35th Annual Forensic Mental Health Association of California Conference

Integrating Disciplines: Affirming Our Core Values

Evolving Concepts in Mental Health Law: Four Decades of *Tarasoff* in California

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LEXSEE 14 CAL. 3D 306

THE PEOPLE, Plaintiff and Respondent, v. CHARLES R. BURNICK, Defendant and Appellant

Crim. No. 16554

Supreme Court of California

14 Cal. 3d 306; 535 P.2d 352; 121 Cal. Rptr. 488; 1975 Cal. LEXIS 287

May 15, 1975

SUBSEQUENT HISTORY: Respondent's petition for a rehearing was denied June 11, 1975. Clark, J., and Richardson, J., were of the opinion that the petition should be granted.

PRIOR HISTORY: Superior Court of Los Angeles County. No. M 231566, Donald F. Pitts, Temporary Judge. *

* Pursuant to *Constitution, article VI, section 21.*

DISPOSITION: The order appealed from is reversed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Following conviction of a crime and a hearing under the mentally disordered sex offenders law (*Welf. & Inst. Code, § 6300 et seq.*), defendant was adjudicated to be such an offender and committed to a state hospital for an indeterminate period. He thereupon demanded a trial of the issue of his status as such an offender, waived a jury trial, and requested that the court apply the "beyond a reasonable doubt" burden of proof standard. However, the court denied the request and in a hearing in which it applied the preponderance of evidence standard, again found defendant to be such an offender and committed him to the same state hospital for an indefinite period. (Superior Court of Los Angeles County. No. M 231566, Donald F. Pitts, Temporary Judge. *)

* Pursuant to *Constitution, article VI, section 21.*

The Supreme Court reversed. After noting that on being charged as a mentally disordered sex offender, a person's liberty is threatened, that the threat is fulfilled in the order of commitment, and that no less stigma results from being pronounced such an offender than from a criminal conviction or an adjudication of juvenile delinquency, the court concluded that sexual psychopath proceedings are subject to the full panoply of the protections of the due process clause. Accordingly, it was held that the due process clauses of *Cal. Const., art. I, § 7, subd. (a)*, and *U.S. Const., 14th Amend.* require that the standard of proof beyond a reasonable doubt be applied in proceedings under the mentally disordered sex offenders law at any stage of the proceedings in which the involved person is committed or recommitted to the State Department of Health pursuant to a finding that he is such an offender. Further, the court announced that its decision is to be given complete retroactive effect. (Opinion by Mosk, J., with Wright, C. J., Tobriner and Sullivan, JJ., concurring. Separate dissenting opinion by Burke, J., * with McComb, J., and Wood, J., + concurring.)

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

\+ Assigned by the Chairman of the Judicial Council.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Criminal Law § 193--Mentally Disordered Sex Offenders--Hearing--Burden of Proof. --The standard of proof applicable to proceedings under the mentally disordered sex offenders law (*Welf. & Inst. Code, § 6300 et seq.*), is controlled by *Evid. Code, § 115*, which declares that except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. As used therein, the word "law" includes the law established by judicial decisions, as well as by constitutional and statutory provisions.

(2) Criminal Law § 193--Mentally Disordered Sex Offenders--Hearing--Findings. --In proceedings under the mentally disordered sex offenders law, resolution of the question whether defendant comes within the definition of such an offender set forth in *Welf. & Inst. Code, § 6300*, is a new finding of fact that was not an ingredient of the offense charged.

(3) Courts § 37--Decisions and Orders--Doctrine of Stare Decisis--Propositions Not Considered. --Cases are not authority for propositions not considered.

(4) Criminal Law § 196--Mentally Disordered Sex Offenders--Commitment--As Deprivation of Liberty. --When a man is charged with being a mentally disordered sex offender, his liberty is at stake. The threat is fulfilled in the order of commitment. Commitment to a state hospital under the mentally disordered sex offenders law (*Welf. & Inst. Code, § 6300 et seq.*), results in a real deprivation of liberty. One so committed suffers a personal deprivation far in excess of that experienced by a youth adjudged to be a juvenile delinquent.

(5) Criminal Law § 196--Mentally Disordered Sex Offenders--Commitment--Possibility of Commitment for Life. --Under *Welf. & Inst. Code, §§ 6316, 6326*, parts of the mentally disordered sex offenders law, a person committed pursuant to its provisions may be detained for any length of time whatever--potentially for life.

(6) Criminal Law § 191--Mentally Disordered Sex Offenders--Stigma of Pronouncement. --No less stigma results from a judicial pronouncement under the mentally disordered sex offenders law (*Welf. & Inst. Code, § 6300 et seq.*) than from a criminal conviction, and the stigma of such an adjudication is greater than that of juvenile delinquency.

(7) Criminal Law § 194--Mentally Disordered Sex Offenders--Hearing--Rights of Defendant--Burden of Proof. --The standard of proof in proceedings under the mentally disordered sex offenders law (*Welf. & Inst. Code, § 6300 et seq.*) must be as high as it is in juvenile delinquency proceedings, to-wit, proof beyond a reasonable doubt. Anything less will fall short of providing the level of due process required by the California and federal Constitutions.

(8) Criminal Law § 194--Mentally Disordered Sex Offenders--Hearing--Rights of Defendant--Burden of Proof. --A requirement of proof beyond a reasonable doubt in proceedings under the mentally disordered sex offenders law (*Welf. & Inst. Code, § 6300 et seq.*) is not negated by the "predictive" content of the ultimate finding.

(9) Criminal Law § 194--Mentally Disordered Sex Offenders--Hearing--Rights of Defendant--Burden of Proof. --The fact that the issues in the criminal trial resulting in the conviction preceding hearings under the mentally disordered sex offenders law (*Welf. & Inst. Code, § 6300 et seq.*) were judged by the reasonable doubt standard has no bearing on how the distinct issues under that law must be proved.

(10) Criminal Law § 194--Mentally Disordered Sex Offenders--Hearing--Rights of Defendant--Jury. --A man facing indefinite confinement in a maximum security state mental institution because of what he is allegedly predisposed to do is entitled to a jury which impartially weighs the evidence, appraises with an open mind the credibility and persuasiveness of all the witnesses, and reaches its own independent judgment on the issues submitted to it.

(11) Criminal Law § 194--Mentally Disordered Sex Offenders--Hearing--Rights of Defendant--Burden of Proof. --The fact that experts testifying in proceedings under the mentally disordered sex offenders law (*Welf. & Inst. Code, § 6300 et seq.*) need not limit their testimony to matters on which they have opinions beyond a reasonable doubt is no reason why the jury in those proceedings should not be required to apply the "reasonable doubt" standard of proof.

(12) Criminal Law § 194--Mentally Disordered Sex Offenders--Hearing--Rights of Defendant--Burden of Proof. --The due process clauses of *Cal. Const., art. I, § 7, subd. (a)*, and *U.S. Const., 14th Amend.* require that the standard of proof beyond a reasonable doubt be applied in proceedings under the mentally disordered sex offenders law (*Welf. & Inst. Code, § 6300 et seq.*) at any stage of the proceedings in which the involved person is committed or recommitted to the State Department of Health pursuant to a finding that he is such an offender.

COUNSEL: Barry David Kohn for Defendant and Appellant.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., and Herbert L. Ashby, Chief Assistant Attorneys General, William E. James, Assistant Attorney General, William R. Pounders and Joel S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: In Bank. Opinion by Mosk, J., with Wright, C. J., Tobriner and Sullivan, JJ., concurring. Separate dissenting opinion by Burke, J., * with McComb, J., and Wood, J., + concurring.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

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OPINION BY: MOSK

OPINION

[*309] [**354] [***490] Professor Wigmore perceptively observes that "The mental condition of one whose mind is so deranged as to require imprisonment for his own and others' good is indeed pitiable. But the mental attitude of one who is falsely found insane and relegated to life imprisonment is [*310] beyond conception. No greater cruelty can be committed in the name of the law." (5 Wigmore on Evidence (Chadbourn rev. 1974) § 1400, p. 201.)

Surely it is no less cruel to falsely find a man to be a "mentally disordered sex offender" and confine him indefinitely in a prison-like state mental institution. Against such grievous errors the law has erected sturdy bulwarks of procedure. In the quoted paragraph, for example, Professor Wigmore stresses the importance of the right of confrontation. No less critical is the standard of proof -- the degree of persuasion which the plaintiff must achieve in the minds of the judge or jury in order to invoke the coercive powers of the state against the defendant. The law wisely proportions this standard to the gravity of the consequences of an erroneous judgment: thus a criminal charge must be proved beyond a reasonable doubt, while an ordinary claim of breach of contract may be established by a preponderance of the evidence. (See generally *In re Winship (1970) 397 U.S. 358, 369-372 [25 L.Ed.2d 368, 378-380, 90 S.Ct. 1068]* (Harlan, J., concurring).)

In the case at bar we are called upon to determine the proper standard of proof in mentally disordered sex offender proceedings. As we shall explain, we reject the asserted right of the state to publicly brand a man as a mentally disordered sex offender and lock him up for an indeterminate period in a maximum security mental hospital on a mere preponderance of the evidence, i.e., "under the same standard of proof applicable to run-of-the-mill automobile negligence actions." (Fn. omitted.) (*Murel v. Baltimore City Criminal Court (1972) 407 U.S. 355, 359 [32 L.Ed.2d 791, 794, 92 S.Ct. 2091]* (Douglas, J., dissenting from dismissal of certiorari).) We hold, rather, that in order to comply with the requirements of the due process clauses of the California and federal Constitutions, so drastic an impairment of the liberty and reputation of an individual must be justified by proof beyond a reasonable doubt.

The case is before us on an appeal by defendant Burnick (*Pen. Code, § 1237, subd. 1*) from an order adjudging him to be a mentally disordered sex offender within the meaning of *Welfare and Institutions Code section 6300.* [1] The code provides that when a person is convicted of any offense [*311] the trial judge may adjourn the proceedings and certify the person to the superior court for a hearing if it appears to the judge there is probable cause for believing him to be a mentally disordered sex offender. (§ 6302.) This procedure was [**355] [***491] followed in the case at bar. [2] The court found Burnick to be a mentally disordered sex offender, and committed him to Atascadero State Hospital for an indeterminate period. (*§ 6316.*) Burnick demanded a jury trial of the issue (§ 6318), but subsequently waived a jury and went to trial before the court. Prior to the taking of testimony Burnick requested that the court apply the standard of proof beyond a reasonable doubt in making its determination. The court refused the request and ruled that it would decide the case by a preponderance of the evidence. Under that standard, Burnick was again found to be a mentally disordered sex offender and a second order was made committing him to Atascadero for an indefinite period. (*§ 6321.*)

1 *Section 6300* defines a mentally disordered sex offender as "any person who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others." The earlier statutory term for such a person was "sexual psychopath." (See former § 5500.)

Unless otherwise specified, all statutory references in this opinion are to the Welfare and Institutions Code.

2 The record before us is silent as to the particular offense of which Burnick was convicted. The Attorney General states -- and for present purposes we may take it as true -- that he was convicted in the municipal court of violations of *Penal Code section 647a* (conduct which "annoys or molests" a person under the age of 18) and *sec-*

tion 272 (contributing to the delinquency of a person under the age of 21). Each is a misdemeanor, punishable by a fine and/or a brief county jail sentence.

I

The importance of the standard of proof in mentally disordered sex offender proceedings is well illustrated by the case at bar. The evidentiary facts are uncomplicated. From psychiatric interviews and probation and other reports it developed that at age 12 Burnick had certain limited sexual contacts with men. He married, apparently while still a teenager, but his wife died in childbirth. For several years after her death he had no sexual relations with women. At the time of the events in question he was 28 years old, and was employed in a shop selling psychedelic art and materials. He became acquainted with two boys aged 13 and 15 years, and the three were friends for approximately a year. In the course of the latter months of that year they engaged in four to six consensual sexual acts, which were the basis of the charges brought against Burnick. He has no record whatever of violence, or of previous violations of law.

From these facts three psychiatrists, all eminently qualified by training and experience as experts on the subject of mentally disordered sex offenders, drew widely differing conclusions as to both Burnick's diagnosis and prognosis.

[*312] Dr. Alvin Davis, the sole witness for the prosecution, gave as his opinion that Burnick was a homosexual pedophile, i.e., a man who engages in sexual activities with adolescent boys; that he was likely to repeat such acts in the future; and that the conduct would be "dangerous to the health and safety of others" (*§ 6300*), but only in the sense that youths who were still "undecided" about their sexual identity might be influenced towards homosexuality because of their experiences with Burnick. On cross-examination, Dr. Davis conceded that a child's sexual identity begins to be formed early in life, long before puberty; that it is possible Burnick would limit his contacts to youths who were already homosexually oriented; and that his conduct would pose no danger to those who were either heterosexuals or confirmed homosexuals.

Two psychiatrists testified for the defense, and their views were in clear conflict with those of Dr. Davis. Dr. Michael Coburn denied that Burnick was a homosexual: although he had participated in both heterosexual and homosexual conduct on occasion, "he is not a homosexual in the commonly understood meaning of the term. He is predominantly heterosexual in his past." Nor was he pedophilic: "I don't find him to be sexually attracted to pre-pubital human beings of either sex. . . . His interest is not in children but in sexually mature individuals, whether or not their age be mature." Dr. Coburn's diagnosis was twofold: that Burnick had a highly immature personality, and that he [**356] [***492] suffered from a long-standing depression resulting from an inability to deal in a realistic way with the death of his wife.

The witness acknowledged that in standard psychiatric nomenclature both immature personality and depression are classified as "character disorders." But whether or not that general term is the equivalent of the statutory phrase, "mental defect, disease, or disorder" (*§ 6300*), Dr. Coburn firmly concluded that Burnick was not "dangerous to the health and safety of others." Although it was "possible" that he might again engage in acts such as those charged, it was not "likely" because the events had caused him increased guilt feelings and decreased sexual pleasure. In any case, Dr. Coburn was of the opinion that isolated acts such as here involved would have no more than a slight effect on the sexual development of even an "undecided" adolescent. [3]

3 The doctor explained that such contacts could be "a factor" in the youth's development, but "So is how his first three or four . . . heterosexual dates treat him. A couple of bad rejections by a heterosexual partner would do maybe more damage as far as making [him] a person unable to have further heterosexual relations."

