[Washington University Law Review](https://openscholarship.wustl.edu/law_lawreview)

Volume 63 | Issue 2

January 1985

Psychiatrists Are Subject to Tort Liability for Failing to Protect the Public from Their Patients' Unintentional Acts: Petersen v. State, 100 Wash. 2d 421, 671 P.2d 230 (1983)

Tom A. Glassberg
Washington University School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview

Part of the Law and Psychology Commons, and the Torts Commons

Recommended Citation

Tom A. Glassberg, *Psychiatrists Are Subject to Tort Liability for Failing to Protect the Public from Their Patients' Unintentional Acts: Petersen v. State, 100 Wash. 2d 421, 671 P.2d 230 (1983)*, 63 WASH. U. L. Q. 315 (1985).
Available at: https://openscholarship.wustl.edu/law_lawreview/vol63/iss2/7

This Case Comment is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

PSYCHIATRISTS ARE SUBJECT TO TORT LIABILITY FOR FAILING TO PROTECT THE PUBLIC FROM THEIR PATIENTS' UNINTENTIONAL ACTS

Petersen v. State, 100 Wash. 2d 421, 671 P.2d 230 (1983)

In *Petersen v. State*,[1] the Washington Supreme Court extended psychiatrist liability to harm caused by patient conduct,[2] holding a psychiatrist liable for failing to confine[3] a drug-addicted[4] mental patient who unintentionally injured another while under the influence of drugs.[5]

Dr. Alva Miller, a psychiatrist, treated Larry Knox[6] while Knox was involuntarily confined[7] at a state hospital. After treating[8] Knox for drug

---

1. 100 Wash. 2d 421, 671 P.2d 230 (1983) (en banc).

2. For a discussion of the duty to protect the public from a violent patient, see Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1974); Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025 (1974).

3. The majority of courts hold that a psychiatrist only has a duty to warn a readily identifiable victim of the foreseeable acts of his patient. *See infra* notes 29-32 and accompanying text. The minority position holds that a psychiatrist has a duty to confine his foreseeably violent patient to protect the general public. *See infra* notes 33-36 and accompanying text.

4. *Petersen* is the first time a court has held a therapist liable for the drug-induced acts of his patient. For a discussion of this distinction, see *infra* notes 53 & 54 and accompanying text.

5. *Petersen* is also the first case to impose liability upon a therapist for his patient's unintentional tort. For a discussion of this distinction, see *infra* notes 59 & 60.

6. On April 16, 1977, Knox cut off his left testicle with a knife. Knox's brother took him to Madigan Army Hospital. After evaluation, Madigan transferred Knox to Western State Hospital. 100 Wash. 2d at 423, 671 P.2d at 234, 235. During treatment, Miller learned that Knox was on probation from a 1975 robbery conviction. Miller was apparently unaware, however, that Knox's probation was conditional and required Knox to participate in mental-health counseling and to refrain from using controlled substances. *Id.* at 423, 671 P.2d at 235.

7. On April 20, 1977, a mental health professional detained Knox for evaluation at Western State Hospital for 72 hours pursuant to WASH. REV. CODE § 71.05.180 (1975). On April 22, 1977, Dr. Miller and a nurse petitioned the Pierce County Superior Court for authority to detain Knox for 14 additional days pursuant to WASH. REV. CODE § 71.05.230 (1975). The court granted the petition. 100 Wash. 2d at 424, 671 P.2d at 235. WASH. REV. CODE § 71.05.230 (1975) provides that after holding a person for a 72-hour evaluation, a mental health professional may detain the patient 14 additional days if the professional finds that a mental disorder caused the patient's condition, if the condition presents a likelihood of serious harm to the person detained or to others, and if other requirements are met.

On May 9, 1977, Dr. Miller discharged Knox from the hospital. Dr. Miller did not request additional confinement of Knox after the expiration of the additional 14-day detention period pursuant to WASH. REV. CODE §§ 71.05.280-290 (1975). WASH. REV. CODE §§ 71.05.280-290 (1975) provide for additional confinement for a period not to exceed 90 days. 100 Wash. 2d at 424, 671 P.2d at 235.

8. Dr. Miller's treatment of Knox included administration of the drug Navane. After discharging Knox, the hospital learned that Knox had flushed the Navane down a toilet. *Id.* at 424, 671 P.2d at 235.

