conduct of the other and if he/she knows or should know of the necessity for exercising the control. There were some exceptions for a duty to control and protect but these were limited to special relationships such as parent/child, master/servant, owner of land/licensee. Mention is also made of those who are in charge of persons having dangerous propensities.

An application of the Restatement yielded Richards v. Stanley in 1954. Here, there was no liability for a defendant who left his keys in his care, thereby indirectly allowing a thief to take the automobile and subsequently injure a plaintiff. Although the act was foreseeable by the defendant, and although the defendant could be said to have some duty to protect nearby pedestrians, the court found through application of the Restatement that no privity existed between the defendant and the injured plaintiff. No obligation on the part of the defendant could be found.

Murphy cites in a footnote an important article having commenting on the implications of the Restatement. Entitled "The Duty to Control the Conduct of Another," (1934), authors Harper and Kime commented on the policy of tort law at that time in terms of its "relational character." In stating that human beings constantly

enter into relationships, tenuous and otherwise, these authors explained that only current social policies really distinguish those relationships which demand special protection. They continued by stating that common law is an attempt to incorporate the attitude of the community into legal rules. Although they added that the categories were flexible, Harper and Kime were nonetheless eager to identify potential problems with the development of the duty to warn at the time. Thus, they felt that when ... "novel cases involving the problem arise, it will become the duty of the judges to examine the analogies of such cases as (already) are discussed ... and to determine whether, in the light of human experience as reflected in the decisions, the relations of the parties fall into one or the other of the general divisions mentioned" (p. 905).

Although Tarasoff was not to arrive until years later, legal scholars at the time of the first Restatement could already see the fallibility in clinging only to the demarcations set out in Section 315.

It was the Restatement of Torts (Second) in 1965 that enumerated the exceptions, in form of particular professions, to the no-duty rule. These included persons known as common carriers, innkeepers, possessors of land, and those, such as police or prison wardens who actually took someone subject to their control. These exceptions were based on all of the tort cases, with the exception of one, that had occurred between 1934 and 1965.

Murphy explains that this second Restatement, however, still only acknowledged relationships that were already socially

recognized and did not consider the relationship that "evolved" as that in Pender. Cases like Pender would have to be reconciled, indeed compromised, under one of the strict categories in the Restatement. As stated before, this will later be seen as one of the initial handicaps that complicated the Tarasoff case a few years later.

According to Murphy, the second Restatement was initiated after many conflicting cases had come to the court. For example, Wright v. Arcade (1964) refused recovery to a five-year-old injured by a school bus because the boy had no relationship with the school district. On the other hand, the court in Raymond v. Paradise the previous year found liability against the bus company because there was no supervision in a bus loading zone, an areas which the court thought was demonstrative of a general relationship between the bus company and its passengers. In response to these cases, Murphy says that the juxtaposition of the cases reveals a tendency to rely on Section 315's "special relationship" analysis when the court was determined to avoid liability, and a decision to find a general relationship through the special circumstances of the Section when the court wanted to establish a duty.

The purported cornerstone case at this time, however, was Amaya v. Home, Ice, and Fuel Co. (1963). Here, in Amaya, there was the final shift in California from a no-duty rule to that of a general duty of care founded on foreseeability. Murphy points out three major ramifications of Amaya: 1) Amaya was the first return to the Pender reasoning since MacPherson; 2) Because of Amaya, the no-duty

concept would still be available but only through manipulating the feasance dichotomy and the privity concept. Consequently, Section 315 would have a bigger role to play in liability-denying rationales because it would be the strongest precedent for showing no duty absent a special relationship; 3) Amaya shows the demarcation between the no-duty factions and the pro-duty factions in terms of the subject of human safety.

Subsequent to the second Restatement, Dillon v. Legg (1968) overruled Amaya in saying that a "zone of danger" standard was too strict in limiting foreseeability. With the Rowland v. Christian case, the same California court moved further to abolish the no-duty rule. Rowland concerned personal injury to a friend of the defendant when plaintiff cut himself on a water faucet in defendant's house. The ruling in Rowland abandoned classifications of trespassers, licensees, and invitees along with respective duties of care that had been owed to each group by the landowner up to this time.

Murphy explains that in leaving the no-duty rule completely, the courts sought to define a general duty of care. This kind of duty could be ascertained through the asking of two basic questions. In order to find liability in a situation, the court would first ask if "there was a sufficient relationship of proximity or neighborhood such that in reasonable contemplation carelessness on one's part would likely cause damage" (p. 167). If so, there existed a "prima facie duty." The second question to ask would be if there were any considerations which ought to negate or limit the scope of the duty.

The answer to the second question would be the initial determinative answer of liability.

According to Murphy, Rowland was important because it appeared as the first "definitive" statement in the United States adopting the larger proposition found in Pender. Murphy points out that there was a feeling that this fundamental principle that was formed would make no distinction between misfeasance and nonfeasance. According to Black's Law Dictionary, misfeasance is the improper performance of an act which is lawful, while nonfeasance is the omission of something which a person ought to do.

These were the developments that had thus far occurred by the time Tarasoff reached the courts. Murphy explains that the two lines of tort development, the first representative of the Pender-Rowland "larger principle" doctrine and the other traceable to Winterbottom (and evidenced in Section 315 of the Restatement), combined in the Tarasoff case. In finding the defendant psychotherapists liable for their failure to warn, the court relied on both the fundamental principle from Rowland and the special relationship analysis of Section 315 of the Restatement.

CHAPTER IV

THE TARASOFF DECISION

The Tarasoff precedent rests on two civil cases, the original Tarasoff decision rendered in 1974 (also called "Tarasoff I") and the 1976 rehearing requested by professional behavioral and health organizations, among them the American Psychiatric Association. The second hearing was an effort to alleviate the fears of psychotherapists who confronted new, unclear responsibilities as a result of Tarasoff. Dr. James C. Beck, author of The Potentially Violent Patient and the Tarasoff Decision in Psychiatric Practice (1985), said that the 1976 ruling was even more distressful than the first as the duties for psychotherapists were expanded, but not clarified (p. 6).

It is also extremely important to note that the Tarasoff opinion does not determine whether Dr. Moore, the murderer's psychologist, or the University of California outpatient clinic was, in fact, negligent. The case only purports that there is a cause of action to be tried and that the case is appropriate for remand to the lower courts. There, the findings of fact, the jury, are still free to determine whether or not Dr. Moore had used due care and saved himself from negligence. Unfortunately, the case never reached remand because it was settled out of court before retrial. These unfortunate circumstances add to the confusion of mental

health practitioners' understanding as to what constitutes negligence (Reisner, 1985, p. 105).

The facts of the Tarasoff cases represent one year in the lives of Prosenjit Poddar and Tatiana Tarasoff, two students at the University of California at Berkeley. A graduate student, Poddar met Miss Tarasoff at a folk dance in October of 1968. They saw each other at social events approximately once a week. Poddar thought that the relationship was serious, but Tatiana told him that it was not. There are no explanations for Tatiana's response in the cases nor commenting texts. As a result of her refusals, Poddar became withdrawn and cried often. His speech was erratic. He ignored his work. He was preoccupied with his infatuation and spent hours with his roommate analyzing tape-recorded conversations with Tatiana. He mentioned being in love with Tatiana. During the next summer, Tatiana left for South America. Poddar, suffering from a lack of concentration and unable to pursue his studies, entered outpatient psychotherapy at the Cowell Memorial Hospital of the University of California on June 5, 1969.

What may seem additionally important, especially for the purposes of this research, is that Poddar was of Indian background and a member of the Harijan caste, those known as "untouchable." A very brief description of the caste system may be in order. In India, the majority of people (approximately 83%) are Hindus, followed by Muslims (approximately 11%), then Christians and Buddhists. The Hindus are separated into social classes or castes. Each caste is usually associated with a specific occupation (priest,

artist, farmer), and the caste serves as a permanent identification. A person is born into a caste and cannot leave it. There is a particular set of rules governing conduct for each caste; marriage rarely occurs between members of different castes. For many years, a group called "untouchables" has been considered perhaps the lowest social class in that its members exist outside the caste system and rank even below the lowest caste. They are a minority, comprising only about 15% of the Indian population. Although the 1950 Indian Constitution ameliorated the untouchables' social status somewhat by granting them equal rights as full citizens, there are still a number of Hindus who believe that this group should not encroach on society (World Book Encyclopedia, 1985, pp. 100-101).

With this background available on Poddar, it might be useful from a psychological perspective to speculate on his motives for pursuing Tatiana and the reasons for his increasing despair over her rebuffs. Martin E.P. Seligman, a clinical and experimental psychologist, has studied the experience of "helplessness" and how it is tied to emotional disturbance. He states in his book, entitled Helplessness (1975), that this kind of despair is "the psychological state that frequently results when events are uncontrollable" (p. 9). Although much of his book centers on laboratory experiments, he insists that the results can be analogized to emotional and psychological breakdowns in humans. He says that organisms which are capable of learning helplessness suffer a decrease in motivation, an inability to recognize success, and a heightening of emotion. Thus, in light of the fact that

Poddar learned that he was born into a caste about which he could do nothing, and in light of the apparent weakness of the Indian people to fully accept the idea of "untouchables" as full citizens, Poddar may have seen Tatiana's rejection as further proof of his helplessness and his genuine inability, despite fervent effort, to obtain what he desired.

Although the counsel for Poddar did not assert a defense of helplessness, they did seek to demonstrate diminished capacity. Defense implored the courts to allow the testimony of an anthropologist who had lived in India for 20 years and had particularly studied problems that Indian students had in adjusting to American universities. It was hoped that her testimony could substantiate a direct link between the stress endured by Poddar and his motivation for killing Tatiana. Although the court invited the defense council to pose relevant, hypothetical questions to the anthropologist, it did not allow the defense counsel to use the witness as an expert. The court reasoned that diminished capacity was a mental illness that was subject to direct testimony only by those professionals in the mental sciences.

Unlike his usual practice, Dr. Gold, the psychiatrist who evaluated Poddar at Cowell, told Poddar at the first interview that his behavior was quite abnormal and could be diagnosed as paranoid schizophrenic. The psychiatrist was a member of the inpatient staff and decided that Poddar did not require hospitalization. He prescribed a neuroleptic (a tranquilizer and antipsychotic drug) and then referred Poddar to Dr. Moore, a clinical psychologist on the

outpatient staff who conducted weekly psychotherapy.

On August 18, 1969 during one of his therapeutic sessions, Poddar disclosed thoughts of harming, or even killing an unnamed girl. She was, however, identifiable to Dr. Moore as Miss Tarasoff. According to the criminal case, People v. Poddar (1972) (summarized in Appendix B), Poddar also told a male friend his intention to kill Miss Tarasoff, by possibly blowing up her room. He also disclosed to either this person or another friend that he felt he could not control himself. The court does not seem disturbed by the lack of facts concerning how Dr. Moore could identify the victim. In a footnote to the 1976 rehearing, the court says that "We recognize that in some cases it would be unreasonable to require the therapist to interrogate his patient to discover the victim's identity ... But there may also be cases in which a moment's reflection will reveal the victim's identity" (p. 345, fn.11.).

Dr. Moore also apparently learned from a friend of Poddar that Poddar planned to purchase a gun. Details about this conference are scarce. The criminal case states that grounds of premeditation included Poddar's possessing a gun and asking if that kind of gun could kill someone. The record does not disclose to whom he asked this question. Dr. Moore became concerned about Poddar and consulted with Dr. Gold and the assistant to the director of the department of psychiatry, Dr. Yandell. After deciding that Poddar needed hospitalization, Dr. Moore phoned and then wrote to campus police on August 20th, explaining that Poddar's dangerousness met California's civil commitment criteria, that he was probably

paranoid schizophrenic, and that he should be detained involuntarily. Whether or not Poddar actually met the commitment criteria is not discussed in the analysis of Tarasoff. Focus is on the relevant civil commitment statute, the Lanterman-Petris-Short Act, in order to determine whether the defendant psychotherapists could enjoy the immunity therein described for government officials. According to the case, the County of Alameda had never appointed the Cowell Memorial Hospital, nor any of its members to begin involuntary commitment proceedings in accordance with the Welfare and Institution Code. Despite the fact that, according to the Act, the lacked status to make commitment judgment, the Court nonetheless awarded them immunity on the basis of their power to make recommendations for commitment.

Campus police aid was requested in committing him. Three campus police officers, one with whom Dr. Moore had previously spoken, interviewed Poddar extensively and decided that he was rational and not dangerous. Although it is uncertain what Poddar said, he promised to stay away from Tatiana and was then released.

According to plaintiffs' allegations, Dr. Powelson, Director of the Department of Psychiatry at the time, ordered that no further action be taken to place Poddar in a 72-hour facility. Dr. Powelson asked the police to return Dr. Moore's letter and also ordered that all copies of the letter and notes that Dr. Moore had taken as therapist be destroyed. As the cases do not disclose any of Powelson's statements, one can only speculate as to his motives for ordering these actions. Perhaps he feared appearing to have

authority to commit Poddar. Neither Tatiana nor anyone in her family was notified of the threats nor the behavior of Poddar that would suggest his violent tendencies toward plaintiff. Poddar did not stay in treatment. Although reasons are not stated, it may be a result of his being detained by the police and thus, his losing confidence in Dr. Moore. At this time, he then befriended Tatiana's brother and encouraged him to be his roommate. Tatiana, who had been in Brazil, returned to Berkeley in the fall of 1969 and again rejected Poddar's advances.

On October 27, 1969, Poddar went to Ms. Tarasoff's home. She was absent and Tatiana's mother, perhaps sensing danger, asked him to leave. Poddar, however, returned later with a pellet gun and a butcher knife, to find Ms. Tarasoff alone. She refused to talk with him and began screaming. He shot her with a pellet gun and she ran from the house. He followed her and stabbed her to death. Afterwards, he called the police and requested that he be handcuffed.

Subsequent to the death of their daughter, the Tarasoffs sued the University, including both the campus police and the student health service psychotherapists. In their allegations, the Tarasoffs said that the psychotherapists had been negligent in not warning Ms. Tarasoff of Poddar's threats and in not confining him. They also charged that the police had been negligent in only questioning Poddar and in not detaining him further.

The defendants (collectively, the University of California) demurred. In essence, they asserted that the plaintiffs had no

cause of action to pursue, even if all of the facts were true. They said that even if the plaintiffs' allegations were true, there really was no legal duty on the part of either the psychotherapists or the police to protect or to warn. The court accepted this argument and dismissed the Tarasoffs' complaint on the grounds that it failed to state a cause of action. The Tarasoffs appealed and this led to Tarasoff I which was decided December 28, 1974.

The plaintiffs' complaint concerned four causes of action comprising two grounds of liability: 1) Defendants' failure to warn plaintiffs of the impending danger, and 2) Defendants' failure to use reasonable care to bring about Poddar's confinement. Defendants asserted that they owed no duty of reasonable care to Tatiana and that they were immune from suit under the California Torts Claim Act of 1963. As an aside, the Act allows indemnification of employees against liability, so long as there is no bad faith. The defense relied on the Act because specific sections of its Government code allowed immunity for government officials who exercise discretionary commitment decisions.

The court found liability on two rationales for the first ground. The court found defendants not liable on the second ground.

The plaintiffs' four causes of action include: 1) Failure to detain a dangerous patient, 2) Failure to Warn on a Dangerous Patient, 3) Abandonment of a Dangerous Patient, and 4) Breach of Primary Duty to Patient and the Public (p. 341). The first cause of action sketches the chronology of how Moore had consulted with psychiatrists at Cowell Memorial Hospital, had notified campus

police that Poddar would be detained, and had requested the aid of the police department in assisting him.

Plaintiffs' second cause of action, "Failure to Warn on a Dangerous Patient," incorporates the charges of the first cause, but also adds that the defendants negligently permitted Poddar to be released from police custody without "notifying the parents of Tatiana Tarasoff that their daughter was in grave danger from Prosenjit Poddar" (p. 341).

Plaintiff's third cause of action, "Abandonment of a Dangerous Patient," sought $10,000.00 in punitive damages against defendant Dr. Powelson. The complaint stated that Powelson "did the things herein alleged with intent to abandon a dangerous patient, and said acts were done maliciously and oppressively" (p. 341).