[*313] Dr. Andre Tweed also refused to classify Burnick as a homosexual, stressing his heterosexual activities. Rather, he found Burnick to be an immature person whose homosexual experiences were entirely situational. The witness recognized that immature personality is classified as a "character disorder" in professional terminology, but explained that the label merely means that "your behavior does not conform to that which society sets up at that particular moment as being the so-called norm." [4]

4 By way of example the doctor stated, "if the Legislature were to say tomorrow, today or tomorrow, that it's perfectly all right to engage in homosexual activities . . . it would no longer be characterized as a character disorder. It would become so-called normal behavior because it would not then be in conflict with society, because society [would have] changed its standards at that particular time."

Dr. Tweed further stated that in his opinion Burnick was not a pedophile. The youths with whom he was involved were not children, and in the doctor's opinion had probably initiated the encounters themselves. Adolescents were not Burnick's primary interest: "I don't believe that he is the type of individual who would go out and

actively solicit activities with that particular age group." Rather, his sexual feelings were "directed more toward consenting adults." In any event, according to Dr. Tweed, the average adolescent today has generally had "some type of sexual experience, heterosexual or homosexual, and it doesn't affect him one way or the other."

For these reasons Dr. Tweed fully agreed with Dr. Coburn's conclusion that Burnick was not "dangerous to the health and safety of others" and was not a mentally disordered sex offender.

No other witness testified, and no documentary evidence was introduced. In oral argument defense counsel sharply challenged the adequacy of the People's proof of each element of their case, urging for example that when we deal with "the possible deprivation of liberty of an individual for his natural life . . . we need something more than just mere personality disorder," and that the speculative risk of his influencing some youths towards homosexuality is not "a sufficient danger to take away Mr. Burnick's liberty for such a prolonged period of time." The court nevertheless found, by an asserted preponderance of the evidence, that Burnick was a mentally disordered sex offender within the meaning of *section 6300.*

II

The record shows that the trial court felt compelled to decide the issue by a preponderance of the evidence because of the statutory directive [*314] that in mentally disordered sex offender proceedings "The trial shall be had as provided by law for the trial of civil causes . . . ." (*§ 6321.*) But it is apparent from the face of the statute that it does not mandate any particular [**357] [***493] standard of proof, nor does any other provision of the mentally disordered sex offender law. (See, e.g., *§ 6316.*) **(1)** The matter is therefore controlled by the general provisions of *section 115 of the Evidence Code*, which declares in relevant part that "*Except as otherwise provided by law*, the burden of proof requires proof by a preponderance of the evidence." (Italics added.) According to the comment to that section by the Assembly Committee on Judiciary, the exception means, "unless a heavier or lesser burden of proof is specifically required in a particular case by constitutional, statutory, *or decisional law.*" (Italics added.) *Evidence Code section 160* defines "law" in the same tripartite terms, and the draftsman's comment thereto reiterates that "a reference [in the Evidence Code] to 'law' includes the law established by judicial decisions as well as by constitutional and statutory provisions." Nor is this surprising, as the choice of standard of proof "is the kind of question which has traditionally been left to the judiciary to resolve . . . ." (Fn. omitted.) (*Woodby v. Immigration Service (1966) 385 U.S. 276, 284 [17 L.Ed.2d 362, 368, 87 S.Ct. 483].*)

That question, accordingly, is not answered by the People's reliance on the general proposition that mentally disordered sex offender proceedings are "civil in nature." (See, e.g., *In re Bevill (1968) 68 Cal.2d 854, 858 [69 Cal.Rptr. 599, 442 P.2d 679].*) Nor is it necessary to inquire into the constitutionality of the quoted language of *section 6321* or *Evidence Code section 115.* Rather we apply those statutes, and proceed to determine whether the standard of proof beyond a reasonable doubt is "otherwise required" in mentally disordered sex offender proceedings. Yet in so doing we are moved by constitutional considerations of the highest order, inasmuch as we discharge our duty to insure that no person be deprived of his liberty without the due process of law guaranteed by *article I, section 7, subdivision (a), of the California Constitution*, and the *Fourteenth Amendment to the United States Constitution.* [5]

> 5 Similarly, the Legislature has not specified the standard of proof for involuntary commitment of persons under our general mental health law (*Welf. & Inst. Code, § 5000 et seq.*, known as the Lanterman-Petris-Short Act), but has provided that such proceedings shall be conducted "in accordance with constitutional guarantees of due process of law and the procedures required under Section 13 [now § 7, subd. (a)] of Article 1 of the Constitution of the State of California." (§ 5303.) As in the case at bar, it will be for the courts to decide which standard of proof is necessary to comport with those "guarantees and procedures" in view of the consequences to the individual of a commitment under the Lanterman-Petris-Short Act.

[*315] In the absence of California cases in point, we find guidance in recent decisions of the United States Supreme Court. The first is *Specht v. Patterson (1967) 386 U.S. 605 [18 L.Ed.2d 326, 87 S.Ct. 1209]*, dealing with a "sexual psychopath" statute essentially similar in outline and purpose to the legislation here challenged. The Colorado Sex Offenders Act provided that if the trial court was of the opinion that a defendant convicted of a specified sex offense "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill, "he could be sentenced to an indeterminate term of one day to life upon a psychiatric examination and report. There was no formal hearing under the statute.

A defendant who had been thus sentenced sought federal habeas corpus, and the United States Supreme Court unanimously reversed a denial of that remedy. The court expressly declined (at p. 608 [*18 L.Ed.2d at p.*

329]) to extend to this area its holding in *Williams v. New York (1949) 337 U.S. 241, 249-250 [93 L.Ed. 1337, 1343-1344, 69 S.Ct. 1079]*, that due process does not require a full hearing with right of cross-examination at the time of fixing sentence. Rather, the court reasoned, "These commitment proceedings *whether denominated civil or criminal* are subject both to the Equal Protection Clause of the Fourteenth Amendment as we held in *Baxstrom v. Herold, 383 U.S. 107*, [**358] [***494] and to the Due Process Clause. We hold that the requirements of due process were not satisfied here.

"The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. *That is a new finding of fact* [citation] *that was not an ingredient of the offense charged.* The punishment under the second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm." (Italics added; fn. omitted.) (*386 U.S. at pp. 608-609 [18 L.Ed.2d at p. 329]*.)

This language repays close examination. To begin with, the court here disregarded the "civil label of convenience" one month before its landmark decision in *In re Gault (1967) 387 U.S. 1 [18 L.Ed.2d 527, 87 S.Ct. 1428]*. [6] Nor was the court deceived by the fact that the purpose of [*316] the confinement was not primarily retribution. Instead the court penetrated directly to the substance of the proceeding and examined the relationship between the original conviction and the ensuing commitment inquiry, holding that the latter must satisfy both equal protection and due process. The court noted that the purpose of the commitment proceeding was to determine whether the defendant "constitutes" a danger to others or "is" a mentally ill habitual offender. That determination, said the court, "is a new finding of fact . . . that was not an ingredient of the offense charged." [7]

> 6 In *Gault*, of course, the court firmly interred that label for all constitutional purposes. A fitting epitaph might be the court's conclusion that "commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" (*Id. at p. 50 [18 L.Ed.2d at p. 558]*.) (For a witty critique of the use and abuse of such labels in civil commitment proceedings, see Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis* (1973) 51 Tex.L.Rev. 1277, 1295-1299.)
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> 7 This holding was reiterated in a passage in *Humphrey v. Cady (1972) 405 U.S. 504, 511 [31 L.Ed.2d 394, 403-404, 92 S.Ct. 1048]*, in which the court emphasized that under the Wisconsin Sex Crimes Act five-year renewal commitments of persons who are determined to be "dangerous" to the public because of their mental or physical "deficiency, disorder or abnormality" are "based on new findings of fact . . . ." The *Humphrey* opinion cites *Specht* at page 508 of 405 U.S. [page 402 of 31 L.Ed.2d].

An identical analysis applies to the California mentally disordered sex offender law. **(2)** We begin with the simple grammatical fact that our statute speaks in the present rather than the future tense: *section 6300* defines a mentally disordered sex offender as a person (1) who suffers, i.e., at the present time, from a "mental defect, disease, or disorder" and (2) who "is" thereby predisposed to commit sex crimes to such a degree that (3) he "is" a danger to others. These are inquiries into the defendant's *present* state of mind and risk of harm, and they are indistinguishable from the issues raised by the statute involved in *Specht*, i.e., whether the defendant "is" a mentally ill habitual offender or "constitutes" a danger to others. As in *Specht*, therefore, their resolution in the commitment proceeding is a "new finding of fact . . . that was not an ingredient of the offense charged."

The *Specht* court then listed the several respects in which the Colorado statute failed to provide due process: that constitutional guarantee "requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed." (*386 U.S. at p. 610 [18 L.Ed.2d at p. 330]*.) We recognize that the right to jury trial and the standard of proof beyond a reasonable doubt are not mentioned among the rights thus enumerated. For at least two reasons, [*317] however, the omission of such matters from the *Specht* opinion is without significance.

[**359] [***495] First, a careful reading of *Specht* and the lower court opinions in that case shows that the petitioner did not specifically claim the right to a jury trial or proof beyond a reasonable doubt; those issues, accordingly, were not presented to the United States Supreme Court. **(3)** In the federal system no less than in California, cases are not authority for propositions not considered. (*In re Tartar (1959) 52 Cal.2d 250, 258 [339 P.2d 553]*, and cases cited.) Second, the precise holding of *Specht* was that the Colorado statute was deficient in due process "as measured by the requirements of the Fourteenth Amendment." (*386 U.S. at p. 611 [18 L.Ed.2d at p. 331]*.) But as of the date of *Specht* (1967) the Supreme Court had not yet held that the due process clause of the federal Constitution requires the states to guarantee a jury trial in criminal cases

and the protection of proof beyond a reasonable doubt. [8] The awaited rulings of the high federal court did not come until 1968 in the case of jury trial (*Duncan v. Louisiana, 391 U.S. 145, 149 [20 L.Ed.2d 491, 496, 88 S.Ct. 1444]*) and 1970 for proof beyond a reasonable doubt (*In re Winship, supra, 397 U.S. 358, 364 [25 L.Ed.2d 368, 375]*; see *People v. Vann (1974) 12 Cal.3d 220, 227-228 [115 Cal.Rptr. 352, 524 P.2d 824]*).

8 This chronology is emphasized in *United States v. Maroney (3d Cir. 1966) 355 F.2d 302*, a decision strongly relied on in *Specht*. There a Pennsylvania sexual psychopath proceeding essentially identical to the Colorado law challenged in *Specht* was attacked on the ground, inter alia, that its lack of a jury trial violated due process. The court was of the opinion that "the guarantee of jury trial would apply to [the Pennsylvania] proceeding if the Fourteenth Amendment makes it applicable in state criminal cases," but explained that the question remained "whether the right to trial by jury, guaranteed as it is by the Sixth Amendment, is within the protection of the Fourteenth Amendment prohibition against deprivation of liberty without due process of law." (*Id. at p. 313.*) Noting that the United States Supreme Court had not yet squarely answered that question, the court deferred in the meanwhile to the views of the Pennsylvania courts on the matter.

Yet if *Specht* did not prophesy each and every step in the future development of the role that due process must play in these commitment proceedings, it clearly pointed the way. The court quoted the following language from *United States* v. *Maroney* (3d Cir. 1966) *supra, 355 F.2d 302, 312*: "It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to *the full panoply of the relevant protections* [*318] *which due process guarantees in state criminal proceedings*. He must be afforded *all those safeguards which are fundamental rights and essential to a fair trial*, including the right to confront and cross-examine the witnesses against him." (Italics added.) The *Specht* court unequivocally adopted this language as its own, saying, "We agree with that view." (*386 U.S. at p. 610 [18 L.Ed.2d at p. 330*].)

In light of the fundamental similarity between the sexual psychopath proceedings challenged in *Specht* and in the case at bar, the question before us is whether proof beyond a reasonable doubt is among the "full panoply of the relevant protections which due process guarantees in state criminal proceedings." The answer was definitively given by the Supreme Court in the second case here in point, *In re Winship* (1970) *supra, 397 U.S. 358.*

As noted above, *Winship* declared that in criminal cases the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt. Particularly important for our purposes is the court's dual justification for that rule: "The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution [**360] [***496] has at stake interests of immense importance, both because of the possibility that he may *lose his liberty* upon conviction and because of the certainty that he would be *stigmatized* by the conviction." (Italics added.) (*397 U.S. at p. 363 [25 L.Ed.2d at p. 375*].) The court then recalled (at pp. 365-366 [*25 L.Ed.2d at pp. 375-377*]) that *Gault* had shown how the same two consequences flow from an adjudication of juvenile delinquency. [9] Accordingly, the court concluded (at p. 367 [*25 L.Ed.2d at p. 377*]) that the safeguard of proof beyond a reasonable doubt must extend to juvenile proceedings as well: judicial intervention in the child's life for his own good, said the court, "cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult." (Fn. omitted.)

9 "We made clear in that decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for '[a] proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.'"

Again the Supreme Court's analysis applies equally -- if not more so -- to the California mentally disordered sex offender law. **(4)** First, as we recognized in *Gross v. Superior Court (1954) 42 Cal.2d 816, 821* [*319] *[270 P.2d 1025]*, when a man is charged with being a mentally disordered sex offender "His liberty is at stake." That threat is fulfilled in the order of commitment. In common with all those confined against their will for treatment of mental illness, a person committed under our statute suffers a "massive curtailment of liberty" (*Humphrey* v. *Cady* (1972) *supra, 405 U.S. 504, 509 [31 L.Ed.2d 394, 402])*. Indeed, his personal deprivation is far in excess of that experienced by a youth adjudged to be a juvenile delinquent.

To begin with, the juvenile may or may not be confined in an institution; other less drastic methods of control are available, including placement in a "suitable family home" or release on probation. (*Welf. & Inst. Code, § 727 et seq.*) By contrast, if the court determines that a mentally disordered sex offender could benefit from treatment and that criminal proceedings against him should not be resumed, it has no option but to order him committed "for placement in a state hospital." (*§§ 6316, 6321.*) There is no half-way house, no outpatient alternative.