Washington University Open Scholarship

addiction and mental problems for seventeen days,[9] Dr. Miller discharged Knox from the hospital. Five days later, Knox ran a red light and injured Cynthia Petersen in an automobile accident.[10] At the time of the accident, Knox was driving over the speed limit[11] and was under the influence of illicit drugs.[12]

Petersen sued the state,[13] alleging that Dr. Miller failed to protect her from Knox's dangerous propensities.[14] Petersen won a judgment against Dr. Miller in a jury trial.[15] The Supreme Court of Washington affirmed in part[16] and *held*: a psychiatrist who fails to confine a patient is liable for the foreseeable drug-induced conduct of the patient.

Under the common law, a person had no duty to protect another from[17] or warn another of danger.[18] Courts carved out exceptions to the

---

9. While treating Knox, Dr. Miller learned that Knox had an extensive history of drug abuse and that he frequently used angel dust. *Id.* at 423, 671 P.2d at 235.

There was conflicting evidence as to the cause and nature of Knox's mental condition. Dr. Miller testified that the use of angel dust caused a schizophrenic reaction in Knox and that Knox had fully recovered from schizophrenia at the time Dr. Miller discharged him from Western. *Id.* Other psychiatrists testified as to Knox's condition as follows: Dr. Van Dooren diagnosed schizophrenia, catatonic type; Dr. Anderson diagnosed schizophrenia, undifferentiated type; and Dr. Petek diagnosed schizophrenia, paranoid type, with depressive features. *Id.* at 438-39, 671 P.2d at 242-43. The court made no finding of fact as to Knox's mental condition at the time Dr. Miller discharged him. There was also no finding of fact as to whether Knox's mental condition was independent of his drug usage. The court referred to Knox's "drug-related mental problems." *Id.* at 428, 671 P.2d at 237.

10. *Id.* at 422-23, 671 P.2d at 234.

11. The court estimated that Knox's automobile was traveling at 50 or 60 miles per hour. *Id.*

12. The opinion states that "Knox was under the influence of drugs at the time of the accident." *Id.* at 424, 671 P.2d at 235.

13. The state of Washington employed Dr. Miller as Clinical Director at Western State Hospital, where Knox had been a patient. *Id.* at 423-24, 671 P.2d at 235. The court rejected the state's immunity defense. *Id.* at 435, 671 P.2d at 241.

14. Petersen alleged that Dr. Miller negligently failed to seek additional confinement of Knox and negligently failed to disclose Knox's drug usage and parole violation to his probation officer. *Id.* at 424, 671 P.2d at 235.

Petersen, however, did not allege that Knox was violent or under the influence of drugs when Dr. Miller discharged him on May 9, 1977. *Id.* at 424, 671 P.2d at 235.

About seven months after the collision with Petersen, Knox killed a couple and raped their daughter. The court allowed Petersen to introduce evidence of the subsequent killings and rape to rebut Dr. Miller's testimony that Knox had fully recoverd from schizophrenia when Miller released him. *Id.* at 439, 440, 671 P.2d at 243, 244.

15. The jury rendered a verdict in favor of Petersen in the amount of $250,000. *Id.* at 446, 671 P.2d at 246.

16. The Supreme Court of Washington reversed the trial court's decision requiring plaintiff to post a cost bond because plaintiff's claim was against the state. *Id.* at 446, 671 P.2d at 246.

17. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 375 (5th ed. 1984) [hereinafter cited as PROSSER] ("[T]he law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other

https://openscholarship.wustl.edu/law_lawreview/vol63/iss2/7

general rule when a special relationship between parties justified imposing a duty.[19]

In *Tarasoff v. Regents of University of California*,[20] the Supreme Court of California held that a psychotherapist has a duty to warn[21] the potential victim of a patient who expressly threatens to kill.[22] The court reasoned that the special relationship between therapist and patient and the therapist's knowledge of the patient's threat to kill the victim justified imposing a duty on the therapist,[23] even though the therapist did not

---

is in danger of losing his life."); RESTATEMENT (SECOND) OF TORTS § 314 (1965) ("The fact that the actor realizes or should realize 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."). *See also* Harper and Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887 (1934) ("[I]t may be said that there is ordinarily no general duty to act for the protection of others.").