Plaintiff's fourth cause of action, "Breach of Primary Duty to Patient and the Public," states allegations similar to the first cause of action, but it seeks to characterize defendants' conduct as a breach of duty to safeguard their patient and the public. The court says that the first and fourth causes of action are essentially the same allegations.

In analyzing the real substance of the complaint, the second cause of action, the court first refers to Dillon v. Legg in saying that liability is usually found where there are allegations of negligence, proximate cause, and damages. The defendants' argument here is that in the circumstances of the present case, they (defendants) owed no duty of care to Tatiana or her parents and that, in the absence of such duty, they were free to act in

disregard for Tatiana's life.

The court expounds on its theory of "duty" by saying that duties are not facts to be discovered, but are conclusory expressions found in particular cases. The court also refers to Prosser (1964) who said that "[Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection" (cited in Tarasoff I, p. 557).

Rowland v. Christian was consulted for a listing of some of those policy considerations. These included: the foreseeability 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 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 (69 Cal. 2d 108, 1113).

The Court admits that under common law, one generally owes no duty to control the conduct of another (Richards v. Stanley) nor to warn those endangered by such conduct (Rest. 2d Torts, Sec. 314). However, the court is also careful to point out that courts have noted exceptions to this rule. According to the court, there have been two situations where courts have imposed a duty of care: (1) cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a

relationship to the foreseeable victim of that conduct (Secs. 315-320), and (2) cases in which the defendant has engaged, or undertaken to engage, in affirmative action to control the anticipated dangerous conduct or to protect the prospective victim (Sec. 321-324a). Both exceptions apply to the facts of this case.

In turning first to the special relationship part of the pleadings, the court notes that a relationship of defendant therapists to either Tatiana or Poddar will suffice to establish a duty of care. The court concludes that there is a relationship here between the defendants and Poddar. It is a relationship of the kind that exists between a patient and his/her doctor.

The court also set some precedent here in saying that although the California decisions that recognize duty have involved cases in which the defendant stood in a special relationship both to the victim and to the person whose conduct created the danger, that duty should not be limited to such situations. Such a strong requirement precludes liability in valid cases concerning an important and influential relationship. The court looks to other jurisdictions to decide that the single relationship of a doctor to his/her patient is sufficient to support the duty to use reasonable care to warn of dangers emanating from the patient's illness. The court decided that a doctor or psychotherapist treating a mentally ill patient is treating someone who presents a danger as serious and as foreseeable as does the carrier of a contagious disease.

Next, the court also points out that Poddar broke off all contact with the health center after his contact with the police.

The plaintiffs assert that it might be inferred that the defendants may have then acquired a duty in contributing to Poddar's dangerousness. Similarly, and along the same lines, it was the defendants' obligations to strive to continue servicing Poddar after his having become a patient, and even after his having left therapy.

In defense of their position, the defendants advanced two policy considerations for a refusal to impose a duty upon psychotherapists to warn third parties of danger arising from violent intentions of a patient. First of all, defendants point out that therapy patients often express ideas of violence, but rarely carry them out. It is extremely difficult to ascertain those who would be likely to carry out the threats. Secondly, the defendants argue that free and open communication is a crucial part of psychotherapy and that a warning to a third party is a breach of trust.

Responding to the first policy concern, the court answers that the standard of care here is no more difficult to determine than that standard for physicians or other professionals. The court determines that although an individual psychotherapist's standard of care may vary, the psychotherapist is still held to that general standard "ordinarily possessed and exercised by members of [his] profession under similar circumstances" (Bardesono v. Michels (1970)). Replying to the second policy reason, the court says that it acknowledges the public interest in confidential treatment, but that the public interest in protection from assault must also be weighed. It explains that the legislature has tried to balance the

concerns through establishing a broad rule of privilege for patients and psychotherapists (Evidence Code 1014). The court also indicates, however, that Evidence Code 1024 contains a limited exception to the psychotherapist-patient privilege when the patient is believed to be dangerous to himself or others. The court continues by stating that the revelation of such a communication is not a breach of trust under the Medical Ethics of the American Medical Association (1957) Section 9, because as stated therein, a physician is required to do so in order "to protect the welfare of the individual or of the community" (p. 347). This court reverses the judgment of the superior court, and determines that plaintiffs' complaint can be amended to show a cause of action. The court concludes: "The protective privilege ends where the public peril begins" (p. 347).

In determining the second prong of the defense, the reliance on the Torts Claim Act of 1963, the court focuses on Section 820.2 of the Government Code in order to determine whether public officials are protected by governmental immunity as a result of their status as public officials. Through studying past cases, the court finds that immunity is given to those who exercise discretionary policy decisions, not basic policy decisions. The court says: "We require of publicly employed therapists only that quantum of care which the common law requires of private therapists, that they use that reasonable degree of skill, knowledge, and conscientiousness ordinarily exercised by members of their profession" (p. 351). Section 820.2 does not shield the therapists from liability for

failure to warn.

The court does, however, sustain defendant therapists' contention that Section 856 of the Government Code protects them from liability for failing to confine Poddar, that failure consisting the plaintiffs' first and fourth causes of action. Section 856 determines liability only where the defendant has failed, through act or omission, to carry out a determination to confine or not to confine. The court here finds, first of all, that Dr. Powelson automatically fits within this exception because he made a decision, and followed through with it. It seems that he cannot be charged with the intent to abandon a dangerous patient if he, as director of the department, and superior to Dr. Moore, is merely disagreeing with his subordinate's decision and following through faithfully on his own deliberations. Additionally, then, Dr. Powelson is also exempt from the punitive damages for this alleged failure, and plaintiff's third cause of action fails.

Dr. Moore's exercise of decision is more difficult to ascertain because he initially differed with Powelson. Nonetheless, the court decided that Dr. Moore's action in not overturning Dr. Powelson's decision was an act of compliance, and really a decision to go along with Dr. Powelson. Whether this compliance was a result of clinical reevaluation or an attempt to ingratiate himself at the health center is unclear. Dr. Moore did assert at trial that he was obliged to obey the decision of his employer. Information about Powelson's order, the date of its issuance, and Powelson's authority over Moore are not entirely discussed in the facts. Thus, the first

and fourth causes of action, referring to liability for failure to detain the patients fail.

In regard to the police officers, the court consults Section 5154 of the Welfare and Institutions Code and finds that they are immune from liability as are "peace officers," mentioned in the code, "who are responsible for the detainment of the person" (p. 353).

According to Goodman, author of "From Tarasoff to Hopper: The Evolution of the Therapist's Duty to Protect Third Parties" (1985), the holding in Tarasoff I, then, was sufficiently narrow. There was a duty to warn only the potential victim. Other causes of action were blocked by governmental immunity. There were background histories for the two different bases used by the court for imposing the duty to warn. First of all, the court relied on an article by Fleming and Maximov (1974) entitled "The Patient or His Victim: The Therapist's Dilemma" to declare that the relationship which arises between a patient and psychotherapist supports affirmative duties on the part of the therapist for the benefit of third parties.

Next, the court relied on extra-jurisdictional cases which imposed a duty to warn in order to find that the duty of the therapist treating a person with violent tendencies was analogous to the carrier of a contagious disease or the driver whose condition or medication affected his ability to drive safely. These ideas were based on policy judgments expressed in Richards v. Stanley (1954) that, in such situations, the person most likely to foresee or prevent an injury should be held responsible for taking steps toward

prevention. Also, as already noted earlier, Goodman also indicates that the Restatement (Second) of Torts, Section 315, was first used by the court in the 1974 decision to find the psychotherapist-patient relationship to be a "special relationship" and an exception to the common law rule that "one person owed no duty to control the conduct of another" (p. 557, citing Richards vs. Stanley 217 P. 2d 23 (1954)).

By 1976, the American Psychiatric Association (APA), in collaboration with other professional organizations, had filed an amicus curiae ("friend of the court") brief asking the Supreme Court to rehear the appeal.

These professionals were worried that requiring therapists to warn potential victims would lead to many more breaches of patients' right to confidentiality. They argued that given the isolated instances of violence, many predictions would be falsely positive. Consequently, the majority of these breaches would serve no purpose other than to instill anxiety in the potential victim, and would, coincidentally, undermine the patient's confidence in the therapist and the therapeutic process.

Also, some psychotherapists believed that they would be obliged to alert patients routinely about the duty to warn. They anticipated the deleterious effect of telling a patient at beginning of therapy that certain things the patient might say could alert the therapist to warn third parties. They saw the negative effect such a warning would have in preventing the patient from disclosing affect-laden fantasies, through process essential to accomplishing

the work of psychotherapy. The APA's fervor was strong enough to persuade the California Supreme Court to rehear the case. In 1976, a second opinion was issued. It is known as "Tarasoff II."

The court again held that a psychotherapist has a duty to the potential victim but relied on Beck (1985), to define that duty more broadly and with more breadth for professional judgment by the therapist (p. 5). The court said: "The discharge of this duty may require the therapist to take one or more of various steps depending upon the nature of the case. Thus, it may call for him to warn the intended victim or others likely to apprise the intended victim of danger, to notify the police, or to take whatever steps are reasonably necessary under the circumstances" (p. 340). The second opinion, then, modified the duty to warn as defined in the first Tarasoff opinion. Beck (1985) saw the result as a duty to protect (p. 5).

He also points out that the court's opinion was not unanimous; only four of the seven judges concurred. Judge Mosk agreed that there was a cause of action because defendants did predict violence and failed to warn. He doubted that negligence would be found because the defendants had notified the police. He could not concur, however, in the majority's rule that a therapist may be held liable for failing to predict his patient's tendency to violence if other practitioners, pursuant to the "standards of the profession," would have done so. He finds that the standards are hard to discern. Psychiatrist predictions of violence are virtually unreliable and may vary considerably from one professional to

another.

In a separate dissent, Judge Clark agreed with the APA members that the new duty would not increase public safety. Clark said "the majority fails to recognize that ... overwhelming policy considerations mandate against sacrificing fundamental patient interests without gaining a corresponding increase in public benefit" (p. 353).

Beck says that the second opinion is unclear because it does not specify who is subject to the duty. The case itself involved a psychologist and a psychiatrist, but nothing was said about social workers, nurse-therapists or counselors (p. 6). Nor did the opinion spell out the steps necessary to discharge the duty of protection. Most importantly, the opinion left unanswered how the therapist is to know when he/she should determine, or how he/she should determine that his/her patient presents a danger of violence to another.

Similarly, according to Goodman (1985), Tarasoff II was the vehicle through which the California Supreme Court dramatically modified its earlier opinion. Instead of imposing an absolute duty to warn, the court in 1976 formulated a two-step analysis. The first step was whether the therapist, through the standards of his/her profession, knew or should have known that the patient presented a serious danger of violence to another and, secondly, whether the therapist used reasonable care to protect the threatened victim. Goodman also highlighted the fact that the court in 1976 expressed that the duty is merely contingent on the circumstances of each case (p. 205).

Goodman says that in both Tarasoff I and Tarasoff II, the defense argued that the decisions in the cases, especially in the latter, were unjust in placing a burden on the psychotherapist and his/her practice. The strongest argument asserted that psychiatrists and those in the mental health professions could not reliably predict potential future violence and dangerousness of their clients.

The alternative assertion by the defense was that unnecessary warnings would have a bad effect on patients through deterring them from seeking therapy and eroding the therapist-patient relationship. (This is similar to Judge Clark's dissent.) The court used a balancing test to weigh the public interest in treatment against the public interest in safety from potential violence. Thus, others have asserted that another important exception to the common law rule of "no duty" was born by the California Supreme Court.

According to Prosser (1971), "The problem of duty is as broad as the whole of negligence ... and no universal test for it has ever been formulated" (cited in Goodman, p. 207). Goodman relies on Lowe's 1975 article "Tarasoff v. Regents of University of California: Risk Allocation" to state that the arguments continue about what factors should be weighed and who should weigh them. The general rule that developed in common law and that was later integrated into the second Restatement was that there is no duty to control the conduct of another, or to warn those endangered. This idea is premised on the common law distinction between affirmative misconduct and passive inaction, misfeasance and nonfeasance. This

represents the commonly-accepted principle that so long as a person does nothing to interfere with another's interests, the law will not require any affirmative undertaking to protect a stranger. Goodman states that the court referred to Winterbottom v. Wright (1842), one of the first cases to focus on precluding an infinite amount of actions. In Wright, mentioned in Chapter III of this thesis, a third party to a sale contract of a defective mail coach and a driver of that coach, could not collect damages for injury resultant of using coach. The government claimed that the seller had no duty to the third-party driver and to hold otherwise would make available liability against anyone subsequently and remotely connected with the initial relationship.

Goodman asserts that in Tarasoff II, Judge Tobriner dramatically modified both the duty required of the defendants and the rationale behind it. The opinion begins with a reference to Heaven v. Pender's "fundamental principle" (1883). As stated earlier, this general principle was the very first interpretation of a duty to protect others. Judge Tobriner indicates, nonetheless, that American courts soon retreated from this broad duty toward a narrowing of the duty in 1934 with the Restatement of Torts. From that time on, Section 315 has been used on occasion to establish a duty to control or to protect third persons, as well as a means to deny liability.

Goodman says in a footnote: "The use of section 315 to impose a duty to control or protect ... has been criticized because explicitly Section 315 does not establish an affirmative obligation

to undertake new actions, but only demands ... vigilance that already has been undertaken" (p. 209, fn.7). He further explains that some have argued that as there is no capacity by therapists to control outpatients, there should neither be a duty to protect potential victims in these cases.

The court, in Tarasoff II, continues to find a "special relationship" between the therapists and Poddar and still relies on the reasoning in Tarasoff I. In Tarasoff II, affirmative duties of a much broader nature are established. In using Pender's "fundamental principle" of care to others, the court apparently arrives at an affirmative duty based primarily upon the element of foreseeability. The second Tarasoff decision left many questions unanswered, one of the most important referring to foreseeability. Resolution of this was left for definition, restriction, and extension in future holdings.

In his opinion, Murphy (1985), author of "Evolution of the Duty of Care: Some Thoughts," says that the holding in Tarasoff is really consistent with Heaven v. Pender. Nonetheless, he says that the decision can be criticized because the duty emanating from Section 315, and that which has been articulated and developed historically in terms of control and protection, has a wider scope of operation and demands a higher standard of care than that imposed by the general rule requiring the exercise of due care. More importantly, according to Murphy, Section 315 requires almost a fiduciary or confidential relationship. Murphy summarizes by saying that all of the relationships in Topic 7 of the Restatement and Section 315 have

something in common. Simply put, it is the fact that relationships, despite tort principles, have historically been defined in terms of the duty to protect or control. Using negligence principles, it seems that the attachment of a duty to exercise reasonable care with regard to one standing in a particular relationship is sufficient once that relationship entailing the duty is established.

According to Murphy, the Restatement analyzes the duty by showing its two divisions. It is to protect, in one class of relations, and to control in another. The general requirement under negligence principles is to be prudent or to use reasonable care. Under the Restatement, protection or control in itself is the object of the duties particularized in Sections 314 through 320 and abstracted in Section 315.

Murphy feels that the phrase "to use reasonable care" is very broad. In this way, it is helpful because it is wide and flexible enough to encompass a full range of human activities. It lacks a level of specificity "that would channel one's conceived and executory actions into routes previously designated to require the exercise of care" (p. 170). For example, the exercise of reasonable care may at some times go well beyond taking efforts to protect or to control. In another case, however, the exercise of reasonable care might require less than one or more of a cluster of acts explicable in terms of protection or control.

Murphy points out that the problem with the words "protect" and "control" is that they are two-sided: They come close to suggesting, but do not demand, a duty to do acts reasonably connected with the

end to be achieved, even if these acts be at one's peril. Murphy indicates that analysis of the special relationship mentioned in Restatement sections 314-320 shows that the group representing "duty to protect" are undertakings, circumstances which require more than reasonable care but something less than absolute liability. An example given is an innkeeper who undertakes to protect guests and not just use reasonable care in regard to the latter's safety.