Nor is there any doubt that such commitment to a "state hospital" results in a real deprivation of liberty. Like all persons found to be treatable mentally disordered sex offenders in California, Burnick was committed by the court to Atascadero State Hospital. Let us not deceive ourselves as to the nature of that institution. (Cf. *In re Gault* (1967) *supra, 387 U.S. 1, 27 [18 L.Ed.2d 527, 545-546].*) It was frankly described as follows by a distinguished body of the medical profession. [10] "In its physical appearance, this is much more like a prison than a hospital. In its architectural planning, it disregards the modern psychiatric concept of the therapeutic community. There are bare corridors, bars, iron gates, rows of cells -- all the stigmata of punishment rather than treatment. Patients who occupy individual rooms are locked out of them during the day and have no opportunity to withdraw for privacy. Patients in wards have a reasonable amount of mobility from one area of the hospital to another, although security precautions are in evidence everywhere. . . . [para.] Externally, the plant has a misleadingly attractive appearance. Internally, despite its dehumanizing attributes, it is well-maintained and well-equipped and [**361] [***497] might be characterized as a sanitary dungeon." Other [*320] observers have confirmed this description. [11] And lest it be thought that only outsiders characterize this institution as essentially indistinguishable from a prison, consider the testimony of Dr. Harold M. Rogallo, senior psychiatrist on the Atascadero staff: [12] Dr. Rogallo identified Atascadero as the only "maximum security" hospital in the Department of Mental Hygiene; noting the fact that "it is all locked and it is under strict supervision, and we have approximately fifty security officers for a population of about thirteen hundred and fifty patients," Dr. Rogallo concluded unequivocally, "Our hospital is pretty much bordering, you might say, [on] a correction facility. . . ." We shall not presume to contradict this appraisal by a senior staff member of the very institution in question.

10 Observations and Comments Based on a Survey of California State Mental Facilities by the California Medical Association, January 18, 1965, page 21. This survey was conducted by the California Medical Association at the request of the Department of Mental Hygiene, supplemented by a resolution of the state Senate. In the case of Atascadero the institution was visited by a team of five physicians, four of whom were psychiatrists.

11 "The physical facility itself is a unique combination of prison and hospital, seemingly symbolic of the uncertain position the institution occupies between the forces of law and psychiatry. Situated three miles south of the small town of Atascadero, on a tract of 1200 acres, it is equally isolated from Los Angeles and San Francisco and cut off from any great hospital or university. Although the outside appearance of the building conveys the impression of an ordinary hospital and the modern, tastefully furnished lobby complements this idea, entrance through the double-doored 'sallyport' jolts the visitor to the stark reality that this is a maximum security prison. Two immense corridors, painted a depressing prison gray and filled with men, lead at right angles away from the sally-port entrance and give access to the cells and dormitories of the twenty-seven wards." (Nasatir, Dezzani, & Silbert, *Atascadero: Ramifications of a Maximum Security Treatment Institution* (1966) 2 Issues in Criminology 29, 30-31.)

After noting certain hospital-like aspects of the "public" areas of the institution, the authors continue (at p. 31): "Unfortunately this impression fades upon viewing the wards and cells which are the patients' home during their stay at this facility. The coffin-like individual cells are devoid of any element of homeliness or individuality. Hospital regulations forbid any attempt by the patient to decorate or humanize his cell. The bars on the windows, cleverly concealed from the outside, are painfully evident from within. The ward day room serves as living room for the entire ward population, therapy center for those undergoing treatment, and a bedroom for those for whom there is no space in cells or dormitories. Most patients sleep in dormitories that house twelve to fifteen patients. Periodically these men are shifted from ward to ward, taking their meagre personal possessions with them in a box as they go." (Fn. omitted.)

12 Dr. Rogallo gave this testimony during the trial of the companion case of *People* v. *Feagley, post*, page 338 [*121 Cal.Rptr. 509, 535 P.2d 373*]. It is transcribed in the record of that case filed with this court, and we may therefore take judicial notice of it. (*Evid. Code, §§ 452, subd. (d)(1)* 459.)

Not only is the mentally disordered sex offender's loss of freedom more severe than that of the juvenile, it is also of a much longer duration. Any confinement of the juvenile is ordinarily limited by law to a few years at most, terminating automatically when he reaches age 21 or shortly thereafter. (*Welf. & Inst. Code, §§ 1769-1771*; but see §§ 1800-1803.) **(5)** A person adjudicated a mentally disordered sex offender, however, is committed "for an indeterminate period" (*Welf. &* [*321] *Inst. Code, §§ 6316, 6326*). The statute means what it says: the individual can be detained for any length of time whatever -- potentially for life. Moreover, release depends not on his reaching a certain age or the end of a fixed term, but on the "opinion" of the hospital superintendent that he will not "benefit" from further treatment and is no longer "a danger" (*§ 6325*) -- a highly discretionary standard difficult to review. Under our statutory scheme, therefore, a mentally disordered sex offender's deliverance can be many years in the uncertain future. [13]

13 This conclusion is unaffected by the statutory authority of the court to obtain progress reports on the person from the superintendent of the state hospital. (§§ 6317, 6327.) In each case judicial intervention is wholly discretionary.

The second justification for the standard of proof beyond a reasonable doubt relied on in *Winship* is the "stigma" and loss of "good name" (*397 U.S. at pp. 363, 364, 367 [25 L.Ed.2d at pp. 374, 375, 377]*) which follow from a criminal [**362] [***498] conviction or an adjudication of juvenile delinquency. **(6)** Surely no less a stigma results from a judicial pronouncement that a man is both "mentally disordered" and a "sex offender." In the ideal society, the mentally ill would be the subjects of understanding and compassion rather than ignorance and aversion. But that enlightened view, unfortunately, does not yet prevail. The stigma borne by the mentally ill has frequently been identified in the literature: "a former mental patient may suffer from the social opprobrium which attaches to treatment for mental illness and which may have more severe consequences than do the formally imposed disabilities. Many people have an 'irrational fear of the mentally ill.' The former mental patient is likely to be treated with distrust and even loathing; he may be socially ostracized and victimized by employment and educational discrimination. Finally, the individual's hospitalization and posthospitalization experience may cause him to lose self-confidence and self-esteem. [para.] The legal and social consequences of commitment constitute the stigma of mental illness, a stigma that could be as socially debilitating as that of a criminal conviction." (Fns. omitted.) (*Developments in the Law -- Civil Commitment of the Mentally Ill* (1974) 87 Harv.L.Rev. 1190, 1200-1201; accord, Rosenhan, *On Being Sane in Insane Places* (1973) 13 Santa Clara Law. 379, 385, and authorities cited in fn. 11.)

When to that stigma is added a charge of unlawful sexual behavior, the shame is complete. This is not an open question in California, as our courts have recognized the odium which commonly attaches to the status of mentally disordered sex offender. Thus in *People v. Fuller (1964) 226 Cal.App.2d 331, 335 [38 Cal.Rptr. 25]*, the court noted the Legislature [*322] has provided that the greatest care is to be taken "before the stigma of sexual psychopathy is finally attached to an individual . . . ." And a subsequent discharge from that commitment does not moot his appeal because, we explained in *People v. Succop (1967) 67 Cal.2d 785, 790 [63 Cal.Rptr. 569, 433 P.2d 473]*, the defendant is entitled to the opportunity to "clear his name" of the adjudication that he is a mentally disordered sex offender.

In fact, the stigma of such an adjudication is greater than that of juvenile delinquency. The latter proceedings are conducted in privacy: the statute flatly declares that "the public shall not be admitted" (*Welf. & Inst. Code, § 676*; see also § 675). Moreover, five years after the juvenile court's jurisdiction terminates, the judge or probation officer "may destroy all records and papers in the proceedings concerning the minor." (§ 826, subd. (a).) No such confidentiality surrounds a mentally disordered sex offender trial, which is open to the public and hence to the news media; and such trial, of course, results in permanently accessible public records of the event and its outcome.

Secondly, to the extent they do become known, acts of juvenile misconduct are often minimized or forgiven on such commonplace rationalizations as "boys will be boys" or "youth will have its fling," coupled with a belief of folk psychology that the miscreant is just "going through a stage" and with maturity will "outgrow" his bad habits. No such indulgence is shown towards the convicted mentally disordered sex offender, however immature or impulsive he may be. He remains forever a pariah, branded with the twin marks of mental and sexual abnormality.

(7) It follows from the foregoing that the standard of proof in mentally disordered sex offender proceedings must be as high as it is in juvenile delinquency proceedings -- to wit, proof beyond a reasonable doubt. Anything less will fall short of providing the level of due process required by the California and federal Constitutions.

The message of the Supreme Court decisions has been clearly understood by our brethren on the federal bench. Speaking of a sexual psychopath law providing for indeterminate commitment, the First Circuit Court of Appeals recognized "the inmate's right to avoid a grievous loss of liberty [**363] [***499] and lifetime

stigma except under the most rigorous safeguards." (*Sarzen v. Gaughan (1st Cir. 1973) 489 F.2d 1076, 1083.*) In holding that a person involuntarily committed to a state mental hospital has a constitutional right to treatment, the Fifth Circuit Court of [*323] Appeals took special note of "the indisputable fact that civil commitment entails a 'massive curtailment of liberty' in the constitutional sense. *Humphrey v. Cady, 1972, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394.* The destruction of an individual's personal freedoms effected by civil commitment is scarcely less total than that effected by confinement in a penitentiary. Indeed, civil commitment, because it is for an indefinite term, may in some ways involve a more serious abridgement of personal freedom than imprisonment for commission of a crime usually does. Civil commitment involves stigmatizing the affected individuals, and the stigma attached, though in theory less severe than the stigma attached to criminal conviction, may in reality be as severe, or more so." (Fn. omitted.) (*Donaldson v. O'Connor (5th Cir. 1974) 493 F.2d 507, 520*, cert. granted *(1974) 419 U.S. 894 [42 L.Ed.2d 138, 95 S.Ct. 171].*)

From these premises the courts have drawn the conclusion that the due process clause requires proof beyond a reasonable doubt in proceedings leading to involuntary commitment of persons found to be both mentally ill and dangerous. Thus in an opinion authored by Judge Robert A. Sprecher of the Seventh Circuit Court of Appeals for a three-judge district court, it was declared that the reasons for the holding in *Winship* as to juvenile delinquents apply a fortiori to commitments of the mentally ill: "The [*Winship*] argument for a stringent standard of proof is more compelling in the case of a civil commitment in which an individual will be deprived of basic civil rights and be certainly stigmatized by the lack of confidentiality of the adjudication. We therefore hold that the state must prove beyond a reasonable doubt all facts necessary to show that an individual is mentally ill and dangerous." (*Lessard v. Schmidt (E.D.Wis. 1972) 349 F.Supp. 1078, 1095*, vacated on other grounds sub nom. *Schmidt v. Lessard (1974) 414 U.S. 473 [38 L.Ed.2d 661, 94 S.Ct. 713]*; accord, *Denton v. Commonwealth (Ky. 1964) 383 S.W.2d 681.*)

Again, the Court of Appeals of the District of Columbia Circuit unanimously so held in *In re Ballay (1973) 482 F.2d 648 [157 App.D.C. 59].* Reversing a judgment of commitment because the jury was permitted to find by a mere preponderance of the evidence that Ballay was mentally ill and likely to be dangerous, the court held the due process clause requires such issues to be proved beyond a reasonable doubt. Its detailed and well reasoned opinion makes many points relevant to our present concern, including the absence of any additional administrative burden if the standard of proof beyond a reasonable doubt is used (*id. at pp. 656, 663)* and the fact that psychiatric testimony [*324] either diagnosing mental disorder or predicting future dangerousness is "far from satisfactory" and has "never been characterized by a high degree of accuracy." (*Id. at pp. 665, 666.*)

In its concluding argument the *Ballay* court analyzed the *Winship* decision and applied the Supreme Court's rationale to the case at hand (*id. at p. 668*): "the loss of liberty -- the interest of 'transcending value' [citing *Speiser v. Randall (1958) 357 U.S. 513, 525 (2 L.Ed.2d 1460, 1472)]* -- is obviously as great for those civilly committed as for the criminal or juvenile delinquent. Indeed, it may be greater in the former since the statute provides for indefinite commitment. The only question is whether the 'stigma' associated with involuntary civil commitment is as severe as the stigma of finding that an individual committed a crime. Even accepting recent medical advances, current studies clearly indicate the fallacy of contending that most people view mental illness as a disease similar to any physical ailment of the body." [**364] [***500] (Fns. omitted.) [14] The court then reasoned as follows (*id. at p. 669*): "In *Winship*, the Court concluded that while the consequences of being adjudged a juvenile delinquent were not identical to being adjudged a criminal, the differences were not sufficient to support a distinction in the standard of proof. This was despite the fact that, unlike involuntary civil commitment, being adjudged delinquent did not deprive the child of his civil rights nor did the statute, which called for confidentiality, expose him to the stigma of a public hearing. We cannot help but conclude that the forcefully committed civil patient has at stake interests of equivalent proportions."

> 14 In a footnote at this point the opinion, in addition to citing numerous cases and commentaries, aptly reminds us of the effect of the stigma of prior mental illness on the 1972 vice-presidential candidacy of Senator Thomas F. Eagleton.

To summarize, *Specht* teaches us that "whether denominated civil or criminal," sexual psychopath proceedings are subject to the "full panoply" of the protections of the due process clause, and an adverse determination in such proceedings is "a new finding of fact"; in turn, *Winship* instructs that the due process clause requires proof beyond a reasonable doubt not only of the guilt of a defendant in a traditional criminal prosecution but also of the dispositive fact or facts in any proceeding in which the state threatens to deprive an individual of his "good name and freedom." The two decisions, handed down less than three years apart, thus complement each other and point to the proper resolution of the case at bar: under *Specht*, this defendant is entitled to all the safeguards of due process of law, and under *Winship* those [*325]

safeguards must include the standard of proof beyond a reasonable doubt. [15]

15 In their extensive study the authors of *Developments in the Law -- Civil Commitment of the Mentally Ill* (1974) 87 Harv.L.Rev. 1190, likewise conclude that the proper standard in proceedings to commit persons who are both mentally disordered and dangerous to others is proof beyond a reasonable doubt. Their analysis is based on the approach of Justice Harlan in his concurring opinion in *Winship* (*397 U.S. at pp. 370-372 [25 L.Ed.2d at pp. 378-380]*). Justice Harlan posited that the choice of standard of proof should reflect the "comparative social disutility" of an erroneous outcome: the greater the interests a party has at stake in the proceeding, the greater the social cost of a mistaken decision and the higher the appropriate standard of proof. The law review authors reason that "The social costs of errors in the civil commitment process may . . . be determined by examining the extent of the resulting harm to the disadvantaged party. The deprivations with which the individual is threatened in commitment are comparable in magnitude, with respect to both the threatened loss of liberty and the stigmatization, to the potential deprivations in criminal cases." (Fn. omitted.) (87 Harv.L.Rev. at p. 1298.) The state's interest in avoiding an erroneous determination in the individual's favor will only be substantial if the authorities can accurately predict that he is highly likely to cause serious harm if released. However, "Current standards of dangerousness do not specify probabilities or magnitudes of harm, and because of the poor predictive capabilities of psychiatrists, individuals in the class of persons presently committed for dangerousness are relatively unlikely to commit dangerous acts. The disutilities of error are therefore much greater for the individual than they are for the state, and the reasonable doubt standard should be applied." (Fns. omitted.) (*Id. at p. 1300*; for other writers calling for this standard of proof in mentally disordered sex offender proceedings, see Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom* (1974) 62 Cal.L.Rev. 693, 750-751; Note, *Toward a Less Benevolent Despotism: The Case for Abolition of California's MDSO Laws* (1973) 13 Santa Clara Law. 579, 604-608; Comment, *The MDSO -- Uncivil Civil Commitment* (1970) 11 Santa Clara Law. 169.)

