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Psychotherapist-Patient Privilege; Patient's Dangerous Condition; Confidentiality; Legal Duty to Warn Potential Victim; Tarasoff v. Regents of University of California

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TORT LAW

Psychotherapist-Patient Privilege • Patient's Dangerous Condition • Confidentiality • Legal Duty to Warn Potential Victim

Tarasoff v. Regents of University of California,
13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974)

PROSENJIT PODDAR HAD COME to the United States from India to pursue graduate studies at the University of California at Berkeley. While attending the University of California, Poddar met and became infatuated with Miss Tatiana Tarasoff. However, Miss Tarasoff did not return Poddar's affection and as a result of her rejection, Poddar became extremely depressed; neglected his appearance, studies, and health; spoke disjointedly, and often wept.[1] It was in this mental state that Poddar sought psychiatric aid at the Cowell Memorial Hospital, at the University of California. During therapy, Poddar confided to Dr. Moore, a psychologist, his intention to kill Tatiana upon her return from South America.[2] Dr. Moore's attempt to have Poddar confined for treatment failed when the campus police released him on his promise to stay away from Tatiana. After this attempt to have Poddar confined, he ceased all treatment at the hospital;[3] and upon Tatiana's return to Berkeley, went to her apartment, and killed her.[4]

Tatiana's parents, as plaintiffs, brought this wrongful death action against the University regents, doctors, and campus police.[5] The plaintiffs alleged liability both for failure to confine Poddar and for failure to warn them of the danger confronting their daughter.[6] The Court of Appeals, First District, Division One affirmed the Superior Court for Alameda County in its dismissal of both causes of action.[7] The Supreme Court of California affirmed the court of appeals as to the dismissal of the first contention of liability, predicated upon the defendants' failure to confine Poddar, on the theory of statutory immunity.[8] However, the dismissal of the second ground for liability, based

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[1] People v. Poddar, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974) (report of the criminal prosecution).
[2] 529 P.2d 553, 554, 118 Cal. Rptr. 129, 130 (1974).
[3] *Id.* at 555, 118 Cal. Rptr. at 131.
[4] People v. Poddar, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974).
[5] 529 P.2d at 554, 118 Cal. Rptr. at 130.
[6] *Id.*
[7] Tarasoff v. Regents of University of California, 33 Cal. App. 3d 275, 108 Cal. Rptr. 878 (1973), *vacated,* 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974).
[8] 529 P.2d at 563, 118 Cal. Rptr. at 139. CAL. GOV'T CODE § 856(a) (West 1966) declares that: "Neither a public entity nor a public employee acting within the scope of his employment is liable for any injury resulting from determining in accordance with any applicable enactment: (1) Whether to confine a person for mental illness or addiction. . . ." The therapist's power to confine Poddar, as specified in CAL. WELF. &

upon the defendants' negligence in failing to warn plaintiffs of the danger confronting their daughter, was reversed.[9] The court, in sustaining this cause of action, stated that:

> When a doctor or a psychotherapist, in the exercise of his professional skill and knowledge, determines, *or should determine,* that a warning is essential to avert danger arising from the medical or psychological condition of his patient, he incurs a legal obligation to give that warning.[10] (emphasis added).

The court fashioned this duty from the two exceptions to the common law rule that a person has no duty to warn those endangered by the conduct of another.[11] One exception had been designed to apply in situations where a special relationship exists between the defendant and either the person whose conduct is to be controlled or the foreseeable victim.[12] The court strongly emphasized that the relationship between the therapist and the patient was sufficient to support a duty to warn the potential victim, and that the lack of a special relationship between the therapist and the victim would not detract from such an obligation.[13] The court expressly declared that the psychotherapist-patient relationship is a sufficient foundation for imposing upon a therapist or doctor "a duty to use reasonable care to give threatened persons such warnings as are essential to avert foreseeable danger arising from his patient's condition or treatment."[14] However, Justice Clark, citing social policy that confidentiality should be fostered between the psychiatrist and his patient, dissented to the application of legal duty imposed purely on this relationship.[15]

The second exception to the common law rule applies where the defendant has "undertaken to engage in affirmative action to control the anticipated

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INST'NS CODE § 5201 (West 1972) places the therapists within the protection of CAL. GOV'T CODE § 856(a) (West 1966). *See* 529 P.2d at 563 n. 17, 118 Cal. Rptr. at 139 n. 17.