In the seminal case of *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), the California Supreme Court stated the rationale for not imposing a duty to protect another:

> This rule derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter . . . . Morally questionable, the rule owes its survival to "the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue . . . ."

Id. at 435 n.5, 551 P.2d at 343 n.5, 131 Cal. Rptr. at 23 n.5 (quoting PROSSER, TORTS 341 (4th ed. 1971)).

18. PROSSER, *supra* note 17, at 375 ("Nor is anyone required . . . to cry a warning to one who is walking into the jaws of a dangerous machine.").

19. *Id.* at 376. Examples of special relationships justifying a duty are carrier/passenger, ship/seaman, employer/employee, innkeeper/guest, shopkeeper/customer, host/social guest, jailer/prisoner, and school/pupil. *Id.* at 376, 377. *See also* RESTATEMENT (SECOND) OF TORTS § 314A (1965) (common carrier/passenger), § 314B (employer/employee), § 316 (parent/child), § 317 (master/servant), and § 318 (possessor/licensee).

20. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

21. The *Tarasoff* defendants argued that a therapist should only have a duty to warn when the therapist actually knows the specific identity of the intended victim. The court stated there may be a duty to warn if "a moment's reflection will reveal the victim's identity." *Id.* at 439 n.11, 551 P.2d at 345 n.11, 131 Cal. Rptr. at 25 n.11.

22. During treatment, the patient in *Tarasoff* told the therapist he intended to kill the victim. *Id.* at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21. The *Tarasoff* plaintiffs alleged that the defendant psychiatrists actually predicted that the patient would kill. *Id.* at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.

23. In one count, plaintiff alleged that the defendant breached a duty to confine the patient. The court held that under California law, the defendant therapists were immune from liability for failure to confine their patient. *Id.* at 446, 551 P.2d at 351, 131 Cal. Rptr. at 31. In a separate count, plaintiff alleged that the defendants breached a duty to warn. The *Tarasoff* court based its holding upon failure to warn, stating that "[t]he issue in the present context, however, is not whether the patient should be incarcerated . . . ." *Id.* at 439, 551 P.2d at 346, 131 Cal. Rptr. at 26. The *Tarasoff* court imposed a duty to warn the victim or others, such as the victim's parents, who were likely to let the victim know that the patient posed a threat to her. *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

Washington University Open Scholarship

have a special relationship[24] with the victim.[25]

In *McIntosh v. Milano*,[26] the Superior Court of New Jersey broadened the duty that *Tarasoff* imposed on a psychiatrist. The *McIntosh* court held that a psychiatrist has a duty to warn a potential victim if the patient's violent tendencies and the potential victim are readily identifiable,[27] even absent an express threat to kill by the patient.[28] Therefore, *McIntosh* expanded the *Tarasoff* duty to warn to include a duty to predict violent behavior.

In *Thompson v. County of Alameda*,[29] the Supreme Court of California clarified its holding in *Tarasoff*. In *Thompson*, the county released a juvenile offender from its custody. Within one day, the juvenile offender murdered a child who lived in the offender's neighborhood.[30] The court held that the county did not have a duty to warn because the victim was not readily identifiable at the time of the offender's release.[31] Many jurisdictions have followed *Thompson*, creating a readily-identifiable-victim requirement for a cause of action against therapists.[32]

---

24. The *Tarasoff* court cited Kaiser v. Suburban Transp. Sys., 65 Wash. 2d 461, 398 P.2d 14 (1965), for the proposition that a doctor need not have a special relationship with the victim to have a duty to protect the victim. In *Kaiser*, the doctor prescribed medicine to a bus driver but failed to warn the bus driver of the medicine's side effects. The court held the doctor liable to a passenger riding on the driver's bus. *Id.* at 464, 398 P.2d at 16. The court held that a special relationship between doctor and patient may justify a duty from doctor to victim.

25. Justice Mosk concurred with the *Tarasoff* majority only because the plaintiffs alleged that the therapists actually predicted the patient would kill. Justice Mosk did not concur that therapists have a duty to predict a patient's violent tendencies. 17 Cal. 3d at 451, 551 P.2d at 354, 131 Cal. Rptr. at 34.

26. 168 N.J. Super. 466, 403 A.2d 500 (1979).

27. The court held that a therapist is liable when he should have determined, under the reasonable standards of his profession, that his patient presented a probable danger to the victim. *Id.* at 489, 403 A.2d at 512.