III

The contrary arguments of the People are not persuasive. Running throughout the People's position is the view that the standard of proof beyond a reasonable doubt is not required because mentally disordered sex offender proceedings are "predictive in nature": i.e., inasmuch as the state is not trying to prove that the defendant committed a particular illegal act in the past but rather is "predisposed" [**365] [***501] to commit sex crimes in the future, fewer safeguards against factual error are required. The facile attractiveness of this theory, however, masks the weakness of its underlying assumption. The assumption is that predictive judgments are truly valid, and that the probability of error in such judgments is significantly less than the probability of error in judgments determining that specific past events occurred. As sometimes happens to our most cherished preconceptions, reality is otherwise.

In the light of recent studies it is no longer heresy to question the reliability of psychiatric predictions. Psychiatrists themselves would be [*326] the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession. It must be conceded that psychiatrists still experience considerable difficulty in confidently and accurately *diagnosing* mental illness. [16] Yet those difficulties are multiplied manyfold when psychiatrists venture from diagnosis to prognosis and undertake to predict the consequences of such illness: "'A diagnosis of mental illness tells us nothing about whether the person so diagnosed is or is not dangerous. Some mental patients are dangerous, some are not. Perhaps the psychiatrist is an expert at deciding whether a person is mentally ill, but is he an expert at predicting which of the persons so diagnosed are dangerous? Sane people, too, are dangerous, and it may legitimately be inquired whether there is anything in the education, training or experience of psychiatrists which renders them particularly adept at predicting dangerous behavior. 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.'" (*Murel* v. *Baltimore City Criminal Court* (1972) *supra, 407 U.S. 355, 364-365, fn. 2 [32 L.Ed.2d 791, 796-797]* (Douglas, J., dissenting from dismissal of certiorari).) [17]

16 The point has been dramatically illustrated by a recent experiment conducted by Dr. D. L. Rosenhan, professor of psychology and law at Stanford University. Eight sane people, including three psychologists, a psychiatrist, and a pediatrician, applied for admission to 12 different mental hospitals, feigning only to have heard voices saying "empty," "hollow," and "thud." In

every other respect the pseudopatients behaved normally and furnished the examining physicians their actual life histories. Yet all 12 institutions admitted them as patients: of the 12 admissions, 11 were diagnosed as schizophrenic and one as manic-depressive. In other words, every one was incorrectly diagnosed as suffering from a severe mental illness. Moreover, immediately upon admission all the pseudopatients ceased simulating *any* symptoms of abnormality. Yet when they were eventually released, none was deemed "cured"; each was discharged, rather, with a diagnosis of schizophrenia "in remission." In short, each pseudopatient "was not sane, nor, in the institution's view, had he ever been sane." (Rosenhan, *On Being Sane in Insane Places* (1973) 13 Santa Clara Law. 379, 384; for other studies reaching similar conclusions, see Ennis & Litwack, *op. cit. supra* fn. 15, at pp. 708-711.)

17 Justice Douglas' quotation is from testimony of Bruce J. Ennis, staff attorney of the New York Civil Liberties Union, given before the Subcommittee on Constitutional Rights of the United States Senate Committee on the Judiciary. Mr. Ennis is an experienced practitioner in the field of psychiatry and the law, and has authored such works as Legal Rights of the Mentally Handicapped (1973), Rights of Mental Patients (1973), and Prisoners of Psychiatry: Mental Patients, Psychiatrists, and the Law (1972). In the latter book Mr. Ennis states (at p. 227), "In a well-known New York study, psychiatrists predicted that 989 persons were so dangerous that they could not be kept even in civil mental hospitals, but would have to be kept in maximum security hospitals run by the Department of Corrections. Then, because of a United States Supreme Court decision [*Baxstrom v. Herold (1966) 383 U.S. 107]*, those persons were transferred to civil hospitals. After a year, the Department of Mental Hygiene reported that one-fifth of them had been discharged to the community, and over half had agreed to remain as voluntary patients. During the year, only 7 of the 989 committed or threatened any act that was sufficiently dangerous to require retransfer to the maximum security hospital. Seven correct predictions out of almost a thousand is not a very impressive record.

"Other studies, and there are many, have reached the same conclusion: psychiatrists simply cannot predict dangerous behavior. They are wrong more often than they are right. And they always err by overpredicting dangerous behavior."

A number of reports on the consequences of the *Baxstrom* experience have been published, e.g., by Henry J. Steadman of the New York State Department of Mental Hygiene. Although the figures vary somewhat according to the duration of the post-release period considered, the overall results remain constant: only a very small proportion of the allegedly dangerous patients committed subsequent acts of violence.

[*327] [**366] [***502] During the past several years further empirical studies have transformed the earlier trend of opinion into an impressive unanimity: "The evidence, as well as the consensus of opinion by responsible scientific authorities, is now unequivocal." (Diamond, *The Psychiatric Prediction of Dangerousness* (1975) 123 U.Pa. L.Rev. 439, 451.) In the words of spokesmen for the psychiatric profession itself, "Unfortunately, this is the state of the art. Neither psychiatrists nor anyone else have reliably demonstrated an ability to predict future violence or 'dangerousness.' Neither has any special psychiatric 'expertise' in this area been established." (Task Force Report, Clinical Aspects of the Violent Individual (American Psychiatric Assn., 1974) p. 28.) And the same studies which proved the inaccuracy of psychiatric predictions have demonstrated beyond dispute the no less disturbing manner in which such prophecies consistently err: they predict acts of violence which will not in fact take place ("false positives"), thus branding as "dangerous" many persons who are in reality totally harmless. (See generally *id. at pp. 23-30.*)

We need not lengthen this opinion by setting forth the various reasons for these limitations on the present-day practice of psychiatry; they are fully discussed in the literature. [18] Nor do we go so far as to join in the [*328] conclusion of certain well-known writers that in civil commitment proceedings no psychiatrists should be permitted to give their opinions as to future dangerousness and that any commitment based on such an opinion constitutes a deprivation of liberty without due process of law. [19] **(8)** For our present purposes it is [**367] [***503] enough to hold that the requirement of proof beyond a reasonable doubt in mentally disordered sex offender proceedings is not negated by the "predictive" content of the ultimate finding. If anything, that aspect of the judgment reinforces our determination to require a high standard of proof on this issue: as a federal circuit court explained in a related context, "the inherently speculative nature of psychiatric predictions, resulting in confinement not for what one has done but for what one will do, demands more than minimal procedures, particularly when such confinement is accomplished outside the traditional criminal process, with its right to jury trial and other ancient safeguards." (*Sarzen* v. *Gaughan* (1st Cir. 1973) *supra, 489 F.2d 1076, 1086.*) [20]

18 A representative sample of the copious outpouring of articles by psychiatrists and psychologists on these topics would include: Diamond, *The Psychiatric Prediction of Dangerousness* (1975) 123 U.Pa.L.Rev. 439; Monahan, *The Prevention of Violence*, in Community Mental Health and the Criminal Justice System (Monahan edit. 1975) p. ; Steadman & Cocozza, *We Can't Predict Who is Dangerous* (1975) 8 Psych. Today 32; Steadman, *Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry* (1973) 1. J. Psychiatry & L. 409; Rubin, *Prediction of Dangerousness in Mentally Ill Criminals* (1972) 27 Archives of Gen. Psychiatry 397; Wenk, Robison & Smith, *Can Violence be Predicted*? (1972) 18 Crime & Del. 393.

The principal recent articles in this field by legal writers, reporting generally on the foregoing studies and their juridical implications, are: Ennis & Litwack, *op. cit. supra fn. 15, at pp. 711-734*; von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons* (1971) 21 Buffalo L.Rev. 717; Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions* (1970) 23 J. Legal Ed. 24, 42-47; Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways* (1968) 4 Trial 29; Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment* (1968) 117 U.Pa.L.Rev. 75, 81-85; *Developments in the Law -- Civil Commitment of the Mentally Ill* (1974) 87 Harv.L.Rev. 1190, 1240-1245.

* 19 These are not the views of a radical fringe of either the psychiatric or legal professions. Dr. Bernard L. Diamond, professor of law and criminology and clinical professor of psychiatry at the University of California, is a nationally known specialist in this field. After a review of the relevant studies he concludes: "Neither psychiatrists nor other behavioral scientists are able to predict the occurrence of violent behavior with sufficient reliability to justify the restriction of freedom of persons on the basis of the label of potential dangerousness. Accordingly, it is recommended that courts no longer ask such experts to give their opinion of the potential dangerousness of any person, and that psychiatrists and other behavioral scientists acknowledge their inability to make such predictions when called upon to do so by courts or other legal agencies." (Diamond, *op. cit. supra*, fn. 18, p. 452.)

For the same reasons, Ennis and Litwack (*op. cit. supra* fn. 15, at pp. 735-738) urge that psychiatrists not be permitted to testify as experts in civil commitment proceedings because of the demonstrated inaccuracy of their predictive judgments, and conclude (at p. 743): "Justifying the deprivation of an individual's liberty on the basis of judgments and opinions that have not been shown to be reliable and valid should be considered a violation of both substantive and procedural due process. Certainly a procedure by which judges flipped coins to determine who would be committed would offend our sense of fundamental fairness. It is our contention that psychiatric judgments have not been shown to be substantially more reliable and valid." (Fn. omitted.) (See generally Ziskin, Coping with Psychiatric and Psychological Testimony (2d ed. 1975) *passim*.)

20 Part of the problem, as recognized by a number of the writers cited above, lies in the imprecision of the definition of mentally disordered sex offender declared by *section 6300* (fn. 1, *ante*). (See, e.g., Diamond, *op. cit. supra* fn. 18, p. 450, fn. 52; see generally *Developments in the Law -- Civil Commitment of the Mentally Ill* (1974) 87 Harv.L.Rev. 1190, 1253-1258; Swanson, *Sexual Psychopath Statutes: Summary and Analysis* (1960) 51 J.Crim.L.C. & P.S. 215, 220-222; Fahr, *Iowa's New Sexual Psychopath Law -- An Experiment Noble in Purpose*? (1956) 41 Iowa L.Rev. 523, 532-539.) The court in *Ballay* saw a connection between this imprecision and the necessity for proof beyond a reasonable doubt: "While a more rigorous standard of proof may not allay infirmities in substantive statutory elements it certainly may, and the reasonable doubt standard is designed particularly to, partially offset them by reducing the risk of factual error." (*In re Ballay (1973) 482 F.2d 648, 667 [157 App.D.C. 59]*.) No such "offset," however, is found by the authors of *Developments in the Law -- Civil Commitment of the Mentally Ill* (1974) 87 Harv.L.Rev. 1190, 1296-1297, footnote 190, who point out that the reasonable doubt requirement "will not render the commitment standards less vague." They conclude (*ibid.*) that "the proper response to vague commitment standards is not to demand a high standard of proof but to declare the statute unconstitutional."

While the question of the vagueness *vel non* of *section 6300* lurks in any consideration of the proper standard of proof in mentally disordered sex offender proceedings, defendant on this appeal does not raise -- and we therefore do not

reach -- the contention that the section violates the due process clause of the California Constitution under the rules of such cases as *In re Newbern (1960) 53 Cal.2d 786, 792-797 [3 Cal.Rptr. 364, 350 P.2d 116]*, and *Perez v. Sharp (1948) 32 Cal.2d 711, 728-731 [198 P.2d 17]*, or the due process clause of the federal Constitution as applied in such decisions as *Papachristou v. City of Jacksonville (1972) 405 U.S. 156 [31 L.Ed.2d 110, 92 S.Ct. 839]*, and *Giaccio v. Pennsylvania (1966) 382 U.S. 399 [15 L.Ed.2d 447, 86 S.Ct. 518]* (see also *United States v. Duardi (W.D.Mo. 1974) 384 F.Supp. 874, 886* ("dangerous offender" statute held void for vagueness)).

[*329] The People next emphasize that mentally disordered sex offender proceedings presuppose a valid criminal conviction as a prerequisite to jurisdiction (*In re Bevill* (1968) *supra*, *68 Cal.2d 854*), and that in each case, as here, such conviction was necessarily proved beyond a reasonable doubt. If the People mean that a person found to be a mentally disordered sex offender has had one bite of the "beyond a reasonable doubt" apple and should not be so greedy as to expect another, their point is refuted by the code itself.

The crime of which the defendant was found guilty need have no connection with sex at all: the statute explicitly states that mentally disordered sex offender proceedings may be instituted "When a person is [**368] [***504] convicted of any criminal offense, whether or not a sex offense" (§ 6302, subd. (a)). Manifestly, a charge of robbery or burglary or grand theft does not even put in issue any of the elements of the statutory definition of a mentally disordered sex offender. (*§ 6300*, fn. 1, *ante*.) Even in those cases in which the conviction was of a sex offense, the issues adjudicated in the criminal trial remain fundamentally different from those in the mentally disordered sex offender proceeding: in the former trial the questions for the jury are whether a specific sexual act violative of a statutory prohibition was committed, and if so, whether the defendant in fact committed that act with the requisite intent. (See *Pen. Code, § 20*.) But a single instance of sexual misconduct does not establish that the defendant is afflicted with "mental disease," nor that he is dangerously "predisposed" to repeat such offenses in the future. Even forcible rape, perhaps the most serious of sex crimes, is often wholly situational and takes place only because of a fortuitous concatenation of circumstances [*330] not likely to recur. **(9)** Accordingly, the fact that the issues at the criminal trial were judged by the reasonable doubt standard has no bearing on how the distinct issues at the mentally disordered sex offender proceeding must be proved.