The police officers' immunity stems from CAL. WELF. & INST'NS CODE § 5154 (West 1972) which states: "The professional person in charge of the facility providing 72 hour treatment and evaluation, his designee, and the peace officer responsible for the detainment of the person shall not be held civilly or criminally liable for any action by a person released at or before the end of 72 hours." *See* 529 P.2d at 565, 118 Cal. Rptr. at 141.

[9] 529 P.2d at 555, 556, 118 Cal. Rptr. at 131, 132. For absence of statutory immunity for negligent failure to warn *see* CAL. GOV'T CODE § 820.2 (West 1966), as construed in Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968). *See also* CAL. GOV'T CODE § 830.8 (West 1966).

[10] 529 P.2d at 555, 118 Cal. Rptr. at 131.

[11] *Id.* at 557, 118 Cal. Rptr. at 133.

[12] *Id.* While the majority states that both of these exceptions are applicable to defendant psychotherapist, the foundation for defendant policemen's liability is unclear. 529 P.2d at 569, 118 Cal. Rptr. at 145 (Clark, J., dissenting).

[13] *Id.* at 558, 118 Cal. Rptr. at 134.

[14] *Id.* at 559, 118 Cal. Rptr. at 135.

[15] *Id.* at 566-69, 118 Cal. Rptr. at 142-45.

dangerous conduct of the patient or protect the prospective victim."[16] The Supreme Court of California also found that the breach of duty to warn arose solely from the policy of this exception to the common law rule. Both the majority and the dissent agreed that defendants' "bungled attempt" to confine Poddar may have deterred him from seeking further therapy and thereby increased the danger to Tatiana.[17]

In placing a legal duty to warn on the psychotherapist, the California supreme court followed the modern trend in tort law by recognizing the subordination of the patient's interest in the confidentiality of the psychotherapist-patient relationship to both the public interest, and to what the court determines to be the patient's own best interest.[18] Under these confined circumstances the therapist acquires a limited right to disclose pertinent information to any person who may have a legitimate interest in his patient's health.[19] However, certain restrictive guidelines have been placed on the disclosure of such information. In *Berry v. Moench,*[20] the Utah supreme court required that: (a) the therapist use good faith and reasonable care to tell the truth; (b) the information be reported fairly; (c) only necessary information be given; and, (d) publication be limited to those persons necessary for protection of the threatened interest.[21]

For many years, the therapist had harbored a right to breach the duty to remain silent concerning his patient's in-session revelations when the interests

[16] *Id.* at 557, 118 Cal. Rptr. at 133. [17] *Id.* at 559, 118 Cal. Rptr. at 135.

[18] Hammonds v. Aetna Casualty & Surety Co., 243 F. Supp. 793, 800 (N.D. Ohio, 1965) wherein it is stated: "We recognize that the right of privacy and duty of secrecy are limited by the considerations of public policy. We do not recognize an *absolute* privilege. . . ." (italics theirs); *In re* Lifshutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970), wherein the California Supreme Court states: "[A]lthough all compelled disclosures may interfere to some extent with an individual's performance of his work, such requirements have been universally upheld so long as the compelled disclosure is reasonable in light of a related and important governmental purpose . . . [A]ll state interest with confidentiality is not prohibited." Hague v. Williams, 37 N.J. 328, 181 A.2d 345 (1962) (holding the patient possesses a limited right against extrajudicial disclosures). *See generally* Note, *Psychotherapy and Griswold: Is Confidence a Privilege or a Right?* 3 CONN. L. REV. 599 (1971); Note, *Medical Practice and the Right to Privacy,* 43 MINN. L. REV. 943, 955 (1959).

[19] Hague v. Williams, 37 N.J. 328, 181 A.2d 345 (1962); Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (1958) wherein it is stated: "[W]here life, safety, well-being or other important interest is in jeopardy, one having information which could protect against the hazard, may have a conditional privilege to reveal information for such purpose, even though it be defamatory and may prove to be false."

[20] 8 Utah 2d 191, 331 P.2d 814 (1958).

