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Physicians and Surgeons - Negligence - Psychotherapist Has a Duty to Warn an Endangered Victim Whose Peril Was Disclosed to Psychotherapist by Patient

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or attempt to remove an impounded vehicle without first paying the costs of impoundment.

If a case similar to *Remm* arises in North Dakota, it appears that the ordinances mentioned above[79] may be declared at least partially invalid under the requirements of *Fuentes v. Shevin*.[80] Although *Remm* has questionable value as precedent in North Dakota, its application of the *Fuentes* decision to the issue of prior notice and opportunity for a hearing before assessment of towing and storage fees before return of an impounded vehicle is sound, and it is likely that other courts will arrive at the same conclusion in scrutinizing similar ordinances. Although the impact of requiring due process in this area is not a matter of life and death, it is significant to a vehicle owner who may believe his vehicle was impounded improperly.

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PHYSICIANS AND SURGEONS—NEGLIGENCE—PSYCHOTHERAPIST HAS A DUTY TO WARN AN ENDANGERED VICTIM WHOSE PERIL WAS DISCLOSED TO PSYCHOTHERAPIST BY PATIENT

Plaintiffs, parents of a young woman murdered by a former mental patient brought a wrongful death action against the regents of the University of California, four university psychotherapists,[1] and five policemen employed by the university. Prior to the woman's murder, the patient, while in psychotherapy, had confided his intention to kill a person readily identifiable as plaintiffs' daughter, but neither plaintiffs nor their daughter were warned of the patient's threats. Shortly after learning of the patient's intention the psychotherapist, assisted by the police, unsuccessfully tried to commit the patient.[2] Subse-

79. See ordinances cited in notes 58-66 *supra*.

80. 407 U.S. 67 (1972). *Fuentes* has already had an impact on North Dakota law. In Guzman v. Western State Bank, 516 F.2d 125 (8th Cir. 1975), the court held that North Dakota's prejudgment attachment procedure, N.D. CENT. CODE § 32-08-01 (1976), was unconstitutional because its provision for summary seizure did not meet the procedural safeguards standards established by *Fuentes* and Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

1. The psychotherapist defendants included Dr. Lawrence, the psychologist who examined the patient and determined that he should be committed; and Dr. Harvey Powelson, chief of the department of psychiatry at the university, who rescinded Moore's decision and directed that the staff at the hospital take no action to commit the patient. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 430n.2, 551 P.2d 334, 340n.2, 131 Cal. Rptr. 14, 20n.2 (1976).

In this comment, the term psychotherapist will include psychiatrists and clinical psychologists.

2. After Dr. Moore had determined that the patient should be committed, he wrote to the campus police, requesting that they briefly detain the patient. The police talked to the patient and upon his assurance that he would stay away from the young woman, they released him. Dr. Powelson then ordered the hospital staff to take no further action to commit the patient. *Id.* at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21.

quently, the patient discontinued the psychotherapy. Two months later, he killed the plaintiffs' daughter. Plaintiffs contended that defendants were negligent in failing to warn the victim and in not bringing about the patient's confinement.[3] The superior court sustained defendant's demurrers, and the state court of appeals affirmed. In reversing, the California Supreme Court held that when a psychotherapist determines, or pursuant to the standards of his profession should have determined, that his patient poses a serious danger to another, he is under a duty to warn the victim of the danger.[4] *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 114 (1976).

Under general tort principles, a person is ordinarily under no obligation or duty either to control the conduct of another[5] or to warn those endangered by such conduct.[6] However the courts have engrafted an exception to this rule where "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."[7]

Once this special relationship is established, affirmative duties, including a duty to warn, may be imposed to prevent injury to third persons. The defendant's conduct may be negligent, innocent or protected by governmental immunity, but as long as it contributes to the danger to the plaintiff, a relationship arises which imposes a duty to avoid further harm.[8]

The special relationships exception has traditionally been limited to the parent-child[9] and master-servant[10] relationships, and to those relationships where one party has charge of an individual with dangerous propensities.[11] The courts have been reluctant to extend the boundaries of this exception beyond these established relationships. When they have done so it has been the result of a serious and careful balancing of various competing social policy considerations.[12]

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3. *Id.* at 432-33, 551 P.2d at 341, 131 Cal. Rptr. at 21.

4. *Id.* at 450, 551 P.2d at 353, 131 Cal. Rptr. at 33.

5. *See, e.g.*, Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954); Wright v. Arcade School Dist., 230 Cal. App. 2d 272, 40 Cal. Rptr. 812 (1964); Scott v. McCrocklin, ——La.——, 29 So. 2d 619 (1947); RESTATEMENT (SECOND) OF TORTS § 315, Comment (1965).