28. The patient never expressed a desire to harm the victim. At most, the patient exhibited a general violent tendency and an obsessive attitude towards the victim. *Id.* at 472, 403 A.2d at 502-04.

29. 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).

30. *Id.* at 746, 614 P.2d at 730, 167 Cal. Rptr. at 72. In *Thompson*, the court reviewed a dismissal. Therefore, the court took the following allegations of the complaint as true: the victim was a child who lived a few doors from a juvenile offender; the defendant knew that the juvenile offender had dangerous and violent propensities toward children and that the offender would endanger children if released; the defendant also knew the offender would attempt to kill a child in the offender's neighborhood if released; and the defendant temporarily released the offender from custody but failed to warn either the police or persons living in the offender's neighborhood. *Id.* at 746, 614 P.2d at 730, 167 Cal. Rptr. at 72.

31. *Id.* at 758, 614 P.2d at 738, 167 Cal. Rptr. at 79-80.

32. *See* Christe v. United States, 564 F. Supp. 341 (E.D. Mich. 1983); Haseni v. United States, 541 F. Supp. 999 (D. Md. 1982); Doyle v. United States, 530 F. Supp. 1278 (C.D. Cal. 1982); Vu v.

https://openscholarship.wustl.edu/law_lawreview/vol63/iss2/7

Three days after the *Thompson* decision, in *Lipari v. Sears, Roebuck & Co.*,[33] the United States District Court for the District of Nebraska extended a psychiatrist's duty beyond the duty to warn readily identifiable victims.[34] In *Lipari*, the patient fired a shotgun into a crowded nightclub. Because the patient acted randomly, the psychiatrist could not readily identify any of the victims at the time of release. Nevertheless, the court held the psychiatrist liable for failing to confine the patient because the psychiatrist could have reasonably foreseen the patient's endangering others.[35] Thus, the psychiatrist in *Lipari* owed a duty to the general public to confine his dangerous patient. Few jurisdictions have followed *Lipari*.[36]

Although these pre-*Petersen* cases differed on whether the potential victim must be identifiable and on whether the therapist's duty was to warn or to confine, they all involved intentional acts by patients acting under a mental defect. Before *Petersen*, no court had held a therapist liable for harm caused by a patient's negligent act while under the influence of drugs.

In *Petersen v. State*,[37] the Supreme Court of Washington considered for the first time whether a psychiatrist is liable for harm caused by his patient. Justice Dolliver, writing for the court en banc,[38] initially considered whether the victim must be readily identifiable. Acknowledging the split of authority on this question, the court held that a therapist has a

---

Singer Co., 538 F. Supp. 26 (N.D. Cal. 1981), *aff'd*, 706 F.2d 1027 (9th Cir.), *cert. denied*, 104 S. Ct. 350 (1983); Leedy v. Hartnett, 510 F. Supp. 1125 (M.D. Pa. 1981), *aff'd mem.*, 676 F.2d 686 (3d Cir. 1982); Davis v. Mangelsdorf, 138 Ariz. 207, 673 P.2d 951 (Ariz. Ct. App. 1983); Davidson v. City of Westminster, 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982); In re Estate of Votteler, 327 N.W.2d 759 (Iowa 1982); Furr v. Spring Grove State Hosp., 53 Md. App. 474, 454 A.2d 414 (1983); Davis v. Lhim, 124 Mich. App. 291, 335 N.W.2d 481 (1983); Cairl v. State, 323 N.W.2d 20 (Minn. 1982); Sherrill v. Wilson, 653 S.W.2d 661 (Mo. 1983); Saunders v. State, 446 A.2d 748 (R.I. 1982), *later proc.*, Saunders v. Rhode Island, 731 F.2d 81 (1st Cir. 1984).

33. 497 F. Supp. 185 (D. Neb. 1980).

34. *Id.* at 193-94.