This obligation is not absolute liability, but it does require something more than reasonable care. What is required is a kind of vigilance "cognate at least with the vigilance that Cardozo spoke of in MacPherson v. Buick" (p. 171). But there is an important difference for Murphy: The vigilance of the innkeeper is directly associated with the nature of the undertaking. He or she voluntarily assumed the responsibility to be careful for the guest. MacPherson is different because the obligation there is imposed by the law; it is a further extension of the standard of care.

Murphy explains that in both groups of relationships, the duty is a result of an already existing control or an already existing protection. Different than MacPherson which stresses an affirmative obligation to do new and positive acts, the duty herein being discussed demands only the continuous vigilance that has already been undertaken by choice or imposed with the acquiescence or knowledge of the burdened party.

Tarasoff is a result of the problems in these contradictory ideas of duty found in Section 315. Murphy explains that initially, in Tarasoff I, the California Supreme Court held that when a

psychotherapist determines or ought to determine that a warning to another is necessary to avert danger from his/her patient, he or she incurs a legal obligation to give that warning. The court found that the relationship itself imposed a duty to warn. Apparently, the court derived this duty to warn from both the special relationship of Section 315 and the fundamental principle of Rowland. As a result of this rule, the psychotherapist was now obligated to warn almost at his or her peril. The only consolation for the psychotherapist was that the duty was simply to warn and not to carry out any other numerous, thoughtful actions. Murphy says that in following Section 315 to its logical conclusion, the court implicitly demonstrated its inapplicability.

Murphy further explains that Tarasoff II, decided two years later, vacated the earlier opinion. The court still confessed to use the "special relationship" and "the fundamental principle" analysis, but now reasoned that the discharge of the duty required the psychotherapist to take one or more various steps depending on the nature of the situation. The duty was one of reasonable care. Murphy says that the court had made a remarkable, though unexpressed, shift. Duty of the psychotherapist was now put seemingly where it belonged, in the fundamental principle and its precedents.

Murphy wishes to show the irony of bringing Section 315 of the Restatement to the forefront and making it one of the more active areas of tort law. In this way, Tarasoff foreshadows the failure of the special relationship analysis, "or at the very least portends

for it a contraction into its former, narrow boundaries" (p. 173). Because of Tarasoff II, Murphy says that other courts have begun to discover the discrepancies in Section 315.

The result of the Tarasoff cases, according to Murphy, is that courts relying on Section 315 may be reluctant, or even unable, to impose liability in newly emerging and socially sensitive fact situations. There are three reasons: 1) Section 315 requires the equivalent of a fiduciary relationship, 2) When courts choose to impose liability, they may find that it results in a loose and ill-defined standard of care (including a warning or other preconceived act) which in any given case may either fall short of, or actually exceed, a standard of reasonableness, and 3) Finally, courts wishing to deny liability will find that the principles embodied in Section 315 are a convenient and plausible device.

Murphy says that a preferable approach in Tarasoff would have been Sims' dissent that found a direct relationship between the victim and the defendants. That is to say that Sims would have employed the fundamental principle to find a duty to exercise reasonable care without invoking Section 315.

According to Murphy, the significance of Tarasoff is that it seems to have "engrafted" the special relationship concept onto the fundamental principle. "The result can only be to retard the final establishment of a concept of duty unimpeded by privity or the misfeasance-nonfeasance dichotomy" (p. 175). He thinks that new duties will develop not from the "special relationship" of Section 315, but from the larger proposition of Heaven v. Pender. Murphy

says that courts are now trying to use the language of Section 315. Nonetheless, the language there will not prevent a court from using a larger principle analysis when nothing in Section 315 works:

Murphy concludes:

> Although the relations that may give rise to a duty of care are infinite in number, the most that the foreseeability test requires is that one exercise reasonable care, a reasonable care founded not in the intricacies of privity or the metaphysics of action-inaction variation, but in ethics-that people exercise the same reasonable care towards others that they expect others to exercise towards them (p. 178).

CHAPTER V

THE IMPACT OF TARASOFF ON CALIFORNIA

It is difficult to neatly organize and categorize the cases that were later decided in reaction to Tarasoff. As the Tarasoff decision became standard law in California, its theory began to be applicable to crimes other than murder. Despite its use, courts were still unclear, however, as to how to interpret the final holding. A 1980 California court even seemed to drastically narrow the therapists' responsibilities in Thompson v. County of Alameda, where the court held that duty to warn only exists when there is an identifiable victim. (Thompson is discussed later in this chapter.) Problems were compounded as Tarasoff decisions spread to other states, and state courts subsequently used each other for reference to the original ruling.

Perhaps what is most interesting about the Tarasoff history is the immediate impact that these California state decisions had in courts throughout the country. Although the subsequent Brady v. Hopper case may have gained more publicity for this area of law, it nonetheless was only a repercussion of the unique controversies initially set forth in Tarasoff.

Perhaps it is most logical to first examine the transformations within the state of California itself. Following Tarasoff, Bellah v. Greenson (1977) was one of the first California cases to be

decided with regard to Tarasoff. Greenson concerned a psychiatrist who did not warn the parents of a deceased patient that their daughter had suicidal tendencies. The psychiatrist also failed to prevent the daughter from meeting with heroin addicts. The California Appellate Court held that the psychiatrist could not be held liable and refused to extend the Tarasoff duty to preclude self-inflicted harm or even property damage. In regard to the allegation of failure to restrain, the court determined that there can be no liability absent risk of violent assault. Risk might be interpreted as the probability of violence occurring. It could be measured by the presence or absence of common violence predictors such as the articulation of a specific threat and the ability to carry it out.

In his article "Therapist Liability and Patient Confidentiality" (1986), William J. Winslade said that the Bellah case proved the court's high regard for confidentiality in cases not involving harm to others. He points out that even the Tarasoff opinion recognizes the authority of section 5328 of the California Welfare and Institutions Code, which requires that the therapeutic conversations with psychotherapists be kept confidential. He comments that the Tarasoff opinion is held only in instances not governed by statutory confidentiality rules.

Two years later, in 1979, the California Appellate Court again held defendant doctors immune to liability for death occurring after a failure to "confine" a mentally ill person. In McDowell v. County of Alameda, the patient was diagnosed as mentally ill and sent by

taxi to a hospital. The patient, however, never arrived at the hospital and subsequently killed the victim. The court justified its decision by finding the case different than Tarasoff on two grounds: First of all, there was no relationship between either the defendants and the victim, nor the patient and the victim. Secondly, there was no foreseeable victim.

During the following year, 1980, Mavroudis v. Superior Court for County of San Mateo reiterated the basic Tarasoff holding together with an indication of the type of danger that must be disclosed to the identifiable victim. Mavroudis concerned allegations brought against a hospital by parents who had been attacked by their son, a mental patient in the hospital. The parents wanted the son's psychiatric records released. Much criticism has been made of this case due to the court's choice for the private review of the records to determine whether the therapist knew or should have known that the son presented a serious propensity for violence. The court wrote that the confidentiality owed to a psychiatric patient should not be broken unless the disclosure would preclude leaving others in peril. What is to be considered is the probability of violence. Winslade explains that this case shows the struggle between judicial interpretation (of cases such as Tarasoff) requesting a duty to warn and statutory law (such as Section 5328 of the California Welfare Code) which prohibits disclosure of therapeutic information. The exception to disclosure only in the event of possible danger to another is the common ground in trying to satisfy both requirements until, as

Winslade suggests, the courts or legislatures move to make either superseding in authority.

Winslade uses this case to make hypotheses about future conflicts between Tarasoff and Section 5328. He says:

> In its 1980 decision in Mavroudis v. Superior Court, a California Court of Appeals recognized that Section 5328 does not permit disclosure of confidential records. It did admit, however, an exception to the psychotherapist-patient privilege in the presence of conditions evoking the Tarasoff duty-under Evidence Code Section 1024.... On that basis, the Mavroudis court ruled that psychiatric records could be obtained by parties to a suit, in pretrial discovery if the judge examined the records in chambers and found that the conditions described in Evidence Code Section 1024 were present and that there was a readily identifiable victim before the time of the incident" (pp. 211-212).

Winslade explained that the actual implications of Mavroudis might not be readily apparent to therapists and lawyers alike. He said that the court's opinion suggests that a party will be allowed to bring suit against an institution covered by Section 5328 for negligence of the Tarasoff duty and that institutions thought to be protected by Section 5328 may not, in fact, be shielded by those statutes. Winslade purports two additional ramifications due to Mavroudis: 1) Confidentiality is probably not protected by different statutes, similar to California's Section 5328 in a Tarasoff situation. 2) Confidentiality and privacy are further mitigated by the judge's private, pretrial examination of the therapists' records and the possible release of those records to litigants.

Winslade suggests that only selected, on point portions of the records should be made available to the court. He says:

> These matters go beyond the original concern of breaching

> confidentiality to warn a victim. Confidentiality may now be breached to further a lawsuit alleging liability of a therapist as opposed to the conduct or potential conduct of the patient involved. Just how much statutory protection of psychotherapist-patient confidentiality still exists in the Tarasoff context remains unclear, because the Mavroudis opinion addresses this question only insofar as it allows litigants pretrial access to privileged information (p. 212).

During that same year, Thompson v. County of Alameda was decided by the California Supreme Court and drastically changed the Tarasoff holding. Justice Richardson, writing for the majority, restricted the duty to protect others. The new warning extended only to a specific threat to a specific, identifiable victim.

Thompson concerned a claim against Alameda County for negligently releasing a juvenile delinquent who killed the plaintiff's son. What is especially important to note in Thompson is that the court was dealing with a county having custody over a juvenile delinquent and not with a hospital nor therapist. What influenced the court's decision were policy considerations respecting the hardship that might be placed upon the State in performing parole and probation decisions. The dissent here included Justices Tobriner and Mosk who contended that the majority had misread the precedent cases which included Tarasoff. Justice Tobriner argued that the Tarasoff duty was not limited to only a warning to a specific victim. He clarified that Tarasoff did not mean that failure to warn a victim who is identifiable is a required criterion for a lawsuit. Rather, taking necessary steps may or may not include warning that victim. It may also include notifying the police or those likely to warn the victim themselves.

The article entitled "Tarasoff duty to warn discussed in three

cases; no such duty found in Maryland" (Mental and Physical Disabilities Law Reporter, 1980, Sept./Oct.) refers to Thompson and argues that the decision to release the patient in Thompson was viewed as a governmental function having immunity under California Government Code Sections 820.2 and 845.8. It states that the focal point of the controversy in the case was whether the county had a duty to warn the local police, neighborhood if released. The court looked to Tarasoff and Johnson v. California (1968), and subsequently held that the child ultimately murdered was not an identifiable victim. In regard to the issuance of general warnings, the court said that these would be impractical and that such warning might undermine the constructive purposes of the parole and probation system by indirectly labeling the released as dangerous to society. The article further states that warning the mother-custodian would not have been worthwhile as she knew of the patient's 18-month detainment. It would not have been conducive to release procedures to expect her to have constant supervision. Finally, the mother had no special relationship with the defendants.

The dissent in this case argued that the mother should have been warned since the Tarasoff opinion did not emphasize identifiable victims. Rather, the essence of the Tarasoff ruling was that special relationships, whether these be between a therapist and a patient or, in this case, a state and its prisoner, are powerful in and of themselves. The relationship allows the therapist or state a unique opportunity to closely observe the person whose capacity for violence is questioned.

Winslade says:

> Thompson speaks to the validity of the state's purposes as they are 'rational policies.' A parallel, however, might be drawn between parole as a rationale policy with respect to successful criminal rehabilitation and confidentiality as a rational policy with respect to successful psychotherapy (itself a kind of rehabilitation). If the parallel is accurate, then it follows that immunity should also be granted to those who honor confidentiality in the pursuit of successful therapy, even if success is not any more guaranteed than it is in criminal rehabilitation (p. 215).

About that time, Buford v. California was decided by the California Court of Appeals. Here, plaintiff was assaulted and raped by patient on leave from the hospital. The plaintiff argued that the state, and its employees, had failed to correctly diagnose and treat the patient. The court of appeals held that the state did have a special relationship to the patient because primarily, he was still a mental patient in spite of "leave" permission and secondly, he still expected assistance in rehabilitation. The court also found that the problem lay not in the discretionary decision made by the state to give a leave of absence. Discretionary functions are those that include a weighing of policy considerations. Winslade exemplifies this argument by saying that the development of government regulations is a discretionary function. Government bodies are protected from liability for discretionary functions through statutory provisions, such as the California Government Code, Section 856. Thus, in Buford, the decision to release a mental patient is discretionary because it concerns consideration as to whether the public policy, favoring rehabilitation, outweighs that of continued detention. The governmental body, then, would be protected for its decision to release.

"Ministerial" actions, however, are of a different type. These are tasks performed usually by personnel, under direction, according to orders, without discretion as to those actions. These are acts performed or omitted by the hospital after the grant of leave was permitted. Winslade points out that the appellate court left to the triers of fact, the jury, the question of whether or not the therapeutic/rehabilitative personnel at the hospital had correctly performed their 'ministerial' duties in releasing Buford into society.

In reference to Tarasoff, Winslade argues that a failure to protect a potential victim would be a failure to perform a ministerial duty. He presents the demarcations made by statutes between discretionary decisions and decisions concerning follow-up, ministerial tasks. In summing up, Winslade says:

> Ministerial actions in Buford seem to be comparable to the therapist's position in Tarasoff-type cases, insofar as each is liable for actions, or failures to act, to prevent harm. It is not clear from the discussions whether the court is concerned with actual distinctions between ministerial and discretionary functions or whether it is trying to determine differing standards that would constitute negligence in the two forms (pp. 216-217).

He notes that cases like Thompson and Buford suggest that liability is dependent upon decisions compatible with professional standards and in response to some rational state policy, rather than with the presence/absence of an identifiable victim. Finally, he purports that such immunity makes wealthy institutions more attractive as defendants than private practitioners.

During the following year, Megeff v. Doland brought under scrutiny the issue concerning the therapist's duty to control

patients, either hospitalized or outpatients. In Megeff, the plaintiffs were the wife and daughter of an 87-year-old man who attacked them upon his release from a hospital. This man had demonstrated aggressive behavior while hospitalized for a cardiac condition. The plaintiffs alleged that the hospital did not adequately exercise sufficient control over a violent person and used Tarasoff and Section 319 of Restatement (Second) of Torts to construct a duty to control. The court, however, did not find a duty to control based on absence of defendant's ability to do so. Consequently, the ability of a psychotherapist to control either a voluntary outpatient or a voluntary inpatient would bring into light the issue of the duty of the therapist to control such a patient by any means other than involuntary commitment.

In the next year, the District Court of California, Central Division heard Doyle v. U.S.A. (1982). This was an action for the wrongful death of a college security guard. It was brought under the Federal Tort Claims Act and was based on negligence of an Army psychiatrist who discharged a 19-year-old serviceman named Carson. Two days after release, the serviceman killed a security guard. This case concerned a conflict of laws between the states of California and Louisiana. Louisiana law was held applicable. Under the law of this state, the army psychiatrists did not have to warn the college guard killed by the serviceman of the serviceman's homicidal intent in that the serviceman never told his psychiatrist nor any counselor who interviewed him of his intention to kill the security guard who patrolled a nearby campus. Additionally, the

court surmised that even if California law could be used in this case, there would be no duty to warn of serviceman's homicidal intent because there was no foreseeable victim. The court cited California's McDowell v. County of Alameda (1979) to show that under California law, the defendant owed no duty of care to a member of the general public such as Mr. Doyle.