The People also assert that proof by a preponderance of the evidence is sufficient in mentally disordered sex offender proceedings "because the jury is in reality asked to confirm what is essentially a psychiatric diagnosis." This is a dismaying claim indeed. Surely we have not gone so far towards 1984 and Orwell's bleak prospect of "government by experts" that in a proceeding in which human liberty is at stake the function of our juries is reduced to "confirming" the guesses of doctors hired by the state. **(10)** A man facing indefinite confinement in a maximum security state mental institution because of what he is allegedly predisposed to do is entitled to a jury which impartially weighs the evidence, appraises with an open mind the credibility and persuasiveness of all the witnesses, and reaches its own independent judgment on the issues submitted to it. Anything less would make a mockery of the entire proceeding. As a recent commentator astutely observed, "If the purpose of the jury safeguard presently afforded by the MDSO statute is nothing more than to rubber-stamp the psychiatric opinion presented, the safeguard is now a meaningless sham and *the burden of proof irrelevant, since nothing is proved.*" (Italics added; fn. omitted.) (Note, *Toward a Less Benevolent Despotism: The Case for Abolition of California's MDSO Laws* (1973) 13 Santa Clara Law. 579, 606.)

(11) Nor is there any reason why, as the People further contend, the state's burden of proof should be no greater than "the degree of assurance with which reputable psychiatrists express themselves." Psychiatrists -- or any other witnesses, for that matter -- are entitled to express themselves in court with any "degree of assurance" they please. The law is not concerned with how firmly *they* believe what they are saying, because they are not the ultimate arbiters of the defendant's fate. That awesome responsibility rests on the jury, and it cannot be evaded; however tentative the testimony of the witnesses may be, the jury is bound by oath to reach a decision or make every effort to do so. It is therefore the degree of assurance in the jurors' minds which matters. Of course, hesitant or conflicting testimony may well put the jury in doubt as to where the truth lies. But difficult as the jury's task may be in that event, the effect of an erroneous decision on the defendant is immeasurably greater. The law, in short, does not weaken the standard of proof merely because the evidence is weak.

[*331] No special exception from this principle is justified for psychiatrists. It is true we have held that medical witnesses, like any other experts, need not limit their testimony in criminal trials to matters on which they have opinions "beyond a reasonable doubt." (*People v. Phillips (1966) 64 Cal.2d 574, 579, fn. 2 [51 Cal.Rptr. 225, 414 P.2d 353]*.) But it does not follow that the [**369] [***505] jury weighing that testimony is relieved of its higher duty. As we explained in *Phillips (ibid.)*, "We do not believe that the questions answered

[by a physician witness] as to the effect of the surgery should have been framed in the terminology of 'beyond a reasonable doubt,' *which expresses the ultimate issue for the determination of the jury.*" (Italics added.)

Other examples of this joint operation of two different standards abound. Perhaps the most relevant is the defense of diminished capacity in murder trials. The assertion of such a defense typically results in psychiatrists' testifying both for and against the defendant on the crucial issue of whether at the time of the killing he lacked the necessary mental capacity to be guilty of murder in the first degree. On that issue the witnesses may properly speak with no more than "the degree of assurance with which reputable psychiatrists express themselves." But when the case is submitted to the jury that body is nevertheless required to determine the defendant's guilt of first degree murder beyond a reasonable doubt, even though the determination may turn on tentative or conflicting opinions of the medical experts. (See, e.g., *People v. Bassett (1968) 69 Cal.2d 122, 139-140 [70 Cal.Rptr. 193, 443 P.2d 777]*, and cases cited.) The same rule applies in the case at bar. [21]

> 21 The People draw their latter two arguments from *People v. Valdez (1968) 260 Cal.App.2d 895, 904 [67 Cal.Rptr. 583]*, a case in which the Court of Appeal held that in narcotics addict commitment proceedings (*Welf. & Inst. Code, § 3000 et seq.*) the requirements of due process do not include proof beyond a reasonable doubt. In the same year this court uncritically accepted that conclusion in *People v. Moore (1968) 69 Cal.2d 674, 685 [72 Cal.Rptr. 800, 446 P.2d 800]*, briefly noting there was "no sound reason" to depart from the ordinary civil standard of a preponderance of the evidence. We do not here adjudicate, of course, the question whether such a "reason" for a different rule in narcotics addict commitment proceedings appeared two years later in the *Winship* decision. But we note that in resolving the principal issue in *Moore* -- i.e., whether illegally obtained evidence is admissible in narcotics addict commitment proceedings -- we spoke in terms remarkably foreshadowing *Winship*: "It has been suggested that the narcotic addict proceeding is for the benefit of the addict and that therefore the state does not profit from its wrong when evidence obtained in violation of the Fourth and Fourteenth Amendments is admitted in such a proceeding. Certainly, the proceeding is in part for the benefit of the addict, but this is not determinative. Rehabilitation is one of the prime goals of our penal system, and the fact that the end result of incarceration in jail may be beneficial to the inmate furnishes no ground for the view that the state does not profit by using evidence to obtain criminal convictions. *Narcotic addict proceedings involve a loss of liberty, and the proceedings are for the benefit of society as well as the addict.* [Citations.] *Whatever the label that may be attached to those proceedings, it is apparent that there is a close identity to the aims and objectives of criminal law enforcement* [citation], . . ." (Italics added.) (*Id. at p. 682.*)

[*332] IV

(12) For the foregoing reasons we hold that the standard of proof beyond a reasonable doubt is required in mentally disordered sex offender proceedings by the due process clauses of *article I, section 7, subdivision (a), of the California Constitution* and the *Fourteenth Amendment to the United States Constitution.* Although the present case challenges an order of commitment made after a trial of the issue pursuant to *section 6321*, the same rule manifestly applies to any stage of the proceedings in which the person is committed or recommitted to the State Department of Health pursuant to a finding that he is a mentally disordered sex offender (e.g., *§§ 6316, 6326, 6327*). And because the major purpose of this rule is to overcome an aspect of those proceedings which "substantially impairs the truth-finding function," our decision today must be given complete retroactive effect. (*Ivan V. v. City of New York (1972) 407 U.S. 203, 205 [32 L.Ed.2d 659, 661, 92 S.Ct. 1951]* (holding *Winship* fully retroactive).)

[**370] [***506] In view of our disposition herein, it is unnecessary to reach Burnick's additional contentions.

The order appealed from is reversed.

DISSENT BY: BURKE

DISSENT

BURKE, J. * I dissent. The "beyond a reasonable doubt" standard is wholly inappropriate to determine whether a person is a mentally disordered sex offender who is predisposed to the commission of sex offenses, dangerous to others, and in need of appropriate treatment in state institutions. In view of the considerable uncertainties inherent in attempting to predict human behavior, and the compelling state interest in treating sex offenders, it should be sufficient that the jury has found, by a preponderance of the evidence, that the defendant is an MDSO.

> * Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

Welfare and Institutions Code section 6321, provides that the MDSO trial shall conform to the procedures for the trial of *civil* causes. In criminal cases, of course, a defendant is presumed innocent and the state [*333] has the burden of proving him guilty beyond a reasonable doubt. (*Pen. Code, § 1096.*) But in civil cases, unless otherwise provided by law, proof by a preponderance of the evidence will suffice. (*Evid. Code, § 115*; see *In re Franklin, 7 Cal.3d 126, 148.*) [1]

> 1 According to Witkin, "The phrase 'preponderance of evidence' is usually defined in terms of probability of truth; e.g., 'such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein.' [Citations.]" (Witkin, Cal. Evidence, § 208, p. 189.)

The majority rely primarily upon *In re Winship, 397 U.S. 358 [25 L.Ed.2d 368, 90 S.Ct. 1068]*, and *Specht v. Patterson, 386 U.S. 605 [18 L.Ed.2d 326, 87 S.Ct. 1209]*, but neither case is controlling. In *Winship*, the United States Supreme Court required, as a matter of constitutional due process, that the "beyond a reasonable doubt" standard be applied during the adjudicatory phase of a juvenile delinquency proceeding. (See also *In re Kenneth W., 12 Cal.App.3d 1120, 1122 [91 Cal.Rptr. 702]*; *In re Samuel Z., 10 Cal.App.3d 565, 569 [89 Cal.Rptr. 246]*; *In re C.D.H., 7 Cal.App.3d 230, 234 [86 Cal.Rptr. 565].*) The court reasoned (p. 365 [25 L.Ed.2d p. 376]) that "The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child. . . . We made clear in . . . [*In re Gault, 387 U.S. 1, 36 (18 L.Ed.2d 527, 551, 87 S.Ct. 1428*)] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for '[a] proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.'"

Unlike criminal or juvenile proceedings, however, wherein the *factual* issue of prior guilt or innocence must be resolved, [2] the issue before the court in MDSO proceedings is essentially predictive in nature, aimed at forecasting whether a person who has already been convicted of one criminal offense is likely to be dangerous to others by reason of a predisposition to commit sexual offenses. (*Welf. & Inst. Code, § 6300.*) In performing this predictive function, the court and jury must necessarily be guided in large part by psychiatric opinion which, by its very nature, is seldom conclusive beyond all reasonable doubt.

> 2 As stated in *In re Winship, supra, 397 U.S. 358, 363 [25 L.Ed.2d 368, 375]*, "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions *resting on factual error.*" (Italics added.)

It should also be pointed out that, unlike criminal or juvenile proceedings, MDSO proceedings take place following a criminal trial at [*334] which defendant has been found guilty of a criminal offense beyond a reasonable doubt. The subsequent MDSO [**371] [***507] proceedings could be viewed as an alternative to penal sentencing, for the time spent under indeterminate commitment as an MDSO must be credited in fixing the term of sentence, in the event the MDSO is ultimately returned to court on the criminal charges. (*Welf. & Inst. Code, § 6325*; see *Humphrey v. Cady, 405 U.S. 504, 510-511 [31 L.Ed.2d 394, 403-404, 92 S.Ct. 1048].*) (It is true that an MDSO commitment could extend beyond the term of sentence which would have been imposed for the criminal offense. But as I point out below, adequate safeguards exist to assure that the term of commitment will not be unduly prolonged.)

Nor is *Specht v. Patterson, supra, 386 U.S. 605*, on point. In that case, the United States Supreme Court specified certain procedural rights which must, as a matter of due process, be afforded in MDSO proceedings, including the right to a hearing, the right to counsel, the right to confront and cross-examine witnesses, the right to present evidence, and the right to demand adequate findings by the court. *Specht* did not mention the right to a jury trial, much less indicate which proof standard should be applied to guide the jury's deliberations. [3] Under the California procedure, however, persons sought to be committed as MDSOs are provided a jury trial, along with the other rights specified in the *Specht* decision. Accordingly, this procedure would appear to satisfy the essential demands of due process of law.

> 3 Subsequently, in *Humphrey v. Cady, supra, 405 U.S. 504*, the court held that principles of equal protection require the availability of a jury trial for persons sought to be committed as MDSOs, since such a trial was available in ordinary civil commitment cases. Significantly, however, the court acknowledged that under the procedure at issue in that case, "If the State establishes the need for treatment *by a preponderance of the evidence*, the court must commit the defendant for treatment in lieu of sentence . . . ." The court made no suggestion that this procedure would be invalid, or that the jury should be held to a higher proof standard.

I believe that an apt analogy can be found in the procedures (see *Welf. & Inst. § 3100 et seq.*) for the involuntary commitment of persons who have been found

to be narcotics addicts or in imminent danger of addiction. In *People v. Moore, 69 Cal.2d 674, 685 [72 Cal.Rptr. 800, 446 P.2d 800]*, we expressly rejected the contention that the facts supporting the commitment of such persons had to be established beyond reasonable doubt. As we pointed out in *Moore*, "The proceedings . . . are fundamentally civil in nature, and no sound reason appears to depart from that ordinary civil rule [preponderance of the evidence] here." (Accord: *People v. Valdez, 260 Cal.App.2d 895, 902-904 [67 Cal.Rptr. 583]*.)

[*335] Similarly, MDSO proceedings are essentially civil in nature and are only collateral to criminal proceedings. (*In re Bevill, 68 Cal.2d 854, 858 [69 Cal.Rptr. 599, 442 P.2d 679]*.) And although *In re Winship, supra, 397 U.S. 358*, cautions us to scrutinize with care the "civil" label of convenience, on balance I believe that the basic demands of due process are satisfied by the use of a preponderance of evidence test in MDSO cases. The court's observations in *People v. Valdez, supra, 260 Cal.App.2d 895, 903-904*, regarding narcotics addicts commitment procedures seem especially pertinent here: "Turning to due process, we may assume that in criminal cases it is part of the due process guaranteed by the Fourteenth Amendment that guilt must be established beyond a reasonable doubt. [Fn. omitted.] *In re De La O., 59 Cal.2d 128, 136-150* . . . [and other cases] have described narcotic commitment proceedings as 'civil,' 'nonpunitive' and 'remedial.' A situation may well arise where such characterization may break down in the face of the reality of the addict's involuntary confinement. (Cf. *In re Gault [supra], 387 U.S. 1* . . . .) [**372] [***508] We do not believe, however, that the distinction between confinement as a criminal and loss of liberty as an addict whom the state hopes to cure is sufficiently artificial to prohibit a difference in the burden of proof. It must be remembered that in a narcotic commitment case the jury is in reality asked to confirm what is essentially a medical diagnosis. The People's burden of persuasion ought to be no greater than the degree of assurance with which reputable physicians express themselves. [Citation.]"

* As I have pointed out, the trier of fact in MDSO proceedings is also charged with predicting future behavior and confirming what is essentially a medical diagnosis. I agree with the reasoning of *Valdez* that the state's burden of proof should correspond realistically with "the degree of assurance with which reputable physicians express themselves." The reasoning is even more compelling in cases involving psychiatric diagnoses. Of necessity, reasonable doubts accompany any attempt to predict human behavior.