35. *Id.*

36. *See, e.g.*, Beck v. Kansas Univ. Psychiatry Found., 580 F. Supp. 527 (D. Kan. 1984) (approving *Lipari*); Brady v. Hopper, 570 F. Supp. 1333 (D. Colo. 1983) (rejecting *Lipari*); Sakuda v. Kyodogumi Co., 555 F. Supp. 371 (D. Hawaii 1983) (distinguishing *Lipari*); Hasenei v. United States, 541 F. Supp. 999 (D. Md. 1982) (rejecting *Lipari*); Case v. United States, 523 F. Supp. 317 (S.D. Ohio 1981), *aff'd mem.*, 709 F.2d 1500 (6th Cir. 1983) (accepting *Lipari*); Leedy v. Hartnett, 510 F. Supp. 1125 (M.D. Pa. 1981), *aff'd mem.*, 676 F.2d 686 (3d Cir. 1982) (rejecting *Lipari*).

37. 100 Wash. 2d 421, 671 P.2d 230 (1983).

38. Seven justices concurred with Justice Dolliver. Justice Dimmick concurred in the result only. There was no dissent.

Washington University Open Scholarship

duty to protect all persons foreseeably endangered by his patient.[39]

The court then considered the nature of the psychiatrist's duty. The court discussed the *Lipari* decision and its own decision in *Kaiser v. Suburban Transportation System*.[40] In *Kaiser*, a passenger injured in a bus accident recovered in a suit against a physician who had prescribed medication that impaired the bus driver's driving. The court held that a physician has a duty to third parties to warn his patient of dangerous side effects of drugs that the physician prescribes.[41] Citing *Lipari* and *Kaiser*, the court simply concluded that Dr. Miller had a duty to protect the public from harm caused by Larry Knox's dangerous propensities.[42]

Although *Petersen* purports to follow *Kaiser* and *Lipari*,[43] both cases are clearly distinguishable. In *Kaiser*, the doctor caused the patient's impairment, a crucial fact not present in *Petersen*.[44] Because the *Kaiser* holding does not require imposing a duty on a doctor who neither actively creates a peril nor affirmatively contributes to his patient's diminished capacity, the court's reliance on *Kaiser* is misplaced.

In addition, the facts in *Lipari* are distinguishable from the facts in *Petersen*. In *Lipari*, the patient intentionally harmed the plaintiff while acting under a mental defect.[45] In *Petersen*, however, Larry Knox unintentionally[46] harmed Cynthia Petersen while under the influence of drugs.[47] Because *Lipari* held a therapist liable when the plaintiff's injury resulted from an intentional act caused by the patient's mental disorder, the court's reliance on *Lipari* is also misplaced.[48]

---

39. 100 Wash. 2d at 428-29, 671 P.2d at 237.

40. 65 Wash. 2d 461, 398 P.2d 14 (1965).

41. *See supra* note 24.

42. 100 Wash. 2d at 428-29, 671 P.2d at 237.

43. "In the present case, we follow the approach utilized in *Lipari*. . . and *Kaiser*. . . ." *Id.*

44. *See supra* note 24.

45. *See supra* notes 33-36 and accompanying text.

46. No evidence suggested that Knox intentionally harmed Petersen. Prosser stated that a person's conduct is only intentional if he actually intended the resulting harm:

> If an automobile driver runs down a person in the street before him, with the desire to hit the person, or with the belief that he is certain to do so, it is an intentional battery; but if he has no such desire or belief, but merely acts unreasonable in failing to guard against a risk which he should appreciate, it is negligence.

PROSSER, *supra* note 17, at 169.

47. *See supra* note 12.

48. Although Knox's violent tendencides may have justified additional confinement, *see supra* notes 6 & 14, Knox's tendency to commit intentional violence did not harm the plaintiff. Instead, Knox's drug abuse proximately caused the plaintiff's injury. Thus, Dr. Miller's decision to release Knox should be evaluated solely on Knox's propensity to cause harm by drug abuse. For a discussion of a therapist's duty in this context, see *infra* notes 53 & 54 and accompanying text.

https://openscholarship.wustl.edu/law_lawreview/vol63/iss2/7

Neither *Kaiser* nor *Lipari* leads to the conclusion reached in *Petersen.* A doctor's overt act gave rise to the *Kaiser* duty.[49] A patient's intentional act, combined with a doctor's special relationship with the patient, gave rise to the *Lipari* duty.[50] Dr. Miller, however, committed no overt act,[51] and Larry Knox did not act intentionally.[52] Therefore, the *Petersen* holding does not logically follow from a combination of the *Kaiser* and the *Lipari* rules.