One year later, in Vu v. Singer (1983), the U.S. Ninth Circuit Court of Appeals followed the earlier and revolutionary ruling of Thompson in finding that, under California law, the victim must be foreseeable and specifically identifiable in duty to warn and control cases. Vu concerned residents being attacked by Job Corps members working at a neighborhood Job Corps center. In a concurring opinion, Judge Rothstein agreed that under California law, Thompson must be followed, but questioned Thompson's view of foreseeability. She acknowledged Justice Tobriner's dissent in Thompson and further commented on the confusion between the existence of a duty of care (warn or control) with the question of an identifiable victim. She wrote:

> As recognized by Justice Tobriner in Thompson, the consideration of whether the Vus are 'identifiable victims' is relevant not to the existence of a duty of care, but only to the question whether a warning to the Vus might have been a reasonable means to discharge that duty.... The application of such a requirement here to a duty of control follows logically from Thompson, but nonetheless compounds the Thompson's court's error in reasoning because it permits a 'means' consideration to dictate the existence of a duty of care (p. 1032).

What Judge Rothstein seems to be saying is that the ability to make a warning to identifiable victims does not constitute the duty to warn, but remains only a measurement as to whether the duty, the

existence of which is established separately, has been reasonably met. In short, recognition of the ability to warn does not signify that there is an actual duty to warn in the particular circumstance.

During that same year, Jablonski v. United States was decided by the United States Ninth Circuit Court who again relied on the issue of the Tarasoff duty to warn. The defendants were Veterans Administration psychiatrists who were found negligent for their failure to record and transmit information, for failure to obtain past medical records indicating that the patient was likely to direct his violence against the victim, and for failure to warn the victim. (Winslade commented that there was recklessness, in addition to negligence.)

Jablonski concerned a case in which the dangerous patient underwent psychiatric examination after attempting to rape his lover's mother. The V.A. psychiatrist concluded through his diagnosis that Jablonski had antisocial characteristics and a tendency to be dangerous. He was not committed and refused voluntary hospitalization despite his past filled with violence at other Veterans Administration facilities. The psychiatrists advised the patient's girlfriend to leave Jablonski. She eventually complied. Upon visiting him at their former apartment, however, she was killed by him. The court held that if the psychiatrists had appropriate relevant information, then violence against the victim would have been foreseeable. The court felt that the facts of the case fit somewhere between Tarasoff and Thompson in having an unidentified but potentially ascertainable victim.

Finally, in the same year, 1983, the California Supreme Court made a substantial modification of the Thompson decision to Hedlund v. Superior Court of Orange County. This was the first major decision affecting the duty to warn since the severe "identifiable victim" test of Thompson. Here, the Supreme Court determined that a therapist who is negligent in meeting his/her duty to warn an identifiable potential victim that another has threatened violence may be responsible not only to the person threatened but also to third parties who may be harmed if the threat materializes.

In this case, the plaintiff was the victim's four-year-old son who sat next to his mother in their car when she was shot by the patient of the two defendant psychologists. The suit here was only for emotional damages, not physical harm to the son. The court showed that it would recognize a duty in future cases not only to children, but also to others in close relationships to the threatened victim and even to some bystanders. Consequently, in California, the duty to warn has been extended to foreseeable persons in a close relationship to the specifically-threatened victim. It is interesting to note that Thompson, which holds to the contrary, is not mentioned in the Hedlund opinion. Because of this, the extent to which new decisions are binding is questionable. At least in the case of Hedlund, the court was not concerned in changing or building upon precedent in order to further a resolution of the legal dilemma in Tarasoff.

Beck (1985) says of Hedlund that the California court found that negligent failure to ascertain dangerousness in a Tarasoff case

is as much grounds for liability as is the negligent failure to warn victims after the determination has been made. He clarifies that where there is a negligent failure to warn, the duty may be owed to any who are foreseeably threatened.

The dissent in Hedlund argued that the majority opinion furthers the incorrect belief that psychiatrists and psychologists have extraordinary perception and are able to predict violence better than others. Dissenters argued for simple negligence, not malpractice toward defendants, because the failure to warn happened after knowledge or treatment. Beck says that this is an incorrect view because a professional, not a civil, judgment is used. He adds that many different standard have been used to evaluate dangerousness and that this implies that there really is no factual basis for diagnosing it. Beck says that imposing potential liability on therapists creates an injustice for therapists by holding them responsible for injuries to people other than the victim.

In 1984, the Court of Appeals for the Ninth Circuit ruled on an action brought against the United States under the Federal Tort Claims Act for the wrongful death of a sect member. in Grunnet v. United States (1984), the U.S. District Court had dismissed the action, and the plaintiff, decedent's mother, appealed. The court of appeals held that the U.S. was immune from suit under the Act's foreign country and discretionary exceptions. This was an incident related to the Jonestown tragedy where the failure to warn the victim occurred in Guyana and is an exception to the jurisdiction of

the FTCA. However, the other failures to warn others (relatives) of the danger that the People's Temple posed, happened within the United States. In order to make a negligence suit in the United States, Grunnet would have had to have shown that the U.S., as a private person, breached a duty owed to her. Since the failure to warn Grunnet happened in California, California law would apply. Because there was no special relationship here, the judgment was affirmed.

In 1985, a bill to reduce therapist responsibility was introduced in the California Legislature by the California Psychological Association. It was explained in the November 1985 issue of the APA Monitor (p. 24). The author said that the Association had been successful in its support of a proposal that exempted psychotherapists from liability for failure to warn and protect "except where the patient has communicated to the psychotherapist a serious threat of violence against a reasonably identifiable victim" (p. 24).

Although the bill passed both legislative houses, Governor George Deukmejian did not sign it because he feared that limiting the duty would present more danger to the public (Mental and Physical Disabilities Law Reporter, 1985, p. 77). It was said in the article that the major adversaries to the bill were state trial lawyer associations because lawyers see therapists as the "bad guys" (p. 24), and seek to collect in lawsuits against therapists.

Rogers Wright, past president of the state association, appeared in the media as a representative for psychology. He said:

"Self-proclaimed experts who make public predictions about what people will do in the future, or speculate about what the someone was thinking at some point in the past, have led the public to believe that psychologists can predict dangerousness" (p. 24). Wright admitted that the bill does not represent "a good law, but the best under the circumstances." He added that such advances "may allow us to practice until the madness passes, until it's realized that we're not godlike but simply people involved with other people in a learning process called psychotherapy" (p. 24).

As a result of Tarasoff, many studies were conducted to assess the impact of its second decision. As early as May 2, 1977, an article entitled "A Growing Problem for Researchers: Protecting Privacy," by Cheryl Fields appeared in The Chronicle of Higher Education (cited in Behavior Today, May 16, 1977, p. 1). Her work describes a study of the issues of confidentiality in research work pursued by Professor James D. Carroll of Syracuse University. Carroll learned through his study that some legal immunity is crucial to protect behavioral researchers from having their documents subpoenaed by the government. Carroll testified before the Congressional Privacy Protection Study Commission which is constituted for facilitation of changes in the federal Privacy Act of 1974. Carroll presented the following findings: 1) More than 7% of the respondents (behavioral researchers) spoke of a problem of confidentiality in their research. 2) In the above 7%, subpoenas were issued in 17 of the cases. In 26 other cases, "substantial government demands (were) made upon researchers through judicial,

legislative, and administrative bodies" (p. 2). 3) Twenty of the 47 incidents concerning important problems of confidentiality involved research possibly leading to "an immediate public-policy issue" which was not further clarified in the article (p. 2).

Similarly, the Match 1979 issue of Behavior Today describes an article by San Francisco attorney Toni Pryor Wise, who has shown that "nine out of ten California psychotherapists have significantly modified their practices as a result of the decision-and in decisions that may be less than optimal for their patients" (p. 1). Wise herself states in the described Stanford Law Review article that the most dramatic change in California is the "heightened anxiety many therapists now feel in any clinical situations in which the potential violence of a patient becomes an issue or in which the prospect of a duty to warn arises" (cited in Behavior Today, March 1979, p. 1). Wise reported that as many as a sixth of all the psychologists who answered her survey noted that they wished to avoid exploring areas as potential homicidal impulses in their work with patients. Many respondents said that they now turned down clients who seemed prone to violence. Some psychotherapists told Wise that they were now more willing to commit a patient who seemed dangerous to a third party.

Wise argues that the treatment of mental health problems may be weakened by therapists' uneasiness. She said that about 25% of the patients were cautious in discussing violent tendencies when they discovered that their therapist might breach their confidences. She also pointed out that Tarasoff may have exacerbated an already

prevalent willingness to overpredict dangerousness. Wise found proof that warnings to family members, police, and potential victims had been common practice among California therapists even before Tarasoff. In fact, she reported that almost one-half of her respondents admitted that they had given these kind of warnings, often to more than one individual during a single occurrence.

Wise thinks that her study has revealed "that imposing on the therapists a legal duty to warn, as opposed to the traditionally discretionary professional duty, has had potentially detrimental effects on psychotherapy" (pp. 1-2). She comments that "courts and legislatures must decide if the uncertain increase in public safety due to Tarasoff outweighs such potentially serious detriments to the practice of psychotherapy" (p. 2).

According to Behavior Today, Wise's survey included state-licensed psychologists and members of the California Psychiatric Association. Response rates were 34% and 35% respectively. Also, 88% of her respondents reported some clinical effects as a result of Tarasoff.

Givelber, Bowers, and Blitch ("The Tarasoff Controversy: A Summary of Findings From an Empirical Study of Legal, Ethical, and Clinical Issues," 1985) describe a study done on psychotherapists post-Tarasoff. Their article is comprised of a number of conclusory statements with ensuing explanations. An effort here is made to summarize the main findings concisely for the purposes of this thesis.

Perhaps their statements can be reorganized into three groups,

each representing a unique conclusion: (a) the identification of the case, (b) the effect on therapists' practices, and (c) the relevant discrepancies between California practitioners and those from out of the state. In the first category, researchers found that the Tarasoff case is well-known and understood as applicable when either therapists assess a patient as potentially violent or, as reasonable therapists, believe that they should have arrived at a positive prediction of dangerousness in a given case. On the other hand, most therapists (75%) mistakenly believe that Tarasoff's real thrust is a duty to warn likely victims, rather than a responsibility to exercise reasonable care. Most of the practitioners believe themselves to be at least ethically bound to follow the Tarasoff decision.

In terms of the second category, therapists have not readily adopted a defense of being incapable of predicting dangerousness. The study shows that over 75% of those surveyed believed that they could make at least a "probable" prediction as to the dangerousness of an individual. Only 5% seemed to think that such a prediction was impossible.

The study revealed that a variety of mental health practitioners rely on the same criteria for predicting dangerousness. These include: violent histories, hostile behavior, abnormal cognitive or emotional states, stressful environments and psychotic diagnoses. Despite this recognition of violent behavior, therapists still are not likely to warn a victim. This will occur in only about 15% of all cases, and it may be connected to specific

verbal threats identifying the victim. In any case, the authors state that warning a victim is almost always accompanied by some other action by the therapist. For example, in addition to the warning, treatment and documentation transpire in 80% of the cases. In almost three-fourths of these cases, the therapist attempted to alert someone other than the victim, such as a friend or family. The article stated that two possible reasons for this kind of action is the disclosure by patient of intended victim or just the mere likelihood that an unnamed, potential victim is known well by the patient.

There were some notable differences revealed between California psychotherapists and therapists from other states. In terms of knowledge of the case, almost every Californian psychiatrist (96%) and the majority of Californian psychologists and social workers (90%) had heard of the Tarasoff decision or something resembling it. Outside of California, 87% of psychiatrists had heard of the case by name and 7% of something like it. Similarly, almost 75% of out-of-state psychologists and more than half of non-Californian social workers knew something about it.

Also, in assessing the duty, Californians are 70% more apt to think that warning alone satisfies a Tarasoff duty. Psychiatrists outside of California are 10% more likely than their fellow psychologists and social workers to believe the same. Thus, psychiatrists in general are more likely to misinterpret the holding.

Finally, Californians are more likely to react to a verbal

threat with a warning to potential victims than are therapists from out of the state. The study reveals that each group of mental health professionals in California is more likely to warn those in other states. For example, California psychiatrists are 11% more likely to warn, psychologists are 5% more likely to warn, and social workers are 20% more likely to warn.

California's response to Tarasoff stirred controversy in the courts and caused California therapists to be more aware of their liabilities. From its inception, the Tarasoff decision was confusing. The rehearing to clarify its ramifications only confused the APA further. Nonetheless, perhaps the attempt to redefine the duty was a necessary step in exploring, for the first time, the legal parameters of mental health practitioners' legal responsibilities. The fact that the courts were inexperienced in ruling on this subject is evidenced in the varying holdings within the state itself, especially in the discrepancy between the Thompson and Hedlund opinions. Nonetheless, it may be reassuring that the surveys done showed a majority of therapists within the state aware of the decision and considering the effect on their own work. It seems impossible that the courts could formulate a proper holding on the duty to warn using only legal theories. The furor over the Tarasoff decision caused therapists, and counsel for therapists, to examine the duty from a therapeutic standpoint. Perhaps it was California's intensity, including its courts' confusion, that was needed for perpetuating a national focus on this aspect of mental health and law.

CHAPTER VI

FEDERAL AND STATE CASES FURTHERING TARASOFF

As evidenced in these studies, there is great dispersion of the Tarasoff decision throughout the country. Many scholars and legal researchers have attempted to examine the effects in case law among the states. What follows are the most well-known ramifications of the Tarasoff decision and its progeny outside of California during the ten years following Tarasoff. As would be predicted, state courts differ with each other and federal courts often look to the law of the state courts involved in their suits for some direction. For purposes of organization only, both state and federal decisions throughout the country will be grouped according to the judicial districts meant for federal courts of appeal. For the purposes of this thesis, emphasis is on the federal decisions considering the duty to warn. However, in federal circuits having no relevant federal case, state cases will be supplemented in order to add to the understanding of that geographical area's disposition on the issue.

Lipari v. Sears Roebuck and Co. (1980) is herein discussed by itself as other courts refer to it in making their decision.

Lipari was a Nebraska suit filed in the eighth Judicial Circuit in 1980. It concerned a mental patient under outpatient treatment at a Veterans Administration hospital. He purchased a gun from

Sears which he later used to fire into a crowded room at a nightclub. The plaintiffs sustained that the VA therapists knew or should have known that the patient was dangerous to himself and others. Consequently, the plaintiffs purported that therapists had a duty to detain or involuntarily commit him. The identity of the victims was remote, but the court refused to limit the therapists' liability only to identifiable victims, thus expanding the limiting requirements of identifiability of the Thompson decision. Lipari's influence will be mentioned in cases that follow.

Proceeding in a chronological order, then, reference is first made to those cases in the first judicial circuit. The states in this circuit are Maine, Massachusetts, New Hampshire, and Rhode Island. In 1982, the Massachusetts Supreme Court decided Commonwealth v. Prendergast. The court here discussed Tarasoff during this murder case, where the defendant had pleaded insanity to killing his girlfriend. In a footnote referring to Tarasoff, the court said that it was unfortunate that the patient had not committed himself involuntarily or that potential victims were not warned, in light of the fact that the patient's records revealed that he was potentially dangerous. Inference is made of the real necessity sometimes in leaning in the direction of warning an individual, rather than maintaining the privilege statutes.

Three years later, in 1985, Gilmore v. Buckley was filed in the Massachusetts division of the federal district court. The plaintiff appealed and the court of appeals for this circuit heard the case in 1986. The case concerned an administration of the estate of a woman

who was murdered by an inmate on furlough. The administrator brought a civil rights action against the county, the sheriff, the county commissioners, the superintendent of the jail, the state hospital's medical director, and the state hospital's psychiatrists. Justice Campbell said that the failure of the state psychiatrists and other county employees to protect the victim from a murderous attack was not actionable under the Civil Rights claim of Section 1983. Also, even though the inmate was legally in state custody on furlough, he was in no relationship with the county commissioners. The commissioners were not involved in individual furlough cases, nor did they know of Prendergast's furlough application. Judgment was affirmed for defendants.