6. W. PROSSER, LAW OF TORTS § 56 at 341 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 315, Comment (1965).

7. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 435, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976). *See* RESTATEMENT (SECOND) OF TORTS §§ 315-320 (1965).

8. *See, e.g.*, Tarasoff v. Regents of Univ. of Cal., 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974); Zylka v. Leikvoll, 274 Minn. 435, 144 N.W.2d 358 (1966); Parrish v. Atlantic Coast Line R. Co., 221 N.C. 292, 20 S.E.2d 299 (1942).

9. *See, e.g.*, Ellis v. D'Angelo, 116 Cal. App. 2d 310, 253 P.2d 675 (1953); RESTATEMENT (SECOND) OF TORTS § 316 (1965); Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 893-95 (1934).

10. Najer v. Southern Pac. Co., 191 Cal. App. 2d 634, 13 Cal. Rptr. 146 (1961); RESTATEMENT (SECOND) OF TORTS § 317 (1965); Harper & Kime, *supra* note 9, at 896-97.

11. Austin W. Jones Co. v. State, 122 Me. 214, 119 A. 577 (1923); RESTATEMENT (SECOND) OF TORTS § 319 (1965); Harper & Kime, *supra* note 9, at 897-98.

12. The major social policy considerations to be balanced are:

The most important consideration in establishing a duty to warn is foreseeability. The existence of a duty to exercise reasonable care to protect third persons is dependent upon whether the risk to be guarded against is one which would normally be foreseen.[13] Thus, courts have imposed a duty on hospitals to control the conduct of their patients and have held them liable for violence perpetrated by a patient against another where the danger to third persons is foreseeable.[14]

In *University of Louisville v. Hammock*,[15] the court found a hospital to be liable to an injured patient, based on the hospital's actual knowledge of the attacking patient's propensity for violence when suffering from one of his bouts with delirium tremens.[16] The court did, however, suggest that liability could be premised on the hospital's and physician's constructive knowledge "that a person so afflicted might reasonably be expected to become violent, uncontrollable, and dangerous at any time."[17]

In *Joachim v. State*,[18] the court, relying on *Hammock*, recognized that foreseeability of harm could be extended to third persons other than fellow patients.[19] Although the court in *Joachim* appeared to base its decision on the third person's status as an "invitee" of the hospital, it relied primarily upon the "reasonable expectation" test used in *Hammock*.[20]

In *Greenberg v. Barbour*[21] liability was imposed on a state mental hospital's staff doctor when he failed to admit a person known to entertain homicidal delusions and that person later assaulted the plaintiff.[22] The court in *Greenberg* appeared to find that the duty of a psychotherapist to protect an endangered person is by no means

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> [T]he 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, [and] the policy of preventing future harm.

Biakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958).

13. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1018 (1956).

14. In Vistica v. Presbyterian Hosp. & Medical Center, 67 Cal. 2d 465, 469, 432 P.2d 193, 196, 62 Cal. Rptr. 577, 580 (1967), the court stated:

> [W]here the hospital has notice or knowledge of facts from which it might reasonably be concluded that a patient would be likely to harm himself *or others* unless preclusive measures were taken, then the hospital must use reasonable care in the circumstances to prevent such harm.

(emphasis added). *See* Meier v. Ross Gen. Hosp., 69 Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968); Wood v. Samaritan Inst., 26 Cal. 2d 847, 161 P.2d 556 (1945). *Cf.* Merchants Nat'l Bank & Trust Co. v. United States, 272 F. Supp. 409 (D.N.D. 1967).

15. 127 Ky. 564, 106 S.W. 219 (1907).

16. *Id.* at ——, 106 S.W. at 220.

17. *Id.* at ——, 106 S.W. at 220.

18. ——Misc.——, 43 N.Y.S.2d 167 (Ct. Cl. 1943).

19. *Id.* at ——, 43 N.Y.S.2d at 170. *See* Weihs v. State, 267 App. Div. 233, ——, 45 N.Y.S.2d 542, 544 (1943); Jones v. State, 267 App. Div. 254, ——, 45 N.Y.S.2d 404, 406 (1943).

20. ——Misc.——, 43 N.Y.S.2d 167 (Ct. Cl. 1943).

21. 322 F. Supp. 745 (E.D. Pa. 1971).

22. *Id.* at 746.

limited to situations where there is a special relationship between the therapist and the patient.[23] An even more compelling duty would seem to arise once the dangerous person has been admitted for therapy and a psychotherapist-patient relationship has been established.