The majority herein, contending that MDSO commitment proceedings are "criminal" in nature, rely primarily upon the fact that the MDSO may be ordered committed to state hospital for an indefinite period. Yet the statutory scheme contains ample protection against an abuse of discretion by hospital authorities in determining whether or not to release an MDSO.

[*336] First of all, under section 6317, the trial courts are empowered to "require the superintendent of the state hospital to make periodic reports to the court concerning the person's progress towards recovery." Moreover, under *section 6327*, after the MDSO has been confined for a period of not less than six months, the committing court may, on its own motion or on motion by the MDSO, "require the superintendent of the state hospital . . . to forward to the committing court, within 30 days, his opinion under (a) or (b) of *Section 6325* [regarding the MDSO's amenability to treatment and progress toward recovery], including therein a report, diagnosis and recommendation concerning the person's future care, supervision, or treatment. After receipt of the report, the committing court may order the return of the person to the court for a hearing as to whether the person is still a mentally disordered sex offender . . . ." The MDSO may request additional hearings on his progress at six-month intervals.

Although the provisions of sections 6317 and 6327 appear to vest the committing court with some discretion whether or not to require the hospital officials to submit the reports specified in those sections, the courts should utilize these procedures whenever a doubt arises regarding the ability of the person committed to seek relief on his own behalf. As we noted in *In re Davis, 8 Cal.3d 798, 806-807*, footnote 6 [*106 Cal.Rptr. 178, 505 P.2d 1018]*, it may be "inappropriate to place upon such [mentally disordered] persons the burden of initiating proceedings . . ." to secure habeas corpus relief.

The foregoing safeguards seem quite adequate to assure that persons such as defendant will be released after a reasonable period of treatment. Under the majority's holding, however, such persons will escape treatment and hospital confinement altogether unless the jurors conclude that MDSO status has been proved beyond a reasonable doubt. The majority's holding in this regard is constitutionally unnecessary and could drastically interfere with the effective functioning of the MDSO treatment program.

The majority suggest, in this case and in the companion case, *People* v. *Feagley, post*, page 338 [*121 Cal.Rptr. 509, 535 P.2d 373]*, that the present system fails to provide adequate care and treatment for the MDSO. If true (and the record in these cases is wholly insufficient on the point), the proper solution is, I suggest, to establish and enforce safeguards which assure that such treatment is forthcoming, and not to erect [**373] [***509] procedural [*337] barriers (such as impractical proof standards) which deprive both the pub-

lic and the defendant himself of the benefits of the MDSO program.

I would affirm the order of commitment.

LEXSEE 17 C.3D 425 (1976)

VITALY TARASOFF et al., Plaintiffs and Appellants, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents

S.F. No. 23042

Supreme Court of California

17 Cal. 3d 425; *551 P.2d 334*; *131 Cal. Rptr. 14*; *1976 Cal. LEXIS 297*; *83 A.L.R.3d 1166*

July 1, 1976

PRIOR HISTORY: Superior Court of Alameda County, No. 405694, Robert L. Bostick, Judge.

DISPOSITION: The judgment of the superior court in favor of defendants Atkinson, Beall, Brownrigg, Hallernan, and Teel is affirmed. The judgment of the superior court in favor of defendants Gold, Moore, Powelson, Yandell, and the Regents of the University of California is reversed, and the cause remanded for further proceedings consistent with the views expressed herein.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a wrongful death action against the Regents of the University of California, psychotherapists at a university hospital, and campus policemen, by parents of a girl who was killed by a man who had confided his intention to kill her to one of the therapists, the trial court sustained defendants' demurrers to the complaint without leave to amend and entered judgment in favor of defendants. The complaint alleged that the police had briefly detained the killer at the request of the therapist but had released him when he appeared rational, that the therapist's superior then directed that no further action be taken to detain the man, and that no one warned plaintiffs of the girl's peril. (Superior Court of Alameda County, No. 405694, Robert L. Bostick, Judge.)

The Supreme Court affirmed the judgment in favor of the police officers and reversed the judgment in favor of the therapists and the regents. The court held that plaintiffs could amend their complaints to state a cause of action against defendant therapists by asserting that they had in fact determined that the daughter's killer presented a serious danger of violence to her, or pursuant to the standards of their profession should have so determined, but nevertheless failed to exercise reasonable care to protect her from that danger. It held that when a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The court further held that the decision whether to warn was not a discretionary act within the immunity provisions of *Gov. Code, § 820.2*, as judicially interpreted. As to plaintiffs' claim of a breach of the therapists' duty by reason of their failure to procure the killer's confinement, however, the court held that they were insulated from liability by the provision of *Gov. Code, § 856*, which affords public entities and their employees absolute protection from liability for "any injury resulting from determining in accordance with any applicable enactment . . . whether to confine a person for mental illness." The demurrers of defendant police officers were held properly sustained without leave to amend in that the complaint alleged no special relationship between the officers and either the killer or the victim that would impose a duty to warn of the danger. With respect to the officers' release of the killer, the court held that the complaint established immunity under *Welf. & Inst. Code, § 5154*, which declares that "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." In holding that no cause of action for exemplary damages was stated, the court pointed out that California statutes and

decisions have been interpreted to bar the recovery of punitive damages in a wrongful death action. (Opinion by Tobriner, J., with Wright, C. J., Sullivan and Richardson, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J. Separate dissenting opinion by Clark, J., with McComb, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Healing Arts and Institutions § 30--Medical Practitioners--Duty of Therapist to Dangerous Patient's Intended Victim. --When a psychotherapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of such duty, depending on the nature of the case, may call for the therapist to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

(2a) (2b) Healing Arts and Institutions § 46--Medical Practitioners--Duties--Pleading--Duty of Therapist to Dangerous Patient's Intended Victim. --In a wrongful death action by parents whose daughter was killed by a patient of defendant psychotherapists some two months after the killer had confided his intention to kill the girl to one of the therapists, the trial court erred in sustaining defendant therapists' demurrers without leave to amend, where the complaint asserted the special relation between defendants and the killer that arises between a patient and his doctor or psychotherapist and that defendants had predicted that the patient would kill but were negligent in failing to warn, and where, though it was not alleged that defendants failed to warn the victim or persons other than plaintiffs who would have been likely to apprise her of the danger, such omission could properly be cured by amendment.

(3) Negligence § 9--Elements of Actionable Negligence--Duty of Care. --Whenever one person is by circumstances placed in such a position with regard to another that if he did not use ordinary care and skill in his own conduct he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger, and that fundamental principle may be departed from only on the balancing of a number of considerations, of which the major ones are 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.

(4) Negligence § 48--Exercise of Care Toward Particular Persons--Persons Foreseeably Endangered by Defendant's Conduct. --Generally, a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct with respect to all risks which make the conduct unreasonably dangerous.

(5) Negligence § 9--Elements of Actionable Negligence--Duty of Care--Duty to Control Conduct of Others. --Though the common law generally imposes no duty on a person to control the conduct of another or to warn those endangered by such conduct, an exception has been judicially established in 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.

(6) Law Enforcement Officers § 17--Police--Duties--Warning Potential Victims of Suspect's Violent Intentions. --In a wrongful death action against police officers and others by parents of a girl killed by a man who had confided his intention to kill her to a psychotherapist who had then requested defendant officers to detain the man, the trial court did not err in sustaining the demurrers of defendant officers without leave to amend, where though plaintiffs alleged failure of defendants to warn them of the man's violent intentions when they released him, they did not plead any special relationship between defendants and either the killer or the victim that would impose a duty to warn, and they suggested no theory, and pleaded no facts that would give rise to any duty to warn on defendants' part absent such a special relationship.

(7) Healing Arts and Institutions § 30--Medical Practitioners--Duties and Liabilities--Publicly Employed Psychotherapists--Immunity. --In a wrongful death action against publicly employed psychotherapists and others by parents of a girl killed by a man who had confided to one of the therapists his intention to kill the girl, defendant therapists could not successfully assert that they were immune under *Gov. Code, § 820.2*, from liability for having failed to warn the girl or those who reasonably could have been expected to notify her of her peril. The statute, which grants a public employee immunity from liability for injuries resulting from acts or

omissions stemming from "the exercise of discretion vested in him," affords immunity only for basic policy decisions, and the decision whether to warn of the patient's violent propensities did not rise to that level.

(8) Healing Arts and Institutions § 30--Medical Practitioners--Duties and Liabilities--Publicly Employed Psychotherapists--Immunity. --The complaint in a wrongful death action against publicly employed psychotherapists and others by parents of a girl killed by a man who had confided to one of the therapists his intention to kill the girl established that defendant therapists were insulated from liability for failure to confine the killer by the provision of *Gov. Code, § 856*, which affords public entities and their employees absolute protection from liability for "any injury resulting from determining in accordance with any applicable enactment . . . whether to confine a person for mental illness," where the complaint alleged that the supervising therapist had ordered that no actions leading to the man's detention be taken, and implied that the subordinate therapists had acquiesced in their superior's determination not to seek confinement.

(9) Law Enforcement Officers § 20--Police--Liabilities--Release of Mentally Disturbed Persons--Immunity. --In a wrongful death action against the Regents of the University of California, psychotherapists employed at a university, and campus policemen, by parents of a girl killed by a man who had confided his intention to kill her to one of the therapists who had requested the police to detain him, the complaint established that defendant policemen were immune from liability for releasing the man after a brief confinement. Though the officers were technically not "peace officers" within the meaning of *Welf. & Inst. Code § 5154*, which declares that a peace officer responsible for the detainment of a person for treatment and evaluation shall not be held civilly or criminally liable for any action by a person released at or before the end of 72 hours," plaintiffs sought to have the officers treated as "responsible for the detainment" of the man and they were therefore entitled to the protection prescribed for peace officers.

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JUDGES: Opinion by Tobriner, J., with Wright, C. J., Sullivan and Richardson, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J. Separate dissenting opinion by Clark, J., with McComb, J., concurring.

OPINION BY: TOBRINER

OPINION

[*430] [**339] [***19] On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff. [1] Plaintiffs, Tatiana's parents, allege that two months earlier Poddar confided his intention to kill Tatiana to Dr. Lawrence Moore, a psychologist employed by the Cowell Memorial Hospital at the University of California at Berkeley. They allege that on Moore's request, the campus police briefly detained Poddar, but released him when he appeared [**340] [***20] rational. They further claim that Dr. Harvey Powelson, Moore's superior, then directed that no further action be taken to detain Poddar. No one warned plaintiffs of Tatiana's peril.

1 The criminal prosecution stemming from this crime is reported in *People v. Poddar (1974) 10 Cal.3d 750 [111 Cal.Rptr. 910, 518 P.2d 342]*.

Concluding that these facts set forth causes of action against neither therapists and policemen involved, nor against the Regents of the University of California as their employer, the superior court sustained defendants' demurrers to plaintiffs' second amended complaints without leave to amend. [2] This appeal ensued.

2 The therapist defendants include Dr. Moore, the psychologist who examined Poddar and decided that Poddar should be committed; Dr. Gold and Dr. Yandell, psychiatrists at Cowell Memorial Hospital who concurred in Moore's decision; and Dr. Powelson, chief of the department of psychiatry, who countermanded Moore's decision

and directed that the staff take no action to confine Poddar. The police defendants include Officers Atkinson, Brownrigg and Halleran, who detained Poddar briefly but released him; Chief Beall, who received Moore's letter recommending that Poddar be confined; and Officer Teel, who, along with Officer Atkinson, received Moore's oral communication requesting detention of Poddar.

[*431] Plaintiffs' complaints predicate liability on two grounds: defendants' failure to warn plaintiffs of the impending danger and their failure to bring about Poddar's confinement pursuant to the Lanterman-Petris-Short Act (*Welf. & Inst. Code, § 5000 ff.*) Defendants, in turn, assert that they owed no duty of reasonable care to Tatiana and that they are immune from suit under the California Tort Claims Act of 1963 (*Gov. Code, § 810 ff.*).

We shall explain that defendant therapists cannot escape liability merely because Tatiana herself was not their patient. **(1)** When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. 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 victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

In the case at bar, plaintiffs admit that defendant therapists notified the police, but argue on appeal that the therapists failed to exercise reasonable care to protect Tatiana in that they did not confine Poddar and did not warn Tatiana or others likely to apprise her of the danger. Defendant therapists, however, are public employees. Consequently, to the extent that plaintiffs seek to predicate liability upon the therapists' failure to bring about Poddar's confinement, the therapists can claim immunity under *Government Code section 856.* No specific statutory provision, however, shields them from liability based upon failure to warn Tatiana or others likely to apprise her of the danger, and *Government Code section 820.2* does not protect such failure as an exercise of discretion.

Plaintiffs therefore can amend their complaints to allege that, regardless of the therapists' unsuccessful attempt to confine Poddar, since they knew that Poddar was at large and dangerous, their failure to warn Tatiana or others likely to apprise her of the danger constituted a breach of the therapists' duty to exercise reasonable care to protect Tatiana.

Plaintiffs, however, plead no relationship between Poddar and the police defendants which would impose upon them any duty to Tatiana, and plaintiffs suggest no other basis for such a duty. Plaintiffs have, [*432] therefore, failed to show that the trial court erred in sustaining the demurrer of the police defendants without leave to amend.

1. *Plaintiffs' complaints*

Plaintiffs, Tatiana's mother and father, filed separate but virtually identical second amended complaints. The issue before [**341] [***21] us on this appeal is whether those complaints now state, or can be amended to state, causes of action against defendants. We therefore begin by setting forth the pertinent allegations of the complaints. [3]

3 Plaintiffs' complaints allege merely that defendant therapists failed to warn plaintiffs -- Tatiana's parents -- of the danger to Tatiana. The complaints do not allege that defendant therapists failed to warn Tatiana herself, or failed to warn persons other than her parents who would be likely to apprise Tatiana of the danger. Such omissions can properly be cured by amendment. As we stated in *Minsky v. City of Los Angeles (1974) 11 Cal.3d 113, 118-119 [113 Cal.Rptr. 102, 520 P.2d 726]*: "It is axiomatic that if there is a reasonable possibility that a defect in the complaint can be cured by amendment or that the pleading liberally construed can state a cause of action, a demurrer should not be sustained without leave to amend." (Accord, *La Sala v. American Sav. & Loan Assn. (1971) 5 Cal.3d 864, 876 [97 Cal.Rptr. 849, 489 P.2d 1113]*; *Lemoge Electric v. County of San Mateo (1956) 46 Cal.2d 659, 664 [297 P.2d 638]*; *Beckstead v. Superior Court (1971) 21 Cal.App.3d 780, 782 [98 Cal.Rptr. 779]*.)