The second judicial circuit is comprised of Connecticut, New York, and Vermont. The noteworthy case in this area, and one similar to that mentioned above is Jane Doe v. United Social and Mental Health heard in the Connecticut division in 1987. This case concerned the administrator of an estate of a woman whom parolee had murdered shortly after his parole from jail. The inmate had been incarcerated for attempted bank robbery during which he shot a female teller. The administrator brought a civil rights action against member of parole board and various parole officers. In connection with this release, a woman was sexually assaulted by this same parolee and brought civil rights actions and common law negligence actions against the same and additional defendants. The defendants moved for summary judgment, asserting, among other arguments, that the parole officers did not assume any special

relationship toward either the woman killed nor the one assaulted by parolee. The motion was granted due to the court's reasoning that past Connecticut cases did not require the kind of foreseeability demonstrated in Tarasoff and Thompson. Looking to Buckley, the court said that indication of a relationship between the inmate and the deceased was even weaker here. There was no demonstration that the defendants could be charged with awareness of inmate's dangerousness at the time of parole. Even if such dangerousness could be assumed, there was no evidence of a special danger for deceased. In regard to the woman assaulted, the court failed to find a special relationship. The court was careful to point out that the Connecticut statute governing parole of inmates does not set out an affirmative duty for defendants to protect a specific, defined class of citizens containing either of the plaintiffs.

The third judicial circuit contains Delaware, New Jersey, and Pennsylvania. Here, there seems to be general consensus that Tarasoff is good law. For example, the New Jersey courts not only adopted, but broadened Tarasoff in McIntosh v. Milano (1979). The facts of McIntosh were a little different than Tarasoff, primarily because the patient never directly threatened the victim who was killed by psychiatric patient. Plaintiffs sustained that the defendant, having the relevant information at hand, should have known that his patient posed a threat and should have warned the victim or police. The court held that the defendant psychiatrists had a duty to protect a potential victim by whatever steps were reasonably necessary, and based this duty upon either the

relationship giving rise to the obligation of Tarasoff or upon the broader requirement of a physician to protect the welfare of his community.

A U.S. District Court in Pennsylvania seemed to accept the Tarasoff theory, but could not extend the theory to extend the facts of the case. In Leedy v. Hartnett (1981), the court held that the Veterans Administration owed no duty to two people who were beaten by an alcoholic veteran recently discharged from a Veterans Administration hospital. Although the veteran was staying in the home of the victims, they were not foreseeable victims. The court specifically declined to follow Lipari, and granted summary judgment for the hospital.

During that same year, Hopewell v. Adibempe (1981) was decided in the Court of Common Pleas of Allegheny County, Pennsylvania. This case presents a different problem as the plaintiff here is the psychiatrist's patient suing a community health center after a warning was made as to her behavior. The court did recognize Tarasoff and its accompanying duty to warn. Nonetheless, it found that the duty did not arise from the circumstances at hand and that the state confidentiality statute was superior to psychiatrist's defense of an obligation to warn plaintiff's employer. The court found the defendant liable but did not formulate an amount for damages.

In Miller v. U.S.A. (1983), a suit filed in the District Court for the Eastern Division of Pennsylvania, the court concluded that the Pennsylvania Supreme Court would impose a duty on a Pennsylvania

municipality to protect a police informant with whom it has established a special relationship. Among the reasons were policy considerations and reciprocal cooperation between police and citizens. The court also considered sections 314 and 315 of the Restatement and the Tarasoff decision.

The fourth judicial circuit contains Maryland, North Carolina, South Carolina, Virginia, and West Virginia. Within the fourth district, Hasanei v. United States (1982) can be cited as further comment on Pennsylvania law. Here, the Federal District Court of Maryland, applying Pennsylvania law, failed to find a right or duty of psychiatrists to predict the actions of a VA outpatient who, by driving negligently, harmed the plaintiff in a car accident. The court commented that the ordinary relationship between a psychiatrist and a voluntary outpatient lacked the capacity of control needed. The court did qualify its response, however, by saying that reasonable actions should be taken where there is a specific threat to a specific person.

In terms of Maryland state law itself, the Maryland Court of Appeals refused to either accept or reject the Tarasoff decision as of 1983. In Shaw v. Glickman (1983), the plaintiff and a separating couple had all been patients of the same psychiatric team. Dr. Shaw was injured by the husband when the husband found Dr. Shaw in bed with the wife. Dr. Shaw sued the team for negligently failing to warn him that one of their patients, the husband, was violent and unstable and presented a danger to him. The trial court granted summary judgment for the psychiatric team on the grounds that Dr.

Shaw voluntarily placed himself within a dangerous plan by becoming the wife's lover. Although Dr. Shaw appealed, the appeals court here found that Tarasoff did not apply in this case, because the husband had not threatened now shown any animosity toward the plaintiff. Neither did the husband's carrying of a gun imply danger to Dr. Shaw. The court noted that the therapists had a duty founded in The Hippocratic Oath and in statutory law to preserve confidentiality.

In Furr v. Spring Grove State Hospital (1983), the Maryland Appeals Court heard a case about a patient who had a history of committing unnatural sexual acts on boys. He had undergone a forensic evaluation and voluntarily committed himself to the hospital as part of a plea bargain in a criminal case. After a sporadic pattern of leaving and returning to the hospital, he committed brutal acts on an 11-year-old boy and murdered him. In looking to Thompson, the court found that the doctors had no duty to warn because there was no foreseeable victim. Summary judgment was granted to defendants.

During the following year, 1986, two cases were heard by the federal courts in this circuit. In the southern district of West Virginia, Davis v. Monsanto concerned an employee who brought an action against the employer/defendant by alleging tortious invasion of privacy and breach of contract, in connection with the employer's disclosures of information that the employee gave to the mental health professional concerning employee's potential for dangerousness. The court said that there was a difference between

publication that is required for others' safety and disclosure which constitutes invasion of privacy. According to the court, an action for invasion of privacy demands a high level of publicity. The court said that it was not a violation of privacy to share a private fact with another individual or even a small group. Additionally, the court said that publication of private matters is entirely privileged if required by law. The court then very briefly summarized the Tarasoff decision. The court noted that the failure of one in a special relationship with a mentally disturbed person to protect others from the danger of that mentally disturbed person would be subject to damages. Therefore, the therapist here acted correctly, and summary judgment is granted for defendant.

The second case during that year was Thigpen v. U.S. (1986) heard in the court of appeals for this circuit. Thigpen concerned an action brought under the Tort Claims Act which sought damages on behalf of minors who were sexually molested by naval hospital employees. The government moved to dismiss. Judge Hawkins of the District Court for the District of South Carolina granted the government's motion and the minors appealed. Judgment was affirmed. Circuit Court Judge Murnaghan, who reluctantly concurred in the decision, stated that a Federal Torts Claim here could not find for the plaintiffs due to a technical reading of the Act, but emphasized that there was, in fact, a special relationship here between the hospital and the patients/plaintiffs who were injured: "Hospital patients stand in particular need of protection from the institution responsible for their care. Weakened by disease or by ... surgery,

they are peculiarly unable to protect themselves. They are ... psychologically unprepared to meet a physical attack..." (p. 402).

During the following year, Currie v. U.S.A. (1987), was heard in the court of appeals for this circuit. The case concerned a wrongful death action that was brought against the U.S. for failure of psychiatrists at Durham, North Carolina VA hospital to involuntarily commit a patient who shot the plaintiff's decedent. Plaintiff is the administratrix of the estate. The U.S. District Court for the Middle District of North Carolina granted the U.S. a motion for summary judgment and the plaintiff appealed. Although the plaintiffs tried to analogize the case to Tarasoff, the court held that there was an important differentiation between the duty to control and the duty to warn. The former may infringe upon the patient's constitutional interests while the latter is but "an expression of humanitarianism and the spirit of the good Samaritan" (p. 213). This seems to imply that the duty to warn, as held here, is a voluntary duty based more on ethical principles than legal obligations. The court also mentions Lipari v. Sears (1980) to say that a special relationship between psychiatrist and patient imports a duty to that patient, but it is uncertain whether or not a duty can run to third parties.

The fifth circuit contains Louisiana, Mississippi, and Texas. Here, mention should be made of Doyle v. United States (1982) which was decided in a U.S. District Court of California, but which nonetheless commented on Louisiana law. The United States District Court of California implied that the Tarasoff reasoning would not be

accepted in Louisiana. Without exact reference to Tarasoff, the court nonetheless said that from a general standpoint, the Louisiana courts have appeared reluctant to allow liability in cases where there has been a failure to protect the public from a dangerous individual.

Similarly, in 1987, Willis v. U.S.A. was decided in the Western District of Louisiana, Alexandria Division. This was an action where persons injured in an automobile accident, allegedly caused by a recently discharged Veterans Administration hospital patient, brought suit under the Federal Tort Claims Act. The district court looked to Louisiana law to decide that the hospital was not liable in absence of medical evidence indicating that the patient was potentially dangerous at time of release and in light of the reasonable care that had been exercised by the hospital in regard to release procedures.

In the sixth district, the federal court initially commented on Ohio law in Case v. United States (1981). The court declared, "The parties agree that this matter will be controlled by the law of Ohio. Therefore, while instructive, the citations of authority to Tarasoff and Lipari are not controlling" (p. 318). In a footnote, the court further states, "Tarasoff stands almost alone in its holding" (p. 318). This case concerned an executrix who wanted damages from the United States according to the Federal Tort Claims Act. The plaintiff asserted that the government was responsible for the death of the victim who was murdered by a psychiatric outpatient of a Veterans Administration hospital. Because the patient had in

recent years "improved" (not specified in opinion), had been a working citizen and had been a productive member of society, he was deemed not to be dangerous to himself or others prior to the occurrence. Using Ohio law, the court said that the doctors were not subject to liability if they acted reasonably in releasing the patient from state control. Additionally, according to the plaintiff's expert, Dr. Nizny, a comment on the patient's condition made to patient's family or friends, without agreement as to this, would be breach of care. The complaint was dismissed.

In 1983, the Michigan Supreme Court decided Davis v. Dr. Yong-Oh Lhim, whereby they adopted the reasoning of Tarasoff and Thompson. In Davis, the defendant, a state hospital psychiatrist dismissed a patient who killed his mother two months later. Relying on Tarasoff, the appellate court held that the psychiatrist recognized only a duty to readily-identifiable victims and not to the public at large.

In Chrite v. United States (1983), the federal court of the Eastern District of Michigan, Southern Division looked to Davis to make the hypothesis that the Michigan Supreme Court would follow a Tarasoff and Thompson rationale. The case determined the validity of a claim for damages allegedly caused by the negligence of a VA hospital in releasing a mental patient who, six months later, murdered his mother-in-law. The court concluded that the Michigan Supreme Court would consider holding the defendant responsible for failure to warn of the released person's dangerousness.

In 1986, the District Court for the Eastern District of

Michigan, Southern Division decided Soutear v. U.S.A.. This case concerned a mental patient's father who brought a wrongful death action alleging that medical personnel at the Allen Hospital in the Shelby Township of Michigan, a VA hospital, were negligent in releasing a mental patient and in failing to warn the patient's parents that the patient posed danger of physical violence to parents. The patient subsequently killed his mother. The court looked to the case of Davis v. Lhim (1983) to determine that liability would exist here if a standard of care had been breached. The VA doctors' belief was that the patient was not dangerous to anyone, and that this was an opinion formulated within the duty of care. There was no duty to warn the parents here because there was a scarcity of evidence to imply that the patient would be dangerous. Moreover, there was enough warning given to the parents, through notice and explanation of their son's illness, that the patient could become dangerous.

The seventh circuit contains Illinois, Indiana, and Wisconsin. Although there are no federal cases available for this circuit, there are two state decisions. FIrst of all, an Indiana Court of Appeals in 1981 cited Tarasoff as an acceptable rationale upon which negligence could be established. Estate of Mathes v. Ireland (1981) concerned a husband who, individually, and as administrator of wife's estate, brought an action for the wrongful death of his wife. The suit included the wife's murderer, the parents and grandparents of the murderer, and the psychiatric facilities which apparently treated the killer. Motions to dismiss the defendants were granted

to all but the killer. The husband appealed, and the Court of Appeals of Indiana ruled in part that the husband's complaint against the psychiatric facilities was valid. The complaint stated that personnel at centers had charge of the killer and know of his violent propensities. The court found that lack of reasonable care toward the patient led to the resulting incident and that defendants were liable under Section 319 of the Restatement (Second) of Torts describing assumption of care of another individual. Nonetheless, the court did not define "reasonable care." In footnote 5 of the opinion, the court cites Tarasoff but still expresses its uncertainty as to the meaning of the decision:

> We observe, without deciding, that those jurisdictions which permit an action on this basis are careful to define the standard of reasonable care as that due from similar professionals in a field where there remains considerable uncertainty of diagnosis and tentativeness of professional judgment (p. 785).

More recently, the March-April, 1988 issue of the Mental and Physical Disabilities Law Reporter describes a new Indiana law that took effect September 1, 1987 which immunizes particular health providers from civil liability to third parties. The new provision does not hold therapists liable for disclosure of private information in an effort to comply with the duty to warn. That duty arises if the patient discloses to the practitioner a real threat of actual violence or harm against a victim that could reasonably be identified or if the patient appears from his/her statement to pose imminent physical threat to others. The therapist can fulfill his/her duties if he/she reasonably tries to inform the victim, if he/she reasonably tries to notify the police in either the patient's

or victim's area of residence, initiates civil commitment procedures, or acts to preclude the use of physical violence to others until law enforcement authorities can be contacted.

Next, the Appellate Court of Illinois, Third District, heard Novak v. Rathnam in 1987. This was on appeal by the plaintiff and administrator of the estate of a woman killed by a former mental patient during attempted armed robbery. The administrator had sued doctors who more than one year earlier had recommended that the patient be released. Judge Courson, for the tenth Judicial Circuit Court, Peoria County, granted the defendants' motion to dismiss the complaint. Judge Strouder, for the Appellate Court, ruled that the doctors' negligence in making the recommendation despite knowledge that the patient was dangerous, was not the proximate cause of the injuries that decedent sustained. Judgment was affirmed.

Although the crux of this case is the alleged negligent release of the patient, some mention of a duty to warn was included: "As has been done in ... cases that have followed ... Tarasoff (although we believe that Illinois would adopt Tarasoff's affirmative duty ... to warn foreseeable third parties) we do not believe ... the duty ... (to) ... extend to victims who are not readily identifiable" (p. 775).

The eighth circuit contains Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. Examination of the eighth circuit reveals that as of 1983, the Iowa and Missouri courts had refused to decide whether or not the Tarasoff rule would be adopted. The relevant cases here are Cole v. Taylor (Iowa,

1981), Estate of Votteber v. Votteber (Iowa, 1982), and Sherrill v. Wilson (Missouri, 1983).

In 1985, three cases were heard at the federal level. At the district level, Anthony v. U.S.A. (Southern District of Iowa/Central Division) concerned a voluntarily-admitted patient, at a Veterans Administration hospital, who later received privileges to leave hospital grounds. He subsequently became part of an automobile collision in which the plaintiff sustained serious injuries and the plaintiff's wife died. Plaintiff here asks that Tarasoff be extended. In response, the court cites Brady v. Hopper (1983), Leedy v. Hartnett (1981), and Thompson v. County of Alameda (1980), to demonstrate that Tarasoff-type liability should not extend to create a duty to protect unspecified, unidentified persons.

Additionally, Mutual of Omaha Insurance Co. v. American National Bank (1985) was filed in the Minnesota Division of the U.S. District Court. This was a case resulting from insurers' refusal to pay proceeds upon death of named insured who was an apparent homicide victim. The insurers sought to obtain hospital and medical records of patient who allegedly fraudulently procured the policies. The court, in deciding this case, said that the rationale behind the physician-patient privilege was the encouragement of the patient to speak freely with the therapist about personal difficulties. The court reviewed the case extensively and found that none of the exceptions to the privilege apply. It was said that there might be, in cases where there is an identifiable victim, a duty to warn but that was not applicable here. The court reasoned that even if there

had been a duty on the part of the psychiatrist to warn the subsequent victim, this duty would not extend beyond the warning itself. The duty would not involve disclosure of records. The court commented that the privilege and its exceptions were competing areas of interest, to be weighed on an individual, case-by-case method. Here, the policy seemed to favor the privilege, especially since there existed no need for a warning to be given.