The cases favoring recognition of a duty to control the dangerous person's conduct center on the defendant's actual or constructive knowledge of the person's dangerous propensities.[24] However, where a duty to warn third persons is sought to be imposed, the courts have generally demanded that the defendant possess actual knowledge of the person's dangerous tendencies.[25]

In *Bullock v. Parkchester General Hospital*,[26] the court stated that the hospital and doctor would be liable for the patient's assault on a nurse *only* if they had actual knowledge of the patient's dangerous condition.[27] In declining to base liability on constructive knowledge, the court in *Bullock* expressed concern that such an imposition would penalize physicians for errors in judgment.[28] The court also suggested that the physician's knowledge of the patient's specific mental condition (psychosis) should not be translated into a duty to know whether a tendency toward violence was predictable.[29]

In *Sealey v. Finkelstein*,[30] the court granted defendant's motion for summary judgment because plaintiff's evidence failed to establish that the physician had actual knowledge that the patient's condition was such that an assault might be expected to follow.[31] In *Sealey*, the court appeared to rely heavily on the fact that the patient had never exhibited any "dangerous and vicious propensities"[32] prior to the assault and, therefore, the physician could not accurately predict whether the patient would become violent.

The overwhelming evidence is that psychotherapists and psychiatrists cannot reliably predict future violent behavior.[33] The majority

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23. *Id.* at 747. *Cf.* Fair v. United States, 234 F.2d 288 (5th Cir. 1956); Morgan v. County of Yuba, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964).

24. *See, e.g.*, Sylvester v. Northwestern Hosp., 236 Minn. 384, 53 N.W.2d 17 (1952); Benson v. State, ——Misc.——, 52 N.Y.S.2d 239 (Ct. Cl. 1944).

25. *See, e.g.*, Stake v. Women's Div. Christian Serv., 73 N.M. 303, 387 P.2d 871 (1963); Sealey v. Finkelstein, ——Misc. 2d——, 206 N.Y.S.2d 512 (Sup. Ct. 1960); Bullock v. Parkchester Gen. Hospital, 3 App. Div. 254, 160 N.Y.S.2d 117 (1957).

26. 3 App. Div. 2d 254, 160 N.Y.S.2d 117 (1957).

27. *Id.* at ——, 160 N.Y.S.2d at 120.

28. *Id.* at ——, 160 N.Y.S.2d at 120, *citing* St. George v. State, 283 App. Div. 245, 127 N.Y.S.2d 147 (1954), where the court felt that an imposition of liability for errors in judgment might lead to the unnecessary confinement of innocent individuals. *See also* Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 462, 551 P.2d 334, 354, 131 Cal. Rptr. 14, 41 (1976) (Clark, J., dissenting).

29. 3 App. Div. 2d 254, ——, 160 N.Y.S.2d 117, 119 (1957).

30. ——Misc. 2d——, 206 N.Y.S.2d 512 (Sup. Ct. 1960).

31. *Id.* at ——, 206 N.Y.S.2d at 516. *See* Stake v. Women's Div. Christian Serv., 73 N.M. 303, 387 P.2d 871 (1963).

32. ——Misc. 2d——, 206 N.Y.S.2d 512, 514 (Sup. Ct. 1960).

33. Justice Douglas has said of the reliability of predicting future violent behavior that:

> Predictions of dangerous behavior, no matter who makes them, are incredibly inaccurate, and there is a growing consensus that psychiatrists are not uniquely qualified to predict dangerous behavior and are, in fact, less accurate in their predictions than other professionals.

in *Tarasoff* recognized this difficulty as inherent in a determinative process that is characterized by complexity and uncertainty,[34] but determined that it was only one factor in establishing the extent of his duty to exercise reasonable care in protecting third persons from his patient's violent acts.[35] The majority indirectly recognized one of the important considerations in the *Bullock*[36] and *Sealey*[37] decisions when it noted that the therapist need not be perfect in his predictions of violence.[38] However, while the court did not require perfection, it did require that the therapist exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances."[39]

The court also acknowledged that the public interest in effective treatment of mental illness and the importance of guarantying the confidential character of psychotherapeutic communications[40] had been recognized by the legislature in the form of a specific psychotherapist-patient privilege,[41] but reasoned that "[t]he protective privilege ends where the public peril begins."[42]

The distinctions made by Justice Clark, in dissent, appear to center on the effect a duty to warn may have on the psychotherapeutic privilege.[43] Justice Clark was strongly concerned that, if the therapist could no longer guarantee the confidentiality of a patient's communications, many people in need of treatment would be deterred from

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Murel v. Baltimore City Crim. Ct., 407 U.S. 355, 365n.2 (1972) (Douglas, J., dissenting from a denial of certiorari). *See, e.g.*, Cocozza & Steadman, *Some Refinements in the Measurements and Prediction of Dangerous Behavior*, 131 AM. J. PSYCH. 1012 (1974); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1975); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 711-16 (1975); Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DEL. 393 (1972); Steadman, *Some Evidence on the Inaccuracy of the Concept and Determination of Dangerousness in Law & Psychiatry*, 1 J. PSYCH. & LAW 409 (1973); Wenk, Robinson & Smith, *Can Violence Be Predicted?* 18 CRIME & DEL. 393 (1972).

34. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 438, 551 P.2d 334, 345, 131 Cal. Rptr. 14, 25 (1976).

35. *Id.* at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.

36. 3 App. Div. 254, 160 N.Y.S.2d 117 (1957).

37. ——Misc. 2d——, 206 N.Y.S.2d 512 (Sup. Ct. 1960).

38. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 438, 551 P.2d 334, 345, 131 Cal. Rptr. 14, 25 (1976).

39. *Id.* at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25, *quoting* Bardessono v. Michels, 3 Cal. 3d 780, 788, 478 P.2d 480, 484, 91 Cal. Rptr. 760, 764 (1970). *See also* Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 397 P.2d 161, 41 Cal. Rptr. 577 (1964); Lawless v. Calaway, 24 Cal. 81, 147 P.2d 604 (1944).

40. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 440, 551 P.2d 334, 346, 131 Cal. Rptr. 14, 26 (1976).

41. CAL. EVID. CODE § 1014 (Supp. 1976). Massachusetts is thus far the only other state that recognizes a similar psychotherapist-patient privilege. MASS. GEN. LAWS ANN. ch. 233 & 20B (Supp. 1976). N.D.R. Ev. 503 adopted by the North Dakota Supreme Court on Dec. 1, 1976, also recognizes the necessity of this privilege.

42. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 442, 551 P.2d 334, 347, 131 Cal. Rptr. 14, 27 (1976). *See also* Simonson v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920); Munzer v. Blaisdell, 183 Misc. 773, 49 N.Y.S.2d 915 (1944); Berry v. Moench, 8 Utah 191, 331 P.2d 814 (1958).

43. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 458-60, 551 P.2d 334, 359-60, 131 Cal. Rptr. 14, 39-40 (1976).

seeking it[44] and that, without this assurance of confidentiality, patients might repress violent thoughts with tragic consequences.[45] However, the dissent seems to have overlooked the most significant consideration involved—the lives of possible victims that may be saved by the creation of a duty to warn.

The incidence of mental illness in North Dakota is not as widespread as in California. Nevertheless, the import of *Tarasoff* cannot be completely overlooked by psychiatrists in North Dakota.

A question similar to the one posed in *Tarasoff* has been addressed by the federal courts in North Dakota. In *Merchants National Bank & Trust Co. v. United States*,[46] a psychologist treating a dangerous mental patient at a veteran's hospital was held to be negligent in failing to bring evidence of the patient's mental condition to the attention of the hospital personnel.[47] With such notice they could have evaluated the evidence and presumably could have refused to allow the patient to leave, thus possibly preventing the murder that the patient committed shortly after his departure from the hospital. While the court did not specifically rely upon a duty to warn for its finding of liability, a fair reading of this decision does indicate a possible basis for future rulings on this issue.

Violence is an ever-increasing and tragic consequence of mental illness. Society has a right to demand protection from this violence and the mentally ill have a concomitant right to psychotherapeutic treatment. The therapist, however, is caught in the middle of this struggle of rights. Since he is involved with potentially dangerous individuals and is given the power to detain those suspected of being dangerous,[48] the public may tend to perceive him as an agent of society whose duty is to protect society from the hidden danger confided to him by his patients. The therapist is similarly seen as a confidant by the patient in whom he can confide his deepest secrets. By imposing a duty to warn on the therapist only when the patient's confidences reveal a preventable danger to a third person, the California Supreme Court has provided a fair and equitable solution to the therapist's dilemma.

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CRIMINAL LAW—ENTRAPMENT—IF DEFENDANT IS PREDISPOSED TO COMMIT THE OFFENSE, NO DEFENSE OF ENTRAPMENT EXISTS, EVEN IF GOVERNMENT AGENT SUPPLIES THE CONTRABAND.

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44. *Id.* at 459-60, 551 P.2d at 359-60, 131 Cal. Rptr. at 39-40.
45. *Id.* at 459, 551 P.2d at 359, 131 Cal. Rptr. at 39. *See also In re* Lifschutz, 2 Cal. 3d 415, 426, 467 P.2d 557, 564, 85 Cal. Rptr. 829, 836 (1970).
46. 272 F. Supp. 409 (D.N.D. 1967).
47. *Id.* at 418.
48. N.D. CENT. CODE § 25-03-08 (1970).