[21] *Id. See* Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma,* 62 CAL. L. REV. 1025, 1065 (1974) [hereinafter cited as Fleming & Maximov] which lists similar criteria including: (a) the necessity of a second opinion before the warning is given to the potential victim; (b) no action be taken until the danger is truly eminent; (c) the course of action which is least harmful to the patient be taken; and, (d) that the therapist tell the patient, before therapy begins, of the possibility of disclosure.

of society had so required.[22] The first manifestation of the therapist's ability to assert his right of disclosure was in the nature of a defense to actions for violations of the patient's right to privacy and actions for defamation.[23] Eventually, state legislatures, including California's, began to doubt the plausibility of the patient's action for the violation of his right to privacy, or his action for defamation, when the patient constituted a threat to society. To deal with such situations, statutes were enacted which denied the patient the right to demand that information concerning his potential harm to the community be kept secret. Such statutes, however, have only applied to disclosures made during judicial proceedings, not to extrajudicial disclosures as evidenced in *Tarasoff*.[24] The *Tarasoff* decision therefore constitutes the final phase of the transformation from a discretionary right to disclose where the public is threatened, into a legal duty to make extrajudicial disclosures to protect potential victims.[25]

The case law foundation for the imposition of a legal duty upon the medical profession to protect the public interest began in 1920, with *Simonsen v. Swenson*.[26] In *Simonsen*, the Nebraska supreme court suggested that a doctor's duty may not end with his patient, but that an additional duty may be owing to the general public, and in certain circumstances to specific third persons.[27] The *Simonsen* court declared that the disclosure to interested individuals was not a violation of the confidential relationship, since, in view of the potential harm to the community, the patient could not realistically expect full confidentiality.[28]

This philosophy of imposing an accountability on the therapist to other interested members of the public has been recognized by the federal courts by extending to third persons, who have been violently injured by the psychotherapist's patient, an action against the psychotherapist based on the negligent treatment of his patient.[29] Two such cases are *Merchant's National Bank v. United States*,[30] and *Underwood v. United States*.[31] In

[22] *See* note 18 *supra*.

[23] Horne v. Patton, 291 Ala. 701, 287 So. 2d 824 (1973); Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (1958); Note, *Torts—Confidential Communications*, 26 ALA. L. REV. 485 (1974).

[24] *See, e.g.*, CAL. EVID. CODE § 1024 (West 1966) (Comment—Law Revision Commission) which states: "[I]t is essential that appropriate action be taken if the psychotherapist becomes convinced during the course of the treatment that the patient is a menace to himself or others and the patient refuses to permit the psychotherapist to make the disclosure necessary to prevent the threatened danger."

[25] *See generally* 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974).

[26] 104 Neb. 224, 177 N.W. 831 (1920) (doctor's duty to warn of contagious disease).

[27] *Id.*

[28] *Id.*

[29] Fleming & Maximov, *supra* note 21, at 1029.

[30] 272 F. Supp. 409 (D.N.D. 1967).

[31] 356 F.2d 92 (5th Cir. 1966).

Merchant's National Bank, a veteran's hospital was found liable under the Federal Torts Claims Act for the wrongful death of a victim of a mental patient. The patient had been left unrestrained in a work project off the hospital premises. He left the assigned area and murdered his wife.[32] In *Underwood,* also brought under the Federal Torts Claims Act, the Fifth Circuit found the proximate cause of the death of an ex-wife of a mentally ill airman to be the negligence of the Air Force in releasing the airman to duty and allowing him to withdraw a pistol and ammunition.[33] The airman shot and killed his former wife with the weapon and ammunition so provided.

Tarasoff has echoed the pattern of these decisions by holding the psychotherapist liable for the violent conduct of his patient. The Federal District Court for the Eastern District of Pennsylvania, interpreting Pennsylvania law in *Greenberg v. Barbour,*[34] had even extended liability beyond the scope encountered in *Tarasoff,* by finding liability predicated upon the failure to accept a mentally ill person with homicidal tendencies as a patient.[35] Logical reasoning concludes that there should be an even greater accountability once the incompetent is accepted as a patient in *Tarasoff.*[36]

The California supreme court, in *Tarasoff,* achieves the culmination of the duty of the psychotherapist to warn his patient's potential victims by combining general tort principles with the trend of the above case law.[37] Justice Tobriner,[38] writing for the court, explains that legal duties are merely "conclusory expressions," and not stable elements of a natural law; and as such they maintain the requisite flexibility to mold a duty whenever the plaintiff's interests are entitled to legal protection against the defendant's conduct.[39] The application of these principles to the psychotherapist-patient relationship is in accord with the general tort law regarding duties arising from similar special relationships.[40] In extending the duties inherent in other

[32] 272 F. Supp. 409, 418 (D.N.D. 1967). The decision construed North Dakota law, finding the gross negligence and careless custodial maintenance of the patient to be the proximate cause of his wife's death. *Id.* at 421.

[33] 356 F.2d 92 (5th Cir. 1966).

[34] 322 F. Supp. 745 (E.D. Pa. 1971).

[35] *Id.* at 747-48.

[36] Fleming & Maximov, *supra* note 21, at 1029-30.