At the court of appeals level, Abernathy v. U.S.A. (1985) concerned the father of a victim beaten to death by an epileptic individual. The father charges that the Bureau of Indian Affairs had control of the individual, but the government is held not to be liable, for fear that the court would be advancing a duty to control by psychotherapists. Tarasoff is mentioned in a footnote to show how Abernathy is different. For example, the perpetrator in Abernathy had never met, nor threatened the victim.

The ninth circuit contains Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, and Hawaii. Other than the California decisions already discussed for the Ninth Circuit, mention can also be made of two other cases. The earliest is Sakuda v. Kyodogumi (1983), heard by the U.S. District Court, Hawaiian division. This case concerned the parents of a riding crew of a towed vessel. They brought a wrongful death action against the husbandry agent of an oceangoing tug which had towed the vessel, and alleged that the agent had negligently serviced the two and negligently failed to warn crew members of potential danger. The plaintiff here argues that an exception exists to the rule in cases

where the defendant stands in a "special relationship" either to the person whose conduct needs to be controlled, or to the foreseeable victim of that conduct. Although this case does not involve the field of psychology, the plaintiffs nonetheless cited Tarasoff and Lipari for support. The district court, in saying that these cases were not applicable, held that the agent stood in no special relationship to the two so as to give rise to cause of action on basis of failure to warn of potential danger. The court concluded that if it were to hold such a duty in this case, it would happen that almost any relationship between two persons would give rise to the duty.

Peterson v. Washington (1983) was a case where the Washington Court of Appeals chose to follow Lipari. Here, the plaintiff was injured when her car was struck by the car of a patient recently discharged from the state hospital. She charged negligence, saying that the psychiatrist should have protected her from the dangerous proclivities of the patient. The court held that the doctor had a duty to use reasonable precaution in order to protect anyone who might foreseeable be threatened by drug-related mental problems. The court affirmed the verdict, finding that the state had a duty to protect this plaintiff, and that the psychiatrist had acted negligently in failing to take some action that would have protected her.

The tenth circuit contains Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming. Durflinger v. Artiles (1981) was decided by the federal district court in Kansas. The court here

approved of the lower court's employment of Tarasoff as a grounds for its instructions on the standard of care for psychiatrists who discharged a mental hospital patient who, in turn, later killed plaintiff's wife and sons. The jury returned a verdict for the plaintiffs and the defendants appealed. At the appeal level, in 1984, this court admitted that it had never adopted the Restatement (Second) of Torts Section 315 (1965), but discussed the concept of special relationship in former cases. Previously, then, the court has held that a special relationship or specific duty has been found when one creates a foreseeable peril, not readily discoverable, and fails to warn. However, the court fails to comment further. Rather, it finds defendants liable on the duty encompassed in the general duties of physicians and surgeons. The court here recognizes as a valid cause of action the claim that grew out of a negligent release of a patient (having violent propensities), from a state institution, as distinguished from the negligent failure to warn persons who might be injured by the patient as a result of the release.

In the same year, 1984, Beck v. Kansas University was decided in the Kansas District Court. This was an action stemming from the shooting of two individuals at the University of Kansas Medical Center emergency room. The plaintiffs here brought an action against members of the Kansas Adult Authority Mental Health Center for failing to control or protect third parties from their patient. Here, the court was convinced that under Kansas law, a duty existed on the part of members of the Adult Authority to protect individuals

(who could be expected to be found at the University of Kansas Medical Center) from foreseeable harm if they knew or reasonably should have known of the special danger which the patient posed toward those individuals. The court looks back to a recent Kansas decision and comments that although Durflinger was narrowly drawn, the Kansas Supreme Court suggested that it would allow liability for failure to warn. This court relied on the Kansas Supreme Court's approval of Tarasoff and Lipari.

The hallmark case in this district, however, and the one that has certainly received the most national attention is Brady v. Hopper (1983), a suit by former White House Secretary and other men who had been shot by the defendant psychiatrist's patient, John Hinckley, during an assassination attempt on President Reagan. This suit was filed in the Federal District Court for Colorado.

The plaintiff's complaint primarily argues that Hinckley presented his psychiatrist with symptoms, abnormal behavior, and historical data that should have persuaded Hopper to make a more thorough examination and come to the conclusion that the patient was dangerous. The plaintiffs' complaint next asserted that the psychiatrist's treatment aggravated Hinckley's condition, that the psychiatrist should have sought consultation, and that the psychiatrist should have warned Hinckley's parents and law enforcement personnel about John Hinckley's dangerousness.

The defense tried a two-pronged approach. First of all, Dr. Hopper argued that the relationship between himself and Hinckley did not give rise to a duty. Dr. Hopper relied upon Hasenei, mentioned

earlier, in order to substantiate his inability to control the patient.

Secondly, the defendant used the Thompson decision to say that there was an absence of a specific threat to a specific person in this case. Therefore, Hinckley alerted no one.

Responding to the defense, plaintiffs argued that the relationship between Hopper and Hinckley could not only be considered a "special relationship" under the Restatement (Second) of Torts Section 315, but under other relevant sections of the Restatement as well. These included Sections 319 ("Duty of Those in Charge of Person Having Dangerous Propensities") and Section 324A ("Liability to Third Person for Negligent Performance of Undertaking"). Additionally, plaintiffs referred to Lipari v. Sears (1980) to claim that the doctor had an affirmative duty to take precautions other than warning for the benefit of others. The plaintiffs argued, then, that duties existed not only to foreseeable victims but to others in general.

The court did not agree. When ruling on the motion, it did not consider whether or not the therapist-patient relationship gave rise to a broad duty to protect the public, but rather discussed the extent to which the psychiatrist was obligated to protect particular plaintiffs from this particular harm. The court said that foreseeability was of primary importance. Although the court finally decided that the psychiatrist's treatment of Hinckley fell below the applicable standards of care, the court nevertheless concluded that the plaintiff's injuries were not foreseeable.

Consequently, the psychiatrist was not held liable.

Secondly, the court resolved that there was no relationship between the defendant and the victims from which a duty might follow. Judge Moore said that a special relationship does not infer that there are obligations owed to the general public. Goodman comments on the case by saying that Judge Moore seemed to go even further than the limiting holdings in Thompson and Megeff. Lastly, the court said that there were important reasons to restrain therapists' responsibilities. It remarked: "To impose upon those in the counseling professions an ill-defined 'duty to control' would require therapists to be ultimately responsible for the actions of their patients" (p. 1339). "Human behavior is simply too unpredictable, and the field of psychotherapy presently too inexact..." (cited in Goodman, 1985, p. 224). Goodman remarks that Judge Moore was probably influenced by policy considerations, but wonders what would be the Judge's ruling if it were found that the defendant knew or should have known that the plaintiffs would be probable victims.

The eleventh circuit contains Alabama, Florida, and Georgia. No federal cases are reported at this time. In 1982, the Georgia Supreme Court applied Tarasoff, together with McIntosh and Lipari, to establish a duty to control. Here, in Bradley Center v. Wessner (1982), the defendant/appellant hospital failed to exercise reasonable care, and did not control appellees' father. Subsequently, the appellee's mother was killed. The court said that in finding the appellant liable it was not creating a tort.

The court maintained that it looked to the state's traditional tort principles of negligence in studying the facts of the case. The court also commented that the duty to respect a standard of conduct is recognized as an element of law in other jurisdictions.

More recently, the January-February, 1988 issue of the Mental and Physical Disabilities Law Reporter cited Swofford v. Cooper (1987). Here, a Georgia appeals court upheld medical malpractice suits against a psychiatrist whose state hospital patient killed his father during a two-week home visit. The patient had been placed in the hospital due to homicidal tendencies. A pass was approved by the psychiatrist for the patient after the patient's 11-month stay. The trial court had found for the psychiatrist on the ground that the patient was contributorily negligent. The court of appeals held, however, that the patient could not be held contributorily negligent because he was psychotic at the time. The psychiatrist was found negligent. Although she argued that the stabbing was unforeseeable, the court answered that the doctor should have expected some occurrence of violence that would occur as her result or omission.

Finally, the D.C. Circuit offers two cases at the federal level. Simpson v. Braider (1985) was heard in the District Court, D.C. Division. This was a diversity action brought against a son and his parents to recover for injuries allegedly sustained when son, then, a minor, shot a BB pellet gun from an apartment window and struck plaintiff. The plaintiff sought discovery of parents concerning psychiatric treatment of son and moved to compel answers

to deposition questions. The District of Columbia here studied legislative history of the physician-patient privilege to show that the purpose of the provision was to place patients and physicians in the same legal relationship as an attorney and his client. An exception only occurred in criminal cases where the patient was a threat to the public. Thus, there is no exception to the statute protection in Simpson, regardless of the mention of mental illness. Also, this privilege extends to parents of a minor in treatment.

Secondly, the court of appeals in 1986 heard White v. United States. Here, the wife of a psychiatric patient brought suit against the hospital for injuries she suffered when she was attacked and stabbed by her husband after his escape from the hospital. The district court held that the husband's psychotherapist did not have a duty to warn the wife, and that the hospital was not guilty of negligence in allowing patient to enter unsupervised hospital grounds. The court of appeals, in relying on Rieser v. D.C. (1977), found that the D.C. court has in the past considered a duty to warn. The court in White, however, held that the defendant psychotherapists were not liable because their assessment of the patient was reasonable. The therapists explained that their patient was able to distinguish fantasizing from actual harming of another. Furthermore, the fantasies held by the patient did not represent a specific threat to the plaintiff.

Thus, Tarasoff has had immediate and far-reaching implications for all mental health practitioners. Although studies may report that California therapists seemed more affected by Tarasoff, it is

inevitable that the subsequent Brady v. Hopper litigation has increased awareness of this same duty notion and furthered the spread of lawsuits alleging the failure to warn. Interesting to note is how some courts have seemed to latch onto certain cases of the Tarasoff progeny such as the Thompson and Lipari cases. These cases have gained notoriety in their own right and have also come to serve, on a less popular level, as a representation of what "duty to warn" means. Tarasoff, with its roots in fundamental negligence law, has served to sustain and perpetuate the principles of law formulated by even the authors of the original Restatement of Torts. What needs to be profiled is whether or not Tarasoff is, or could soon become, outdated and burdensome in the present atmosphere of modern mental health specialists.

CHAPTER VII

CURRENT LEGAL IMPLICATIONS AND RECOMMENDATIONS

As these cases illustrate, there are several problems in trying to instrumentalize the Tarasoff reasoning. Among these are the protection of civil rights, the scope of the confidentiality promise, the inability to predict dangerousness, the determination of what is reasonable care, and the legal burden placed on psychotherapists.

Perhaps it is best to conclude this thesis by showing how well therapists are working with a duty to warn and how they are incorporating it into their practice. In this way, it might be shown where developments are still needed to lessen the interference with therapy.

From the courts' perspective, the Tarasoff case represents an array of legal theories. As can be seen from some of the above stated cases, Constitutional due process is an argument appearing in recent legal decisions brought against the government. The plaintiffs' claims in these cases assert that since the perpetrator of the violence was a patient of a government-run institution, the plaintiffs who were subsequently hurt were deprived of "life and liberty" without due process of the law. In most of these cases, however, the courts have held that first of all, the Due Process clause is not the promise of life itself. Secondly, many of these

courts have also found that the government in these circumstances is protected by immunity statutes. Finally, the courts have found that a duty to control is different than a duty to warn, and that this duty to warn depends on the state's law. Often, the states have looked for a "special relationship" and an "identifiable victim."

In this way, the courts at least appear to be trying to mitigate the possibility that all information about parolees and mental health patients be made readily available and publicized without sufficient reason. Yet, there remains real confusion about the limits of confidentiality and when and to whom it may remain absolute.

Many of the above cases focus on privilege and communication. Yet, it is puzzling that if a court ultimately has a difficult time deciding what is to be admitted into evidence, a therapist may be required to somehow make an individual, often immediate judgment on both legal and psychological issues pertaining to his/her client.

The courts are careful to comment that a therapist does not have a legal duty to control. Yet, the therapist does have at least a professional and ethical duty, if not a legal duty as well, to control the patient's therapy. This happens through the decision of whether or not to disclose. There is a definite line between controlling and influencing a person's actions. Nonetheless, it is a fine line. Therapy should enable a person to see alternatives and to recognize the freedom to make choices. However, the therapist would be remiss if he/she did not attempt to steer the patient away from poor, debilitative choices. It is questionable if a patient

can come to a genuinely free and individual choice for a positive alternative when threatened with a psychotherapist's legal duty to warn.

What Tarasoff appears to hold is that a therapist can be held accountable for another's actions despite a lack of control over the person. What therapists are fearing is not the decision whether or not to commit, (for which they are sometimes protected under statutory immunities), but the actions of the patient outside of their office. THus, the judgments for which therapists are most capable and for which they should be held most accountable are exactly those which they can make with "discretion." On the other hand, they are held accountable for patients' choices that no education or preparation entirely anticipates. Perhaps psychotherapists are believed to be fortified through their study, wisdom and familiarity with world of crisis. Perhaps they are considered strong enough to endure being the scapegoats in an area of law not yet fully developed, or yet capable of meeting its end. That is to say that while the Tarasoff decision seems to have been founded on good intentions, it failed to anticipate the problems of the holding, especially as to how the duty extends to other kinds of mental health practitioners. Additionally, perhaps psychologists, because of their training are expected to maintain heightened sensitivity to the prediction of violence, a capability not requested of even police officers who have extensive experience with criminals.

There have been several recommendations for the confidentiality

dilemmas from Tarasoff. There have also been many cries for help among different areas affected by the decisions. Among these pleas are those of Donald H. Henderson, author of the article "Negligent Liability and the Foreseeability Factor: A Central Issue for School Counselors" appearing in the October 1987 issue of the Journal of Counseling and Development. He says that in his state, that are no guidelines for a counselor to refer to when confronting a troubled student. Should he/she refer the student elsewhere and/or notify the parents? Also, there seems to be no adequate suggestions in much of the case law about the release of confidential information when the student may inflict danger on himself/herself or others. Henderson notes, however, that there is sufficient detail relating to the conditions under which a psychotherapist must disclose.

Henderson shows that federal statutory law tries to deal with this problem by allowing educational agencies to disclose personally identifiable information from the educational records of a student to appropriate parties in connection with an emergency. This kind of legislation upholds the common law doctrine of in loco parentis and pariens patriae, in which teachers and the state are given the right to exercise limited authority over pupils and to be responsible for those who are attending educational institutions.

In the January 18, 1988 edition of Behavior Today, Steven Engelberg, legal counsel for the American Association for Marriage and Family Therapy, offers his recommendations for therapists, who are being called upon to testify in court. He advises that a subpoena for confidential information is not a requirement that the

information be divulged. Rather, it is only a demand that the one subpoenaed appear with the requested information. Engelberg says that a therapist should demonstrate reluctance to reveal information because it is plainly against the ethical principles of the profession and that a therapist should not do so unless ordered to testify by the court. If the judge so orders, then the therapist can divulge without fear of violating confidentiality. Engelberg says that one may be held in contempt if he/she refuses to comply.

Although confidentiality laws are sometimes nebulous, at least the availability of statutes eases the therapists' predicament. When faced with the issue precedent to the break of confidentiality, the determination of dangerousness itself, lawyers and psychologists alike are at a loss for support. Where some courts recognize the insubstantial amount of evidence on theories of psychological prediction, the U.S. Supreme Court seems to act capriciously in relying on psychological data pertaining to the prediction of future violence. This is shown in an article by Susan Cunningham which appeared in the September 1983 issue of the APA Monitor. In her article "High court distorts results of research on dangerousness," Cunningham explains that the U.S. Supreme Court may have been incorrect in depending too heavily upon behavioral science research in two recent cases. She explains how mental health practitioners' abilities can be artificially heightened through misinterpretation of information. She describes two cases.

The first case, Jones v. U.S. (1983), was a narrow, 5-4 ruling initiated in the District of Columbia. Facts of the case concern a

man who was caught attempting to steal a jacket from a department store approximately eight years previous to the publication. At his trial, he was successful with an insanity defense and was sent to a federal mental hospital for eight years. Now, Jones is trying to gain freedom.

The case is fraught with a Constitutional due process problems, burden of proof shifting and confrontation with at least two mental health experts who at least imply that the Court is incorrect in their view on mental health work.