Plaintiffs' first cause of action, entitled "Failure to Detain a Dangerous Patient," alleges that on August 20, 1969, Poddar was a voluntary outpatient receiving therapy at Cowell Memorial Hospital. Poddar informed Moore, his therapist, that he was going to kill an unnamed girl, readily identifiable as Tatiana, when she returned home from spending the summer in Brazil. Moore, with the concurrence of Dr. Gold, who had initially examined Poddar, and Dr. Yandell, assistant to the director of the department of psychiatry, decided that Poddar should be committed for observation in a mental hospital. Moore orally notified Officers Atkinson and Teel of the campus police that he would request commitment. He then sent a letter to Police Chief William Beall requesting the assistance of the police department in securing Poddar's confinement.

Officers Atkinson, Brownrigg, and Halleran took Poddar into custody, but, satisfied that Poddar was rational, released him on his promise to stay away from Tatiana. Powelson, director of the department of psychiatry at Cowell Memorial Hospital, then asked the police to return Moore's letter, directed that all copies of the letter and notes that Moore had taken as therapist be destroyed, and "ordered no action to place Prosenjit Poddar in 72-hour treatment and evaluation facility."

[*433] Plaintiffs' second cause of action, entitled "Failure to Warn On a Dangerous Patient," incorporates the allegations of the first cause of action, but adds the assertion that 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 Posenjit Poddar." Poddar persuaded Tatiana's brother to share an apartment with him near Tatiana's residence; shortly after her return from Brazil, Poddar went to her residence and killed her.

Plaintiffs' third cause of action, entitled "Abandonment of a Dangerous Patient," seeks $ 10,000 punitive damages against defendant Powelson. Incorporating the crucial allegations of the first cause of action, plaintiffs charge that Powelson "did the things herein alleged with intent to abandon a dangerous patient, and said acts were done maliciously and oppressively."

Plaintiffs' fourth cause of action, for "Breach of Primary Duty to Patient and the Public," states essentially the same allegations as the first cause of action, but seeks to characterize defendants' conduct as a breach of duty to safeguard their patient and the public. Since such conclusory labels add nothing to the factual allegations of the complaint, the first and fourth causes of action are legally indistinguishable.

As we explain in part 4 of this opinion, plaintiffs' first and fourth causes of action, which seek to predicate liability upon the defendants' failure to bring about Poddar's confinement, are barred by governmental immunity. Plaintiffs' third cause of action succumbs to the decisions precluding exemplary damages in a wrongful death action. [**342] [***22] (See part 6 of this opinion.) We direct our attention, therefore, to the issue of whether plaintiffs' second cause of action can be amended to state a basis for recovery.

2. **(2a)** *Plaintiffs can state a cause of action against defendant therapists for negligent failure to protect Tatiana.*

The second cause of action can be amended to allege that Tatiana's death proximately resulted from defendants' negligent failure to warn Tatiana or others likely to apprise her of her danger. Plaintiffs contend that as amended, such allegations of negligence and proximate causation, with resulting damages, establish a cause of action. Defendants, however, contend that in the circumstances of the present case they owed no duty of care to Tatiana or her parents and that, in the absence of such [*434] duty, they were free to act in careless disregard of Tatiana's life and safety.

In analyzing this issue, we bear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. As stated in *Dillon v. Legg (1968) 68 Cal.2d 728, 734 [69 Cal.Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316]*: "The assertion that liability must . . . be denied because defendant bears no 'duty' to plaintiff 'begs the essential question -- whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. . . . [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.' (Prosser, Law of Torts [3d ed. 1964] at pp. 332-333.)"

In the landmark case of *Rowland v. Christian (1968) 69 Cal.2d 108 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496]*, Justice Peters recognized that liability should be imposed "for injury occasioned to another by his want of ordinary care or skill" as expressed in *section 1714 of the Civil Code.* **(3)** Thus, Justice Peters, quoting from *Heaven* v. *Pender* (1883) 11 Q.B.D. 503, 509 stated: "'whenever one person is by circumstances placed in such a position with regard to another . . . that if he did not use ordinary care and skill in his own conduct . . . he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.'"

We depart from "this fundamental principle" only upon the "balancing of a number of considerations"; major ones "are 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." [4]

4 See *Merrill v. Buck (1962) 58 Cal.2d 552, 562 [25 Cal.Rptr. 456, 375 P.2d 304]*; *Biakanja v. Irving (1958) 49 Cal.2d 647, 650 [320 P.2d 16, 65 A.L.R.2d 1358]*; *Walnut Creek Aggregates Co. v. Testing Engineers Inc. (1967) 248 Cal.App.2d 690, 695 [56 Cal.Rptr. 700]*.

The most important of these considerations in establishing duty is foreseeability. **(4)** As a general principle, a "defendant owes a duty of [*435] care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." (*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal.3d 382, 399 [115 Cal.Rptr. 765, 525 P.2d 669]*; *Dillon v. Legg, supra, 68 Cal.2d 728, 739*; *Weirum v. RKO General, Inc. (1975) 15 Cal.3d 40 [123 Cal.Rptr. 468, 539 P.2d 36]*; see *Civ. Code, § 1714.*) As we shall explain, however, when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn [**343] [***23] of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim. Since the relationship between a therapist and his patient satisfies this requirement, we need not here decide whether foreseeability alone is sufficient to create a duty to exercise reasonable care to protect a potential victim of another's conduct.

(5) Although, as we have stated above, under the common law, as a general rule, one person owed no duty to control the conduct of another [5] (*Richards v. Stanley (1954) 43 Cal.2d 60, 65 [271 P.2d 23]*; *Wright v. Arcade School Dist. (1964) 230 Cal.App.2d 272, 277 [40 Cal.Rptr. 812]*; *Rest.2d Torts (1965) § 315*), nor to warn those endangered by such conduct (*Rest.2d Torts, supra, § 314, com. c.*; Prosser, Law of Torts (4th ed. 1971) § 56, p. 341), the courts have carved out an exception to this rule in 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 (see *Rest.2d Torts, supra, §§ 315-320*). Applying this exception to the present case, we note that a relationship of defendant therapists to either Tatiana or Poddar will suffice to establish a duty of care; as explained in *section 315 of the Restatement Second of Torts*, a duty of care may arise from either "(a) a special relation . . . between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation . . . between the actor and the other which gives to the other a right of protection."

5 This rule derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter. (See Harper & Kime, *The Duty to Control the Conduct of Another* (1934) 43 Yale L.J. 886, 887.) 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 . . . ." (Prosser, Torts (4th ed. 1971) § 56, p. 341.) Because of these practical difficulties, the courts have increased the number of instances in which affirmative duties are imposed not by direct rejection of the common law rule, but by expanding the list of special relationships which will justify departure from that rule. (See Prosser, *supra*, § 56, at pp. 348-350.)

[*436] **(2b)** Although plaintiffs' pleadings assert no special relation between Tatiana and defendant therapists, they establish as between Poddar and defendant therapists the special relation that arises between a patient and his doctor or psychotherapist. [6] Such a relationship may support affirmative duties for the benefit of third persons. Thus, for example, a hospital must exercise reasonable care to control the behavior of a patient which may endanger other persons. [7] A doctor must also warn a patient [**344] [***24] if the patient's condition or medication renders certain conduct, such as driving a car, dangerous to others. [8]

6 The pleadings establish the requisite relationship between Poddar and both Dr. Moore, the therapist who treated Poddar, and Dr. Powelson, who supervised that treatment. Plaintiffs also allege that Dr. Gold personally examined Poddar, and that Dr. Yandell, as Powelson's assistant, approved the decision to arrange Poddar's commitment. These allegations are sufficient to raise the issue whether a doctor-patient or therapist-patient relationship, giving rise to a possible duty by the doctor or therapist to exercise reasonable care to protect a threatened person of danger arising from the patient's mental illness, existed between Gold or Yandell and Poddar. (See Harney, Medical Malpractice (1973) p. 7.)

7 When a "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." (*Vistica v. Presbyterian Hospital (1967) 67 Cal.2d 465, 469 [62 Cal.Rptr. 577, 432 P.2d 193]*.) (Italics added.) A mental hospital may be liable if it negligently permits the escape or release of a dangerous patient (*Semler* v. *Psychiatric Institute of Washington, D.C.* (4th Cir. 1976) 44 U.S.L. Week 2439; *Underwood v. United States (5th Cir. 1966) 356 F.2d 92*; *Fair v. United States (5th Cir. 1956) 234 F.2d 288*). *Greenberg v. Barbour (E.D.Pa. 1971) 322 F.Supp. 745*, upheld a cause of action against a hospital staff doctor whose negligent failure to admit a mental patient resulted in that patient assaulting the plaintiff.

8 *Kaiser v. Suburban Transportation System (1965) 65 Wn.2d 461 [398 P.2d 14]*; see *Freese v. Lemmon (Iowa 1973) 210 N.W.2d 576* (concurring opn. of Uhlenhopp, J.).

Although the California decisions that recognize this 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, [9] we do not think that the duty should logically be constricted to such situations. Decisions of other jurisdictions hold that the single relationship of a doctor to his patient is sufficient to support the duty to exercise reasonable care to protect others against dangers emanating from the patient's illness. The courts hold that a doctor is liable to persons [*437] infected by his patient if he negligently fails to diagnose a contagious disease (*Hofmann v. Blackmon (Fla.App. 1970) 241 So.2d 752*), or, having diagnosed the illness, fails to warn members of the patient's family (*Wojcik v. Aluminum Co. of America (1959) 18 Misc.2d 740 [183 N.Y.S.2d 351, 357-358]*; *Davis v. Rodman (1921) 147 Ark. 385 [227 S.W. 612, 13 A.L.R. 1459]*; *Skillings v. Allen (1919) 143 Minn. 323 [173 N.W. 663, 5 A.L.R. 922]*; see also *Jones v. Stanko (1928) 118 Ohio St. 147 [6 Ohio L.Abs. 77, 160 N.E. 456]*).

9 *Ellis v. D'Angelo (1953) 116 Cal.App.2d 310 [253 P.2d 675]*, upheld a cause of action against parents who failed to warn a babysitter of the violent proclivities of their child; *Johnson v. State of California (1968) 69 Cal.2d 782 [73 Cal.Rptr. 240, 447 P.2d 352]*, upheld a suit against the state for failure to warn foster parents of the dangerous tendencies of their ward; *Morgan v. County of Yuba (1964) 230 Cal.App.2d 938 [41 Cal.Rptr. 508]*, sustained a cause of action against a sheriff who had promised to warn decedent before releasing a dangerous prisoner, but failed to do so.

Since it involved a dangerous mental patient, the decision in *Merchants Nat. Bank & Trust Co. of Fargo v. United States (D.N.D. 1967) 272 F.Supp. 409* comes closer to the issue. The Veterans Administration arranged for the patient to work on a local farm, but did not inform the farmer of the man's background. The farmer consequently permitted the patient to come and go freely during nonworking hours; the patient borrowed a car, drove to his wife's residence and killed her. Notwithstanding the lack of any "special relationship" between the Veterans Administration and the wife, the court found the Veterans Administration liable for the wrongful death of the wife.

In their summary of the relevant rulings Fleming and Maximov conclude that the "case law should dispel any notion that to impose on the therapists a duty to take precautions for the safety of persons threatened by a patient, where due care so requires, is in any way opposed to contemporary ground rules on the duty relationship. On the contrary, there now seems to be sufficient authority to support the conclusion that by entering into a doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient." (Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 Cal.L.Rev. 1025, 1030.)

Defendants contend, however, that imposition of a duty to exercise reasonable care to protect third persons is unworkable because therapists cannot accurately predict whether or not a patient will resort to violence. In support of this argument amicus representing the American Psychiatric Association and other professional societies cites numerous articles which indicate that therapists, in the present state of the art, are unable reliably to predict violent acts; their forecasts, amicus claims, tend consistently to overpredict violence, and indeed are more often wrong [*438] than right. [10] Since [**345] [***25] predictions of violence are often erroneous, amicus concludes, the courts should not render rulings that predicate the liability of therapists upon the validity of such predictions.

10 See, e.g., *People v. Burnick (1975) 14 Cal.3d 306, 325-328 [121 Cal.Rptr. 488, 535 P.2d 352]*; Monahan, *The Prevention of Violence*, in Community Mental Health in the Criminal Justice System (Monahan ed. 1975); Diamond, *The Psychiatric Prediction of Dangerousness* (1975) 123 U.Pa.L.Rev. 439; Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom* (1974) 62 Cal.L.Rev. 693.

The role of the psychiatrist, who is indeed a practitioner of medicine, and that of the psychologist who performs an allied function, are like that of the physician who must conform to the standards of the profession and who must often make diagnoses and predictions based upon such evaluations. Thus the judgment of the therapist in diagnosing emotional disorders and in predicting whether a patient presents a serious danger of violence is comparable to the judgment which doctors and professionals must regularly render under accepted rules of responsibility.

We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence. Obviously, we do not require that the therapist, in making that determination, render a perfect performance; the therapist need only exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that

professional specialty] under similar circumstances." (*Bardessono v. Michels (1970) 3 Cal.3d 780, 788 [91 Cal.Rptr. 760, 478 P.2d 480, 45 A.L.R.3d 717]*; *Quintal v. Laurel Grove Hospital (1964) 62 Cal.2d 154, 159-160 [41 Cal.Rptr. 577, 397 P.2d 161]*; see 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 514 and cases cited.) Within the broad range of reasonable practice and treatment in which professional opinion and judgment may differ, the therapist is free to exercise his or her own best judgment without liability; proof, aided by hindsight, that he or she judged wrongly is insufficient to establish negligence.

In the instant case, however, the pleadings do not raise any question as to failure of defendant therapists to predict that Poddar presented a serious danger of violence. On the contrary, the present complaints allege that defendant therapists did in fact predict that Poddar would kill, but were negligent in failing to warn.