[37] *See generally* 529 P.2d at 556-60, 118 Cal. Rptr. at 132-36.

[38] For Justice Tobriner's personal views regarding the social responsibility of those rendering public services *see* Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State,* 55 CAL. L. REV. 1247 (1967).

[39] 529 P.2d at 557, 118 Cal. Rptr. at 133. *See* D'Ambra v. United States, 354 F. Supp. 810, 816 (D.R.I. 1973); Dillion v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954); Dawidoff, *The Malpractice of Psychiatrists,* 1966 DUKE L.J. 696 (1966). *But see* Zepada v. Zepada, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963) (all elements of a tort are recognized, however, social and legal consequences arising from the creation of the new tort prohibit the granting of a remedy).

[40] *See* Singer v. Marx, 144 Cal. App. 2d 637 (1956); Ellis v. D'Angelo, 116 Cal. App. 2d

special relationships to the psychotherapist-patient relationship, the court takes cognizance of the fulfillment of its dynamic role as part of the common law system by adapting the law to keep in stride with the demands of our advancing civilization.[41]

As a result of the *Tarasoff* decision, the psychotherapist is confronted by two converging duties. One is to maintain the confidential relationship as required by the patient's right to privacy;[42] and the other is to warn potential victims of any realistic threats of danger.[43] The "safety zone" for the psychotherapist lies "in the exercise of reasonable skill and care ordinarily possessed and exercised by the members of his profession."[44] As long as the therapist acts without malice,[45] and uses reasonable care under the cirmumstances,[46] he will be able to harmonize his apparently conflicting duties.

The *Tarasoff* decision, in imposing a duty to warn potential victims, has marked the zenith of confidentiality that can be awarded the psychotherapist-patient relationship. As emphasized by Justice Clark's dissent, the policy of safeguarding the confidential relationship in psychotherapeutic treatment arises from the necessity of full and free disclosure by the patient if the results of the treatment are to be effective.[47] Psychotherapy requires the patient to reveal the entire gamut of his experiences and feelings.[48] Without the legal protection afforded this confidential relationship, the patient may become inhibited in his disclosures of embarrassing or legally damaging experiences.[49] Confidentiality has, therefore, been stated to be the *sine qua non* of effective treatment.[50]

Policy arguments similar to those enumerated above have been used to

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310, 253 P.2d 675 (1953) (negligent failure to warn the babysitter of a boy's habit of violently attacking people). *See also* RESTATEMENT (SECOND) OF TORTS §§ 315-324A (1965).

[41] *See* Rodriquez v. Bethlehem Steel Corp., 12 Cal. 3d 82, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

[42] *In re* Lifshutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

[43] *See* note 10 *supra* and accompanying text.

[44] 529 P.2d at 560, 118 Cal. Rptr. at 136. *See also* Bardessono v. Micheals, 3 Cal. 3d 780, 478 P.2d 480, 91 Cal. Rptr. 760 (1970).

[45] *See* Swartz v. Thiele, 242 Cal. App. 2d 799, 51 Cal. Rptr. 767 (1966).

[46] W. PROSSER, LAW OF TORTS, § 56 at 43 (4th ed. 1971).

[47] Solvenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 WAYNE L. REV. 175, 184 (1960).

[48] *Id.*

[49] Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955); Slovenko, *supra* note 47, at 184-87.

[50] Group for the Advancement of Psychiatry 92, *Report No. 45* (1960) states that: "[t]he psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their ability and willingness to talk freely. . . . A threat to secrecy blocks successful treatment."

encourage the passage of rules of evidence dealing with the protection of the psychotherapist-patient relationship.[51] Such evidentiary rules grant a privilege to a specially interested individual (the holder of the privilege) so that he may, with limited exceptions, prevent the disclosure of confidential information during a judicial proceeding.[52] The sole basis for granting such protection is that the fostering of the psychotherapist-patient relationship and its inherent therapeutic value for those in need of psychotherapy is deemed to be of greater social value than legally requiring the full disclosure of confidential information at a judicial proceeding.[53] In considering the scope of the evidentiary privilege,[54] the California Senate Committee on the Judiciary has recognized that the lack of sufficient guarantees of secrecy is a deterrent to the seeking out of psychiatric aid.[55] The Committee also concluded that many of the persons who need the treatment the most are often the first to reject it when secrecy can no longer be assured.[56] As a result of such considerations, many state legislatures have foreclosed this source of information at judicial proceedings.[57]

The policy of protecting the psychotherapist-patient relationship against the unauthorized divulgence of confidential information during judicial proceedings has been manifest in the tort area of extrajudicial disclosures by granting the patient a cause of action against his therapist based on the patient's right of privacy.[58] The California supreme court, in *In re Lifshutz*[59] has recognized that this right of privacy is founded upon constitutional

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[51] MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, § 99 at 213, n.9 (2d ed. 1972) [hereinafter cited as MCCORMICK].