The crux of the discussion is that the Court's decision in this case allows a patient to stay indefinitely at a federal mental hospital for reasons of insanity, even though that patient may not be dangerous to society. Although civil commitment hearings in the district require the government to give a preponderance of evidence that the defendant is dangerous, the burden to prove that defendant is <u>not</u> dangerous shifts to defendant in criminal cases. That is to say that a criminal defendant with an insanity defense is automatically presumed to be dangerous, and subject to commitment, unless he can prove otherwise. Jones apparently had been given the opportunity to prove himself, but these details were not described in the article.

Among the opponents of the Court's decision was a District of Columbia public defender who argued that the Constitutional provisions of due process require the government to let go of Jones or to turn to civil commitment proceedings after one year. Another opponent is psychologist John Monahan of the University of Virginia

who argues that it is virtually impossible to predict future dangerousness even in those situations where an individual has committed a violent act in the past. Also, the prediction is weaker still when, as in the Jones case, there has been no previous violent episode.

The person who really seems to have taken a hold on this view was Justice Brennan who wrote the dissent for Jones. He quoted Monahan frequently and argued directly against the majority's contention by saying "even if an insanity acquitee remains mentally ill, so long as he has not repeated the same act since his offense, the passage of time diminishes the likelihood that he will repeat it" (p. 3). However, the majority of the Court sustained its holding that a criminal action dictates dangerousness, and the ruling stands. Monahan proposes that this more liberal finding on the criteria for dangerousness could influence lower courts and create obstacles to release for those who are civilly committed.

An interesting twist is that the court in Jones seemed to be indifferent to mental researchers but supported mental health experts in a second case, Barefoot v. Estelle (1983) decided at approximately the same time.

Estelle is a Texas case concerning a murderer who challenged the competencies of the two psychiatrists who determined that he would be dangerous. Not only did the high court state that psychiatrists as a class were capable of judging potential violence, but also held that the doctors could even make a judgment on hypothetical profiles of the defendant, while absent actual

examination of the defendant himself. What is interesting to note is that the Estelle case is at least the second time in judicial authority that Texas has been allowed to acknowledge low reliability and prejudicial impact of expert testimony as to future dangerousness, while proceeding with the evidence. In both cases, the APA filed an amicus curiae brief for the defendant and lost.

The Court's majority, according to this article, seems to be saying that compromising, even in death penalty situations, is acceptable. Justice White, of the majority, wrote: "Neither petitioner nor the Association suggest that psychiatrists are always wrong with respect to future dangerousness" (cited in APA Monitor, 1983, p. 3). Leonard Rubenstein, of the Mental Health Law Project, found this reasoning in opposition to the rules of evidence. He implied that it would be admitting false testimony to include the testimony of an expert witness whose statements are "predicated on the belief that he is likely to be more wrong than right" (cited in APA Monitor, 1983, p. 3).

Similar to Jones, Estelle presents problems of due process. John Duncan, of the Texas American Civil Liberties Union, says that untruths were absolute denials of constitutional guarantees. Consequently, the Texas chapter of the ACLU also filed an amicus curiae for the defendant.

Of the court, Justice Blackmun seemed to be the most outspoken for the dissent. He made a differentiation that, in his eyes, would allow expert witness testimony: "One may accept this in a routine lawsuit for money damages, but when a person's life is at stake--no

matter how heinous his offense--a requirement of greater reliability should prevail" (cited in APA Monitor, 1983, p. 3). Secondly, he pointed out that the witness testimony used here did not even qualify as expert testimony. He said that one of the criteria, that the state of scientific knowledge in the area be established and accepted by the scientific community, was absent. Judge Blackmun was very disturbed by the majority's opinion. "Ultimately," he said, "when the Court knows full well that psychiatrists' predictions of dangerousness are specious, there can be no excuse for imposing on the defendant, on pain of his life, the heavy burden of convincing laymen of the fraud" (cited in APA Monitor, 1983, p. 3).

Another damaging effect pointed out is that even the majority members in this case were aware that the two psychiatrists who testified against the defendant symbolized a minority within the profession. One was named "Dr. Death" or the "Killer Shrink" by Texas defense attorneys. He represented that he was "100 percent and absolute" that defendant would become violent again.

Although Blackmun pointed out the lack of expertise on the part of these doctors, the Court countered by saying that cross-examination and defense expert witnesses could be provided for a counterbalance. Blackmun responded by saying that the jury doesn't always properly decide the merits of an expert witness. He recalled studies that show the tendency of jurors and judges to accept scientific testimony without proper examination. Nonetheless, Justice White of the majority said that "There is no doubt that the

psychiatric testimony increased the likelihood that the petitioner would be sentenced to death. ... But this fact does not make that evidence inadmissible," (cited in APA Monitor, 1983, p. 3).

The Barefoot opinion, according to this article, means that states can decide individually the means of regulating expert testimony in capital cases if they decide to regulate. Even more devastating is the Supreme Court's reasoning that juveniles may be held in custody before a "trial" on the allegations against them. Recently, (November 1984), the APA Monitor presented Susan Cunningham's article entitled "Preventive detention law seen as setback for youth and blow to science." Here, it was shown that the recent Supreme Court's ruling allows states to detain juvenile suspects before trial and is indifferent to recent research on predicting violent behavior. According to juvenile justice advocates, says Cunningham, it also serves to inhibit attempts to ameliorate jail conditions for juveniles. In light of the loco pariens theory mentioned before, the Schall v. Martin (1984) case allowing preventive detention was viewed not to be punishment and not denial of due process because juveniles are always in some kind of custody.

Mental health practitioners arguing from a legal standpoint may assert that the average citizen who makes a threat is not subject to others' scrutiny while others who are making a responsible choice by seeking therapy implicate themselves by being honest with their therapist. Some mental health practitioners may see this possibility a deterrent to those needing therapy. On the other

hand, others may state that patients' reporting feelings of violence after a therapist's warning are people truly wanting help and protection for themselves and others. If clients, aware of their choice to drop counseling at any point, proceed with therapy after having been given a warning about a possible break in confidentiality, they are making the future decision to be subject to interrogation about violence. In fact, some may even be encouraged to continue therapy by using the warning about potential violence as a catalyst for discussion of that very problem.

Maybe mental health practitioners are being forced into thinking that they are controllers and predictors. If legal requirements expand even further, the patient may in turn fall into a false belief system about himself/herself and begin to believe that he or she is really dangerous. Consequently, the helping professions might facilitate the belief that mental health patients are dangerous and uncontrollable. This may also diminish patients' taking responsibility for their actions.

These predictions should not materialize if, as the courts assert, reasonable care is followed. Tarasoff, as explained in Doyle v. U.S.A., held that psychotherapists are entitled, within bounds of professional competence, to broad discretion as well as to the manner in which they conduct exams. Each practitioner's sequence of activities is usually respected and not questioned as long as he/she includes those essential to therapy.

The courts seem to be saying two things at once. It appears that although counsel support rehabilitation of criminals, they

would like to base that rehabilitation on a regimen, a structure, a litany of requirements that can be found within the Restatement. As was seen, however, the Restatement contains contradictory provisions, many exceptions and numerous overlaps. Some states have still not adopted fully the Restatement reasoning in their Tarasoff cases.

Reasonable care is not an easy definition. Yet, in light of the fact that violence is hard to predict, reasonable care remains a key component to finding liability. Behavior Today (December 28th-January 4th, 1988) made mention of a paper presented at a APA conference by David L. Shapiro who stated that "Review of ... recent court decisions highlight the fact that ... legal liability of the mental health professional rarely ... is due to ... failure to predict dangerousness, but rather (to) the failure to do an ... assessment on which a decision ... may be based" (p. 6). Although only this statement is included in order to represent Shapiro's paper, it appears safe to assume that Shapiro believes in using a diagnostic procedure, rather than the course of therapy, in order to handle the duty problem. In short, he seems to hold that more sophisticated intake procedures, capable of readily identifying dangerous propensity, may alleviate practitioners' anxieties.

Paul S. Appelbaum, M.D., contributed to Beck's edited book through "Implications of Tarasoff for Clinical Practice" (p. 93) and "Rethinking the Duty to Protect" (p. 109). Each encompasses the factors already mentioned, while making a comment on reasonable care. In the latter chapter, the describes the problematic effects

of Tarasoff at four stages: (a) prior to the initiation of therapy, (b) during the usual course of therapy, (c) when the therapist suspects the patient may intend to commit a violent act, and (d) when a suit is brought alleging that the duty to protect has been breached.

In the first category, Appelbaum suggests that decisions on the duty to protect will deter patients from seeking needed psychiatric care. Although studies are sparse, Appelbaum argues that recent studies have shown that patients place a high value on the protection of their revelations. Appelbaum anticipates that not only will potentially-violent patients be deterred from getting treatment, but that mental health practitioners will also begin to cease treating potentially violent patients.

In the second category, Appelbaum fears that therapists may begin putting inappropriate emphasis on exploring patients' violent fantasies, thereby ignoring other valid areas of concern. Appelbaum refers to a study illustrating this phenomenon. He further comments that this same study indicated some therapists' refusal to confront violent propensities for fear that they, as therapists, would be required to take action. Appelbaum is concerned that the Tarasoff problem might be an unnecessary distraction to therapists who become preoccupied with potential liability and fail to deal therapeutically with clients.

In the third category, Appelbaum is concerned that Tarasoff effects tend to influence overprediction. When joined with the therapist's uncertainty, "unnecessarily intrusive but potentially

more secure alternatives (such as involuntary commitment) will frequently be chosen" (p. 115). Finally, Appelbaum concludes that there may not be any measurement at all as to predicting dangerousness. "Nor are the courts in a position to impose a standard of care, as they have in other areas of medical practice, such as informed consent, because they are equally at a loss to suggest how prediction might be accomplished" (p. 116). Appelbaum points out that the court's failure to identify "reasonable steps" to protect a third party creates more obstacles to therapist's practice. The crux of the problem in this area is that Tarasoff and other decisions state that a lay standard of reasonableness, rather than a professional standard of behavior should apply. He points out that the jury may construct too comprehensive a picture, and that a subsequent occurrence of violence would mean that "all reasonably necessary steps were not taken" (p. 116). Appelbaum explains that there is always another step that can be taken in any situation. The absence of a professional standard increases therapists' frustration in independently deciding whether they have done enough. If a professional standard were available for therapists, practitioners would have a defense in having satisfied the recommendations.

In light of all the criticism that Appelbaum has for the Tarasoff requirements, he decides to construct his own overview of a proposal. In the preface to his proposal, he states that first and foremost, therapists have a moral duty to protect third parties. It is a moral duty which encompasses and surpasses the legal duty.

Appelbaum's definition of a moral duty is a belief "that human beings in an organized society face a moral imperative to come to the assistance of their fellow human beings whose safety is endangered" (p. 117). Appelbaum comments, though, that "there is often no way to keep the moral obligations of a psychotherapist from being translated into legal standards" (p. 118).

The duty that Appelbaum perceives is fourfold. The first part of this duty should be to collect information relevant to an evaluation of the patient's potential dangerousness as found under accepted professional standards. He suggests that these standards entail determining whether or not the patients have engaged in violence or made threats of violence in the past. Appelbaum points out the unfortunate side of court deliberations when the judges and juries tend to scrutinize records of treatment after a violent act has occurred. Appelbaum thinks that it is unfortunate that indications of dangerousness can usually be found in these circumstances, but are not readily revealable when the therapist is conducting the interview. A history of past violence, then, seems a good criterion and an easy demarcation line.

At the time that a violent act becomes imminent, Appelbaum suggests that the therapist should be required to obtain appropriate information of the professional standard for dangerousness. Despite the lack of solid data regarding predictions of dangerousness, Appelbaum offers a compromise through saying that "consensus can be achieved as to which information allows the best possible predictions of dangerousness to be made, even as we acknowledge that

those predictions are often highly inaccurate" (p. 122). He seems to be saying that most professionals will agree that particular characteristics lead to dangerousness more often than not.

Appelbaum disagrees with Justice Mosk's recommendation that therapists are only held accountable for failure to warn when they first have come to a conclusion that their patient is dangerous, and, secondly, when they then fail to take steps necessary to prevent the danger. He suggests that the view is too vague and may even encourage therapists not to come to a conclusion about their patients' dangerousness. Instead of the Mosk rule, then, Appelbaum suggests a standard where professional guidelines need not be determined. Rather, remedies could be obtained where there was "outrageous neglect of professional and common sense" (p. 124). In this way, only clinicians acting in reckless disregard of the evidence would be held negligent. The art of "defensive psychiatry" (p. 124) would be lessened.

Once a therapist determines that a patient may be violent toward others, the duty to protect requires the clinician to take reasonable steps to safeguard potential victims. The court of action, according to Appelbaum should rest on a "reasonable care" model. "As long as therapists are held to a genuine professional standard of care-in contrast to Tarasoff's lay standard-... they should be able to select any reasonable option or combination of options with the assurance that liability will not ensue" (pp. 125-26). Appelbaum adds that many elements constitute reasonable behavior. These include availability of resources, support staff,

time, and money. With consideration of these factors, reasonable care might be concluded from the maximum use of them. Thus, Appelbaum concludes that therapists' actions would be judged by a professional standard of care except in those areas of prediction for dangerousness where no meaningful professional standards have yet developed.

In his other chapter, "Implications of Tarasoff for Clinical Practice," Appelbaum states many of the same propositions as above but places special emphasis on assessment procedures, along with selection of a course of action and implementation. Focus will be on the first only because Appelbaum states that the most crucial weakness among therapists is inadequate assessment. He asserts that the best protection for therapists might not be an attempt to predict liability, but a concerted effort to obtain sufficient information for reasonable clinical care. He offers three components to a substantial intake. The first includes a history and biographical sketch of the person. Factors to be included are age, sex, race, socioeconomic status, history of substance abuse, intelligence, education and residential/employment stability. A second component is assessing the psychological functioning of the patient as it is linked to the ability to control violent impulses (e.g. command hallucinations). The third component includes studying the environmental circumstances that are prone to provoke or inhibit the expression of violent impulses.

Appelbaum admits that research about prediction of violence is ambiguous. He comments that not only is there an absence of such

studies, but that ethical and legal considerations prevent even the most feasible designs to be tested. Appelbaum comments, however, that Monahan's work in the field has shown that many mental health practitioners feel capable of predicting violence that occurs within hours or days of the session as opposed to that occurring within weeks or months. Appelbaum comments that this differentiation exists because imminent violence can be ascertained through present mental states and current environmental decisions. Perhaps this kind of demarcation could serve as a component in a standard for reasonable care. Still, Appelbaum says that even these short-term predictions have no genuine accuracy at this time.

In the chapter, "Overview and Conclusions," Beck makes his own suggestions to therapists in the wake of the Tarasoff controversy. He says that initially, the psychiatrist should have a thorough discussion with the patient about the patient's intentions, make a thorough assessment of the patient's mental status and then consult with a colleague. Beck suggests that in some cases it may even be possible to bring in the proposed colleague for a three-party conference. If not, Beck suggests calling the victim on the phone while the patient is present. If such methods do not work, then the therapist should at least let the patient know what plans he or she will make to contact the victim. In all cases, according to Beck, the therapist should write a note listing his or her assessment, conclusions and plans for action.

Like Appelbaum, Beck agrees that the actions of a therapist according to Tarasoff should be judged according to a professional

standard of negligence and not an ordinary standard. Beck thinks that this is appropriate because the Tarasoff duty itself rests on the existence of a special relationship. Similarly, a professional standard should also be used in determining whether or not adequate steps have been taken to assure that the course of action has been carried out.