The distinction between a patient's intentional act and negligent act might favor the plaintiff in *Petersen* because operation of an automobile by a chronic drug abuser while under the influence of drugs is generally more foreseeable than commission of an intentional tort by a mental patient.[53] Thus, on the basis of foreseeability alone, the court could have found that *Petersen* followed a fortiori from *Lipari.*[54] This foreseeability rationale, however, ignores the traditional tort concept of a duty of reasonable care.

Under Judge Learned Hand's oft-cited definition of reasonable care,[55] an actor has a duty to prevent a risk of harm to another if the burden of adequate precautions is less than the gravity of the resulting injury multiplied by the probability of its occurrence.[56] The probability of the injury

---

49. *See supra* notes 24 & 44 and accompanying text.

50. *See supra* notes 33-36 and accompanying text.

51. 100 Wash. 2d at 422-26, 671 P.2d at 234-36.

52. *See supra* note 46 and accompanying text.

53. As a class, patients with drug or alcohol problems would seem more predisposed to drive under the influence than mental patients to act violently. Such a danger is arguably foreseeable every time a doctor releases an alcohol or drug addict. *See infra* notes 59 & 60 and accompanying text.

54. *See supra* note 42 and accompanying text.

55. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). Learned Hand's balancing formula has become increasingly more relevant in modern economic evaluations of tort liability. *See* R. EPSTEIN, C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 147 (4th ed. 1984).

The Learned Hand formula is the basis for § 291 of the RESTATEMENT (SECOND) OF TORTS:

> Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

RESTATEMENT (SECOND) OF TORTS § 291 (1965).

56. The Learned Hand approach evaluates liability in terms of the risk of harm regardless of the fact that the harm has in fact occurred. Thus, even when the defendant's conduct has in fact harmed the plaintiff, the defendant can escape liability by showing that the risk of harm did not outweigh the cost of prevention.

Washington University Open Scholarship

occurring refers to incremental probability.[57] Common sense supports incremental probability because the defendant should be responsible only for the portion of risk that is attributable to him. If the defendant's act or omission does not increase the probability of harm, there should be no duty to act.[58]

A comparison of the incremental probability of harm in *Petersen* with that in *Lipari* reveals that the incremental risk in *Petersen* was actually lower than that in *Lipari.* Negligent driving is generally more foreseeable than intentional homicide.[59] Therefore, the victim's risk of injury by negligent driving in *Petersen* was large, even in the absence of the psychiatrist's failure to confine Knox. In *Lipari,* the victim's risk of being intentionally murdered was not large, even in the absence of the psychiatrist's act. It follows that the incremental probability of harm was arguably greater in *Lipari* than in *Petersen.*[60]

---

57. As used in this Comment, the term "incremental probability" describes the increase in the risk of harm to the plaintiff from the defendant's conduct at the time the defendant acted.

Legal scholars have supported the concept of incremental probability. *See, e.g.,* Brown, *Toward an Economic Theory of Liability,* 2 J. LEGAL STUD. 323, 333-35 (1973). Brown derived a theory of "incremental standards of negligence" from the Learned Hand formula. Brown surmised that in actual tort litigation, the plaintiff attempts to prove that the net social benefit favors liability, while the defendant attempts to prove the opposite. The court must weigh the incremental benefits against the incremental costs of imposing liability. *Id.* Such a formulation implicitly evaluates the incremental risk, the amount that a particular standard of conduct increases or reduces the risk of harm to the plaintiff. Under this analysis, the greater the increase in the risk of harm to the plaintiff, the greater the social benefits of the act must be to excuse liability. RESTATEMENT (SECOND) OF TORTS § 293 comment (b) (1965) ("As the extent of the chance of harm increases, the utility required to justify the risk increases proportionally."). *See also* PROSSER, *supra* note 17, at 203 (defendant liable when conduct greatly increases risk of harm to plaintiff).

58. In a psychiatrist/patient situation in which the patient is not dangerous, no difference exists between the probability of harm if the therapist protects and the probability of harm if the therapist does not protect. In such a situation there is no duty to protect.

Incremental risk analysis supports a finding of duty in *Tarasoff.* Because the patient in *Tarasoff* presented a specific danger to a specifically identifiable victim, the risk of harm to that victim was high. In addition, the burden of adequate precautions, warning the intended victim, was relatively low. Accordingly, the therapist had a duty to protect the victim.