[52] *See generally* PROPOSED FEDERAL RULES OF EVIDENCE 501-13.

[53] MCCORMICK, *supra* note 51, § 72, at 152.

[54] *See generally* CAL. EVID. CODE § 1013-24 (West 1966).

[55] CAL. EVID. CODE § 1014 (West 1966) (Comment—Senate Committee on Judiciary).

[56] *Id.* Where it is stated:

> Many of those persons are seriously disturbed and constitute threats to other persons in the community. . . . Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected.

[57] *See* note 51 *supra;* DeWitt, *Privileged Communications Between Physician and Patient* 23 (1958) who warns that the statutory privilege does not encompass extrajudicial disclosures by stating:

> As far as the statute goes, the physician may talk about the ailments of the patient from New York to San Francisco and to every Tom, Dick, and Harry on the street or in his club since the statute merely permits the patient or holder the privilege to seal the lips of the physician against testifying in a judicial proceeding, or an investigation authorized by law, and is wholly ineffectual to prevent a public disclosure elsewhere.

See also Horne v. Patton, 291 Ala. 701, 709, 287 So. 2d 824, 830 (1973); Note, *Torts—Confidential Communications,* 26 ALA. L. REV. 485 (1974).

[58] *See, e.g.,* Hammonds v. Aetna Casualty & Surety Co., 243 F. Supp. 793 (N.D. Ohio 1965). For other potential grounds for liability for unauthorized disclosure, *see generally* Note, *Psychiatric Negligence,* 23 DRAKE L. REV. 640 (1974).

[59] 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

principles[60] as expanded in *Griswold v. Connecticut*.[61] However, in line with *Tarasoff*, the *Lifshutz* court states that even though a "zone of privacy"[62] protects the psychotherapist-patient relationship, "all interference with such confidentiality is not prohibited."[63] The *Tarasoff* court succinctly caps the expansion of this claim to the right of privacy based on the need for psychotherapeutic secrecy by declaring that "[t]he protective privilege ends where the public peril begins."[64]

CONCLUSION

Even though one out of four hospital beds in this country is occupied by a schizophrenic,[65] the field of psychotherapy continues to progress at a stunted rate.[66] Authorities have recognized that psychotherapists continue to grossly overpredict dangerousness in their patients.[67] The impact of the newly created duty to inform members of the general public of possible threats of violence, coupled with this gross overprediction of dangerousness may, in the long run, be a deterrent to the seeking out of psychotherapeutic aid by those who are most in need.[68] The implication is that *Tarasoff*, in terms of medical capabilities, may be ahead of its time. It may validly be asserted that it would be more beneficial to our society to postpone the duties imposed by this decision until a time when mental illness is more of a science, and less of a mystery.*

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[60] *See* text accompanying note 42 *supra*.

[61] 381 U.S. 479 (1965). *See generally Psychotherapy and Griswold: Is Confidence a Privilege or a Right?* 3 CONN. L. REV. 599 (1971).

[62] *Id.*

[63] 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

[64] 529 P.2d at 561, 118 Cal. Rptr. at 137.

[65] Osmundsen, *New Unit Formed on Schizophrenia*, New York Times, Nov. 27, 1965, at 28, col. 7.

[66] *Compare* Williams v. LeBar, 141 Pa. 149, 21 A. 525 (1891) (per curiam) *with* Steadman & Kevelas, *The Community Adjustment and Criminal Activity of the Baxtrom Patients: 1966-1970*, 129 AM. J. PSYCHIATRY 80, 83, 304, 307 (1972) [hereinafter cited as Steadman & Kevelas], which reports on an experiment in which 121 adjudicated "dangerous criminally insane" patients were released from custody and in the four years following their release there were only nine people arrested, and a total of sixteen convictions—approximately the same ratio as "normal" people.

[67] Steadman & Kevelas, *supra* note 66.

[68] *See* note 56 *supra* and accompanying text.

* A rehearing was granted in the Tarasoff case on March 12, 1975. Oral arguments took place on May 5th before the Supreme Court of California sitting in banc. At the date of publication, however, no decision had been rendered. *See* Tarasoff v. Regents of University of California, Case No. SF23042 (Cal. March 12, 1975).