In the August 26th, 1985 newsletter of Behavior Today, an article entitled "Professional Differences in Assessing Dangerousness" described a study done by Bruce A. Eather, Ph.D. The study consisted of reports from 80 doctorally-prepared psychologists from special divisions of the APA and 80 board-certified psychiatrists, all licensed to practice in the state of California. This was a survey in which each of the subjects received one of two specifically-designed fictitious case reports describing an individual who demonstrated at least some degree of disturbance and potential dangerousness. Respondents were asked to decide: (a) whether or not the individual needed involuntary civil commitment for legal reasons of being mentally ill and/or dangerous to others; (b) the level of dangerousness, and (c) the factor(a) that most influenced their decision. Additionally, a six-item questionnaire was included for the purposes of surveying psychologists and psychiatrists about their attitudes toward areas related to voluntary/involuntary commitment. Clinicians were also requested to reveal their professional interests, their years licensed and the extent of their former professional involvement in civil commitment proceedings.

Eather's study revealed an important number of differences between psychologists and psychiatrists. For example, psychiatrists were often more likely than psychologists to involuntarily commit the presented individual. Eather suggests that this might be an effect of psychiatrists' reliance on a medical model which views civil commitment as a valid move by the state to help the mentally ill. Secondly, psychiatrists may have more experience with commitment proceedings. Psychiatrists also assessed the individuals in the sketches as being more dangerous than the psychologists did. There were also important differences between psychologists and psychiatrists in regard to their thoughts about evidentiary standards of proof that should apply during commitment hearings. Most of the psychologists favored using "clear, cogent, and convincing evidence" (p. 3), while psychiatrists usually supported the judicial systems' most liberal standard, "preponderance of evidence" (p. 3). This latter view seems to support the fact that therapists also are more willing to commit patients and were found, through the study, to see the sample clients as more dangerous. Additional questionnaire information revealed that neither psychiatrists nor psychologists believed that they were "qualified" at predicting dangerousness. Each group recognized the other as qualified to make judgments in regard to some determinations of dangerousness. Both refuted the idea of granting lawyers expert witness status on such matters.

To cite some encouragement for therapists at this point, the November 12, 1987 issue of Guidepost (of the American Association

for Counseling and Development) contained an article pertaining to liability. Staff writer Naomi Thiers focused on recent implications of Tarasoff. She assured the reader that the psychologists who have studied the problem have found that suits against mental health practitioners are still uncommon, especially among those who are ethical. Two authorities upon whom she relies for her article are Paul Snider, an American Mental Health Counselor Association member and Burt Bertram, chair of the AACD Insurance Trust. Snider argues that the mental health counselor and probably his/her supervisor are those most susceptible to liability. Bertram advises that it is not easy to get data on the number of suits pursued against counselors because information is not categorized and is often even confidential. Bertram was able to say that AACD's insurer is receiving at least 6,000 more applications for coverage, but an increase is not necessarily linked to litigation, especially litigation tied to Tarasoff. In fact, Cunningham says that counselors are sued mostly for alleged sexual misconduct.

Snider recognizes an increasing willingness on the part of today's consumers to take their therapists to court. Nonetheless, he cautions against therapists being preoccupied with the possibility of litigation to the extent that fear interferes with their counseling.

Both Snider and Bertram try to see some good emanating from the Tarasoff influence. For example, Bertram said "If there's a silver lining it's that we as a profession are going to begin practicing with the full recognition that if we overstep our expertise, if we

promise what we can't deliver, we may be held accountable" (p. 116). Snider agreed by adding therapists are becoming more attentive to what transpires in therapy sessions. Goal-setting has become increasingly important. He recommends "three Rs" to prevent litigation rapport with clients, reasonable behavior, and extensive record-keeping. Snider continues by stating that having an "open" and "honest" relationship with clients is the best safeguard for litigation. Rapport, as mentioned in Chapter II of this thesis, allows the counselor and patient to be candid with each other and to discuss the possibility of consequences. The therapist who has a good therapeutic relationship with his/her client is better able to evoke the client's true intentions. Reasonable behavior precludes potential injury while not alarming the client. As long as the behavior can be anticipated by the client (as through an earlier explanation of warning) and is based on a relationship with the client and not on the therapist's eagerness to avoid liability, intervention should not become a problem. Finally, record-keeping provides the therapist with concrete evidence of having met legal obligations if he/she faces a lawsuit.

Appelbaum and Beck seem to concur with what Snider says, although each of the former has different kinds of suggestions. Appelbaum asserts that the initial stage of gathering information (Snider's record-keeping) is the most essential part of protection from liability. At this time, the therapist should pay special attention to the client's past and his/her propensity toward violence. Beck, on the other hand, places emphasis on the

relationship with the client (Snider's rapport). He argues that Tarasoff-type duties may be fulfilling by fashioning a clinical warning against violence, one which appears to be for the client's own welfare. He explains that this approach not only precludes threatening the client with the law, but actually serves to strengthen the therapeutic relationship, as the therapist appears truly concerned about his/her client. Both Appelbaum and Beck agree that a mixture of ordinary precautions will adequate protect the practitioner from liability. Appelbaum says "... clinicians have learned to live with Tarasoff, recognizing that good common sense, sound clinical practice, careful documentation, and a genuine concern for their patients, are almost always sufficient to fulfill their legal obligations" (p. 106). Similarly, Beck comments that "there is reason to believe that we can identify most potentially violent patients. If we rely on our clinical judgment and use good sense, we will serve our patients and society well, and protect ourselves in the bargain" (p. 138).

In returning to the beginning of this thesis and Lord Esher's "larger proposition" theory, what therapists and lawyers alike may be trying to do is to show that a relationship imports duty and responsibilities. Unfortunately, the ships used in Esher's negligence example are easier to steer and guide than people, and many professionals hold contrary viewpoints as to the extent of carrying out this duty and the number of people to whom it should apply.

Counsel may cling to the layman's standard of "reasonable

care." At present, that seems to be the overwhelming consensus, but this writer fears that even this standard will be subject to further subdivision and categorization in the time to come. In addition to the expert witnesses already being used, reasonable care might be further defined by the elitism of the profession. Those professionals with the least education and experience in the mental health field would become most vulnerable to liability. Additionally, courts may look to whether or not the profession is regulated. Those particular professions not enjoying licensure, certification nor registration may be more vulnerable to liability suits for negligence because they have no professional standards on which to rely.

The ultimate separation of classes can also be understood from a practical view. For example, a therapist without a medical or advanced graduate degree may be seen by juries or finders of fact as less capable or knowledgeable. This hypothesis may be dramatized when expert witnesses with consummate degrees are called in to testify against the therapist. It is conceivable that the experts would set out additional, reasonable steps that the therapists did not consider. If these ramifications became prevalent today, patients may begin to avoid therapists altogether. Similarly, therapists would begin to surrender their own clients. As therapists and counselors often rely on authorities such as psychologists and psychiatrists for consulting purposes, it is not difficult to see therapists' increased reliance on these professionals, especially in duty-to-warn situations. The

independence of the more contemporary therapies may falter and clients who are seen as potentially dangerous may be given referrals by their own therapists to doctors and psychologists owning more credentials. Eather's study already showed clear differences between medical mental health therapists and psychologists. Additionally, a recent article in the March-April, 1988 issue of Social Work magazine responded that social workers as a group are more likely than either psychologists or psychiatrists to breach confidentiality in certain situations. The study that was conducted was similar to Eather's work. It included a survey based on 10 vignettes which concerned the breaking of confidentiality. Results showed that social workers are more likely than psychiatrists or psychologists to admit that they will disclose confidential information when asked about the specified clinical situations. No mention was made in the article as to the nature of these vignettes. There were no important relationships between the responses and gender or exposure to clients. Older social workers, however, are more likely to keep confidence. The authors conclude that these results may reflect the nature of social workers' professions. Social workers' roles are more nebulous and their experience with cases concerning potential harm is more limited than that of psychiatrists and psychologists: "Presented with socially threatening behavior, social workers' position is relatively more vulnerable and probably more ambiguous than that of colleagues in psychiatry or psychology to whom they must report" (p. 158).

If one of the purposes of the behavioral science professions is

to create helping relationships, there should be some forethought by the courts to protect these therapies. Other than financial differences, some clients inevitably prefer talking with a "social worker," instead of a "psychiatrist" because the latter is still sometimes a symbol of sickness and serious maladjustment. Similarly, some people will only talk to priests or religious advisers in the hope of avoiding mental health therapists altogether. If the ability to find liability for negligence among these professions continues, both client and counselor will shy away from forming helping relationships. The counselor will fear ultimate lawsuits with each personal encounter. The clients will fear disclosure of problems that need discussing. In short, those in need of help would not get it, and the actual violence that is feared would not be curtailed. In addition, the now-burgeoning field of new therapies might begin to deflate as practitioners began to balance the constant threat of liability against only the potential of a rewarding and fulfilling career.

In Durflinger, it was assured that negligence may not ordinarily be found short of serious error or mistake. It is difficult to ascertain during therapy precisely what makes a serious error or mistake. Unfortunately, according to Beck, courts often see a "serious" error with perfect, retrospective vision at subsequent court hearings. In Lord Esher's time, serious error may have been the collision of two boats whose captains anticipated the crash. But the collision among people and the harm done by individuals to one another is currently immeasurable and

unpredictable. Perhaps a step toward preventing what is only thought to be a dangerous situation may merely delay, not temper a furor. As seen in the Tarasoff case, Poddar left therapy shortly after being stopped and questioned by police. Feelings powerfully tinged with anger and violence that are addressed, but left unexplained, are less apt to lose their forcefulness. An emphasis on legal punishment and punitive reaction only heightens the confusion among mental health patients. Such an atmosphere can lead to greater psychological sickness and an even larger propensity toward uncivilized and destructive behavior.

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APPENDIX A

August 15, 1988

Madeleine Sharko
10425 S. LaPorte
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Ms. Ellen Hume
CLEAR
Resource Association
P.O. Box 11910
Lexington, Kentucky

Dear Ms. Hume,

On Friday, August 12, 1988, I contacted your office to request permission for use of one of the tables in State Credentialing of the Behavioral Science Professions: Counselors, Psychologists and Social Workers. As a graduate student at the Loyola University of Chicago, I am writing a thesis for the completion of a Master's degree in Counseling Psychology. Much of your report was extremely helpful.

In intend to use Table II-1 which appears on page 11 of your report. It will appear in my paper in exactly the same format, aside from a different type. It is entitled "State Regulation of the Behavioral Sciences Professions." The report appears in my reference list and is named in the text as well. Nonetheless, I really need your consent to reproduce the table. Your office instructed me to write this letter.

For your interest, my thesis concerns mental health practitioners' legal duty to warn third parties of potentially violent patients. As I include all therapists within this topic, I address the differences among counselors. One of the most important dissimilarities is the presence or absence of licensure.

Please sign one of these letters and return it to me in the enclosed envelope. Retain the other for your own records.

Thank you for very much for your consideration.

Sincerely,

PERMISSION GRANTED_____

APPENDIX B

Summary of People v. Poddar

The criminal case of People v. Poddar (1969) contained facts very similar to those specified in the civil case of Tarasoff. Initially, Poddar was convicted by the Superior Court of Alameda County. The defense appealed on the goals of improper jury instructions. The case on appeal can be divided into two major parts, each having several components. The first part concerns arguments for and against the inclusion of testimony and evidence on behalf of Poddar.

Appellant asserts that the court should have instructed the jury on unconsciousness for a complete defense. According to precedent in California, the court is obliged to instruct the jury on law principles which have a close connection with the facts of the case. What is needed is substantial evidence to apprise the trial judge of plausible issues.

The defense counsel asserts two elements relating to unconsciousness. One is the testimony of a neurologist who examined Poddar's electroencephalogram and found a temporal lobe lesion, a defect which may relate to uncontrollable seizures of which the defendant is not aware. The appeals court dismissed the argument, reminding the defense counsel that the information had initially been used to explain problems in controlling aggressiveness, and had not been used to reflect unconsciousness.

A stronger criterion is the testimony of one of the psychiatrists, Dr. Grossi, who testified that the defendant's psychotic state did not allow the defendant to understand the

killing. When asked about the issue of consciousness, Dr. Grossi explained that he had not used that specific term.

Finally, the court of appeals found that a defense of unconsciousness should not have been included in the jury instructions because trial counsel itself requested from the jury a verdict of manslaughter in the opening argument. Unconsciousness is a complete, and not a partial defense. It could not be used independently in a manslaughter verdict.

The second component under Part 1 concerns the exclusion of the testimony of the anthropologist. As mentioned in the text of this thesis, defense counsel offered to show that an expert witness holding a degree in social sciences, and having the experience of living in India for several years, could demonstrate that Poddar's status as an "untouchable" directly led to his diminished capacity. The court refused the witness an opportunity to draw the analogy, suggesting that the witness only be allowed to answer hypothetical questions about Poddar's cultural adaptation. The court reasoned that diminished capacity is a mental illness and could only be thoroughly diagnosed by those in the respective field. The court further explained that allowing such testimony would open a floodgate of testimonies which would only confuse the jury. The court also commented that stress regarding cultural differences had already been accounted for by Poddar's psychiatrists.

The last two elements of Part 1 include arguments against exclusion of testimony about Poddar's behavior after the killing, and inclusion of testimony by a court appointed psychiatrist.

Regarding the former, the court had not allowed the testimony of a lay witness named Mr. Martinez who supposedly would offer evidence that he had seen defendant talking to himself approximately four months after the killing. The court of appeals affirmed the exclusion, saying that it had been too remote in time and that the testimony of the defendant's state of mind had already been extensive.

The defendant claims that the latter problem, the testimony of a Dr. Peschau, should not have been allowed because the record does not specify that Poddar had been allowed to remain silent or had had a right to counsel before the interview commenced. The court of appeals said that no prior objection to this testimony had been made and that the issue could not be raised for the first time on appeal. Furthermore, Dr. Peschau's testimony did not contain any incriminating statements made by the defendant.

Part 2 of the case at the court of appeals concerns the instructions to the jury on different charges, among these first degree murder. Defense counsel asserts that although the verdict was of second degree murder, it was error that the court instructed the jury on first degree murder because the very instruction made it less likely that the jury would find the lesser degree of manslaughter. The court of appeals does not hold that there was such a likelihood in this case. The court cites nine indications of premeditation in this case. Defense counsel suggests that the premeditation is inextricably linked with the inability of the defendant to conduct calculated decisions and cannot be regarded as

genuine planning of a crime. In furtherance of their stand, the court relies on the record to show that the jury took extensive time in reaching its decision, specifically in considering second degree murder and manslaughter. First degree murder did not seem to be at issue and so it does not appear that the decision was reached by compromise.

The next component of Part 2 was applicant's contesting the use of instruction on involuntary manslaughter which arises from sudden quarrel or heat of passion. Appellant asserted that there is no evidence on this subject and that the defense is not arguing for a heat of passion defense allowed to a person of ordinary sensibilities. Appellant contends that giving the instruction was error. The court of appeals affirms that this was error but states that in order to consider whether or not it was prejudicial, it must be considered in combination with the error in instructing on second degree murder.

The discussion on this instruction is fairly extensive. Briefly, the conflict is over two sets of jury instruction on second degree murder that were given. The first, CALJIC No. 8.30 (California Jury Instruction Criminal, Number 8.30) allows second degree murder when there is an intent to kill, but one which is not as fully deliberated as that belonging to first degree murder. The second set of jury instructions, CALJIC No. 8.31, requires no specific intent for second degree murder if the act involved directly caused the killing. Appellant contends that the latter instruction should not have been used. Appellant contends that the

jury could not find defendant innocent of second degree murder on the basis of the first set of jury instructions because the second set of instructions, without intent, allowed the charge. The defendant's counsel alleged that the second set of instructions should only be used when the underlying felony is independent of the killing itself. The court concludes that this instruction also was error.

Despite the errors, the court holds that the conviction of felonious homicide is to be sustained. It does, however, reduce the charge from second degree murder to manslaughter.

APPROVAL SHEET

The thesis submitted by Madeleine Sharko has been read and approved by the following committee:

Dr. Kevin J. Hartigan
Assistant Professor, Counseling and Educational Psychology, Loyola

Dr. Terry Williams
Associate Professor, Educational Leadership and Policy Studies, Loyola

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated and that the thesis is now given final approval by the Committee with reference to content and form.

The thesis is therefore accepted in partial fulfillment of the requirements for the degree of Master of Arts.

April 3, 1989
Date

Kevin J. Hartigan
Director's Signature