Incremental risk analysis also supports a finding of duty in *Lipari.* In that case, the patient presented a risk of intentional violence, but not to a specifically identifiable victim. Because intentional murders occur infrequently, the release of the violent patient greatly increased the risk of harm to the community. Although the burden of prevention, confinement, was great, the increment of risk was greater. Accordingly, the psychiatrist had a duty to protect the victim.

59. In 1980, there were 24,278 homicide victims in the United States. In 1982, there were 1,405,000 arrests for driving while intoxicated and 565,000 arrests for drug abuse violations. In 1982, there were 18,100,000 motor vehicle accidents, resulting in 44,000 deaths and 1,700,000 injuries. 104 STATISTICAL ABSTRACT OF THE UNITED STATES—1984, at 180, 184, 608 (1984).

60. The frequency of automobile collisions is certainly greater than the frequency of intentional

https://openscholarship.wustl.edu/law_lawreview/vol63/iss2/7

In addition to overlooking the lesser incremental risk in *Petersen*, the court failed to recognize the substantial social burdens imposed by its decision in *Petersen*. By failing to limit the potential reach of its decision, the court added uncertainty to future decisions of mental health professionals in a wide range of factual situations.

First, the *Petersen* duty to protect the public by confining a patient could extend for an indefinite period, because the potential for recurring drug use remains long after detoxification. Moreover, the medical community is uncertain that it can ever cure a drug addict. Because of potential liability under *Petersen*, mental health professionals will undoubtedly opt for involuntary confinement in many more cases. *Petersen* does not consider how society will pay for such increased institutionalization.[61] Similarly, the court fails to consider the rights of patients who may be subjected to long-term confinement.

Second, the court failed to consider the logical implications of its holding. The Washington confinement statute relied upon in *Petersen* also granted psychologists, nurses, and social workers the authority to initiate commitment proceedings. Presumably, the *Petersen* duty would extend to them as well. In addition, the *Petersen* situation seems analagous to the situation facing a therapist treating an alcohol abuser. A duty to confine alcoholics would greatly increase potential institutionalization.[62]

Therapists will undoubtedly respond to *Petersen* in one of two ways. Some will avoid liability by not treating patients with drug or alcohol problems. Most, however, will adopt a rigid confinement policy that will deter persons with drug or alcohol problems from seeking treatment.

---

homicides. Because the release of Knox in *Petersen* did not substantially increase the probability of injury to the plaintiff by unintentional collision, the formula does not clearly indicate liability in *Petersen*.

In addition, the risk of harm is arguably greater when a patient presents a risk of intentional harm. When a patient intends to harm another, he will likely cause that harm. A patient whose dangerous act is negligent, however, will not always cause harm. Because Knox's act was negligent rather than intentional, the Learned Hand formula again does not clearly indicate liability in *Petersen*.

61. Mental health professionals who work in drug abuse centers make daily decisions whether approximately 150,000 outpatients should be institutionalized. 104 STATISTICAL ABSTRACT OF THE UNITED STATES-1984, at 127, 184 (1984). Currently, outpatients outnumber institutionalized drug-abuse patients by approximately ten to one. Therefore, the potential for increased costs resulting from increased institutionalization is staggering.

62. Currently, there are approximately thirteen million problem drinkers in the United States, *Report to the President and the Congress on Health Hazards Associated with Alcohol and Methods to Inform the General Public of the Hazards*, U.S. Dep't of the Treasury and U.S. Dep't of Health and Human Services (1980), and more than 1.4 million annual arrests for driving while intoxicated, 104 STATISTICAL ABSTRACT OF THE UNITED STATES-1984, at 127, 184 (1984).

Washington University Open Scholarship

Both responses will reduce the treatment opportunities for substance abusers, thereby increasing the dangers posed by these persons.

The *Petersen* court carved out too large an exception to the general rule that one has no duty to protect another from harm caused by a third person. By extending psychiatrists' liability to harm caused by substance-abusing patients, *Petersen* goes too far. In its zeal to protect the public, the *Petersen* court puts mental health professionals in an untenable position. In making confinement decisions, mental health professionals must balance their own interests against those of their patients. As a result, the indefinite confinement of drug addicts and alcoholics may rise to a socially intolerable level.

T.A.G.

https://openscholarship.wustl.edu/law_lawreview/vol63/iss2/7