[*439] Amicus contends, however, that even when a therapist does in fact predict that a patient poses a serious danger of violence to others, the therapist should be absolved of any responsibility for failing to act to protect the potential victim. In our view, however, once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger. While the discharge of this duty of due care will necessarily vary with the facts of each case, [11] in each instance the adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances. (Accord *Cobbs v. Grant (1972) 8 Cal.3d 229, 243 [104 Cal.Rptr. 505, 502 P.2d 1]*.) As explained in Fleming and Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 Cal.L.Rev. 1025, 1067: ". . . the ultimate question of resolving the tension between the conflicting interests of patient and potential victim is one of social policy, not professional expertise. . . . In sum, the therapist owes a legal [**346] [***26] duty not only to his patient, but also to his patient's would-be victim and is subject in both respects to scrutiny by judge and jury."

11 Defendant therapists and amicus also argue that warnings must be given only in those cases in which the therapist knows the identity of the victim. We recognize that in some cases it would be unreasonable to require the therapist to interrogate his patient to discover the victim's identity, or to conduct an independent investigation. But there may also be cases in which a moment's reflection will reveal the victim's identity. The matter thus is one which depends upon the circumstances of each case, and should not be governed by any hard and fast rule.

Contrary to the assertion of amicus, this conclusion is not inconsistent with our recent decision in *People v. Burnick, supra, 14 Cal.3d 306*. Taking note of the uncertain character of therapeutic prediction, we held in *Burnick* that a person cannot be committed as a mentally disordered sex offender unless found to be such by proof beyond a reasonable doubt. (*14 Cal.3d at p. 328.*) The issue in the present context, however, is not whether the patient should be incarcerated, but whether the therapist should take any steps at all to protect the threatened victim; some of the alternatives open to the therapist, such as warning the victim, will not result in the drastic consequences of depriving the patient of his liberty. Weighing the uncertain and conjectural character of the alleged damage done the patient by such a warning against the peril to the victim's life, we conclude that professional inaccuracy in predicting violence cannot negate the therapist's duty to protect the threatened victim.

[*440] The risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved. We would hesitate to hold that the therapist who is aware that his patient expects to attempt to assassinate the President of the United States would not be obligated to warn the authorities because the therapist cannot predict with accuracy that his patient will commit the crime.

Defendants further argue that free and open communication is essential to psychotherapy (see *In re Lifschutz (1970) 2 Cal.3d 415, 431-434 [85 Cal.Rptr. 829, 467 P.2d 557, 44 A.L.R.3d 1]*); that "Unless a patient . . . is assured that . . . information [revealed by him] can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment . . . depends." (Sen. Com. on Judiciary, comment on *Evid. Code, § 1014.*) The giving of a warning, defendants contend, constitutes a breach of trust which entails the revelation of confidential communications. [12]

12 Counsel for defendant Regents and amicus American Psychiatric Association predict that a decision of this court holding that a therapist may bear a duty to warn a potential victim will deter violence-prone persons from seeking therapy, and hamper the treatment of other patients. This contention was examined in Fleming and Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 Cal.L.Rev. 1025, 1038-1044; they conclude that such predictions are entirely speculative. In *In re Lifschutz, supra, 2 Cal.3d 415*, counsel for the psychiatrist argued that if the state could compel disclosure of some psychotherapeutic communications, psychotherapy

could no longer be practiced successfully. (*2 Cal.3d at p. 426.*) We rejected that argument, and it does not appear that our decision in fact adversely affected the practice of psychotherapy in California. Counsels' forecast of harm in the present case strikes us as equally dubious.

We note, moreover, that *Evidence Code section 1024*, enacted in 1965, established that psychotherapeutic communication is not privileged when disclosure is necessary to prevent threatened danger. We cannot accept without question counsels' implicit assumption that effective therapy for potentially violent patients depends upon either the patient's lack of awareness that a therapist can disclose confidential communications to avert impending danger, or upon the therapist's advance promise never to reveal nonprivileged threats of violence.

We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy (see *In re Lifschutz, supra, 2 Cal.3d at p. 432*), and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault. The Legislature has undertaken the difficult task of balancing the countervailing concerns. In *Evidence Code section 1014*, it established a broad rule of privilege to protect confidential [**347] [***27] communications between patient and psychotherapist. [*441] In *Evidence Code section 1024*, the Legislature created a specific and limited exception to the psychotherapist-patient privilege: "There is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." [13]

13 Fleming and Maximov note that "While *[section 1024]* supports the therapist's less controversial *right* to make a disclosure, it admittedly does not impose on him a *duty* to do so. But the argument does not have to be pressed that far. For if it is once conceded . . . that a duty in favor of the patient's foreseeable victims would accord with general principles of tort liability, we need no longer look to the statute for a source of duty. It is sufficient if the statute can be relied upon . . . for the purpose of countering the claim that the needs of confidentiality are paramount and must therefore defeat any such hypothetical duty. In this more modest perspective, the Evidence Code's 'dangerous patient' exception may be invoked with some confidence as a clear expression of legislative policy concerning the balance between the confidentiality values of the patient and the safety values of his foreseeable victims." (Italics in original.) Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 Cal.L.Rev. 1025, 1063.

We realize that the open and confidential character of psychotherapeutic dialogue encourages patients to express threats of violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened. To the contrary, the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger. (See Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 Cal.L.Rev. 1025, 1065-1066.) [14]

14 Amicus suggests that a therapist who concludes that his patient is dangerous should not warn the potential victim, but institute proceedings for involuntary detention of the patient. The giving of a warning, however, would in many cases represent a far lesser inroad upon the patient's privacy than would involuntary commitment.

The revelation of a communication under the above circumstances is not a breach of trust or a violation of professional ethics; as stated in the Principles of Medical Ethics of the American Medical Association (1957), section 9: "A physician may not reveal the confidence entrusted to him in the course of medical attendance . . . *unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of* [*442] *the individual or of the community.*" [15] (Italics added.) We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.

15 See also Summary Report of the Task Force on Confidentiality of the Council on Professions and Associations of the American Psychiatric Association (1975).

Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed

knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest. [**348] [***28] For the foregoing reasons, we find that plaintiffs' complaints can be amended to state a cause of action against defendants Moore, Powelson, Gold, and Yandell and against the Regents as their employer, for breach of a duty to exercise reasonable care to protect Tatiana. [16]

16 Moore argues that after Powelson countermanded the decision to seek commitment for Poddar, Moore was obliged to obey the decision of his superior and that therefore he should not be held liable for any dereliction arising from his obedience to superior orders. Plaintiffs in response contend that Moore's duty to members of the public endangered by Poddar should take precedence over his duty to obey Powelson. Since plaintiffs' complaints do not set out the date of Powelson's order, the specific terms of that order, or Powelson's authority to overrule Moore's decisions respecting patients under Moore's care, we need not adjudicate this conflict; we pass only upon the pleadings at this stage and decide if the complaints can be amended to state a cause of action.

Finally, we reject the contention of the dissent that the provisions of the Lanterman-Petris-Short Act which govern the release of confidential information (*Welf. & Inst. Code, §§ 5328- 5328.9*) prevented defendant therapists from warning Tatiana. The dissent's contention rests on the assertion that Dr. Moore's letter to the campus police constituted an "application in writing" within the meaning of *Welfare and Institutions Code section 5150*, and thus initiates proceedings under the Lanterman-Petris-Short Act. A closer look at the terms of *section 5150*, however, will demonstrate that it is inapplicable to the present case.

Section 5150 refers to a written application only by a professional person who is "a member of the attending staff . . . of an evaluation [*443] facility designated by the county," or who is himself "designated by the county" as one authorized to take a person into custody and place him in a facility designated by the county and approved by the State Department of Mental Hygiene. The complaint fails specifically to allege that Dr. Moore was so empowered. Dr. Moore and the Regents cannot rely upon any inference to the contrary that might be drawn from plaintiff's allegation that Dr. Moore intended to "assign" a "detention" on Poddar; both Dr. Moore and the Regents have expressly conceded that neither Cowell Memorial Hospital nor any member of its staff has ever been designated by the County of Alameda to institute involuntary commitment proceedings pursuant to *section 5150*.

Furthermore, the provisions of the Lanterman-Petris-Short Act defining a therapist's duty to withhold confidential information are expressly limited to "information and records *obtained in the course of providing services* under Division 5 (commencing with *section 5000*), Division 6 (commencing with section 6000), or Division 7 (commencing with section 7000)" of the Welfare and Institutions Code (*Welf. & Inst. Code, § 5328*). (Italics added.) Divisions 5, 6 and 7 describe a variety of programs for treatment of the mentally ill or retarded. [17] The pleadings at issue on this appeal, however, state no facts showing that the psychotherapy provided to Poddar by the Cowell Memorial Hospital falls under any of these programs. We therefore conclude that the Lanterman-Petris-Short Act does not govern the release of information acquired by Moore during the course of rendition of those services.

17 Division 5 includes the Lanterman-Petris-Short Act and the Short-Doyle Act (community mental health services). Division 6 relates to programs for treatment of persons judicially committed as mentally disordered sex offenders or mentally retarded. Division 7 encompasses treatment at state and county mental hospitals, the Langley Porter Neuropsychiatric Institute and the Neuropsychiatric Institute of the U.C.L.A. Medical Center.

Neither can we adopt the dissent's suggestion that we import wholesale the detailed provisions of the Lanterman-Petris-Short Act regulating the disclosure of confidential information and apply them to disclosure of information *not governed by the act*. Since the Legislature did not extend [**349] [***29] the act to control all disclosures of confidential matter by a therapist, we must infer that the Legislature did not relieve the courts of their obligation to define by reference to the principles of the common law the obligation of the therapist in those situations not governed by the act.

[*444] **(6)** Turning now to the police defendants, we conclude that they do not have any such special relationship to either Tatiana or to Poddar sufficient to impose upon such defendants a duty to warn respecting Poddar's violent intentions. (See *Hartzler v. City of San Jose (1975) 46 Cal.App.3d 6, 9-10 [120 Cal.Rptr. 5]*; *Antique Arts Corp. v. City of Torrance (1974) 39 Cal.App.3d 588, 593 [114 Cal.Rptr. 332]*.) Plaintiffs suggest no theory, [18] and plead no facts that give rise to any duty to warn on the part of the police defendants

absent such a special relationship. They have thus failed to demonstrate that the trial court erred in denying leave to amend as to the police defendants. (See *Cooper v. Leslie Salt Co. (1969) 70 Cal.2d 627, 636 [75 Cal.Rptr. 766, 451 P.2d 406]*; *Filice v. Boccardo (1962) 210 Cal.App.2d 843, 847 [26 Cal.Rptr. 789]*.)

18 We have considered *sua sponte* whether plaintiffs' complaints could be amended to assert a cause of action against the police defendants under the principles of *Restatement Second of Torts (1965) section 321*, which provides that "If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect." (See *Hartzler v. City of San Jose, supra, 46 Cal.App.3d 6, 10.*) The record, however, suggests no facts which, if inserted into the complaints, might form the foundation for such cause of action. The assertion of a cause of action against the police defendants under this theory would raise difficult problems of causation and of public policy, which should not be resolved on the basis of conjectural facts not averred in the pleadings or in any proposed amendment to those pleadings.

3. (7) *Defendant therapists are not immune from liability for failure to warn.*

We address the issue of whether defendant therapists are protected by governmental immunity for having failed to warn Tatiana or those who reasonably could have been expected to notify her of her peril. We postulate our analysis on *section 820.2 of the Government Code*. [19] That provision declares, with exceptions not applicable here, that "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion [was] abused." [20]

19 No more specific immunity provision of the Government Code appears to address the issue.

20 *Section 815.2 of the Government Code* declares that "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." The section further provides, with exceptions not applicable here, that "a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." The Regents, therefore, are immune from liability only if all individual defendants are similarly immune.

[*445] Noting that virtually every public act admits of some element of discretion, we drew the line in *Johnson v. State of California (1968) 69 Cal.2d 782 [73 Cal.Rptr. 240, 447 P.2d 352]*, between discretionary policy decisions which enjoy statutory immunity and ministerial administrative acts which do not. We concluded that *section 820.2* affords immunity only for "*basic* policy decisions." (Italics added.) (See also *Elton v. County of Orange (1970) 3 Cal.App.3d 1053, 1057-1058 [84 Cal.Rptr. 27]*; 4 Cal. Law Revision Com. Rep. (1963) p. 810; Van Alstyne, Supplement to Cal. Government Tort Liability (Cont. Ed. Bar 1969) § 5.54, pp. 16-17; Comment, *California Tort Claims Act: Discretionary Immunity* (1966) 39 So.Cal.L.Rev. 470, 471; cf. James, *Tort Liability of Governmental Units and Their Officers* [**350] [***30] (1955) 22 U.Chi.L.Rev. 610, 637-638, 640, 642, 651.)

We also observed that if courts did not respect this statutory immunity, they would find themselves "in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government." (*Johnson v. State of California, supra, at p. 793.*) It therefore is necessary, we concluded, to "isolate those areas of quasilegislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision." (*Johnson v. State of California, supra, at p. 794.*) After careful analysis we rejected, in *Johnson*, other rationales commonly advanced to support governmental immunity [21] and concluded that the immunity's scope should be no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions.

21 We dismissed, in *Johnson*, the view that immunity continues to be necessary in order to insure that public employees will be sufficiently zealous in the performance of their official duties. The California Tort Claims Act of 1963 provides for indemnification of public employees against liability, absent bad faith, and also permits such employees to insist that their defenses be conducted at public expense. (See *Gov. Code, §§ 825- 825.6, 995- 995.2.*) Public employees thus no longer have a significant reason to fear liability as they go about their official tasks. We also, in *Johnson*, rejected the argument that a public employee's concern over the potential liability of his or her employer serves as a basis for immu-

nity. (*Johnson v. State of California, supra, at pp. 790-793.*)

Relying on *Johnson*, we conclude that defendant therapists in the present case are not immune from liability for their failure to warn of Tatiana's peril. *Johnson* held that a parole officer's determination whether to warn an adult couple that their prospective foster child had a background of violence "[presented] no . . . reasons for immunity" (*Johnson v. State of California, supra, at p. 795*), was "at the lowest, [*446] ministerial rung of official action" (*id., at p. 796*), and indeed constituted "a classic case for the imposition of tort liability." (*Id., p. 797*; cf. *Morgan v. County of Yuba, supra, 230 Cal.App.2d 938, 942-943.*) Although defendants in *Johnson* argued that the decision whether to inform the foster parents of the child's background required the exercise of considerable judgmental skills, we concluded that the state was not immune from liability for the parole officer's failure to warn because such a decision did not rise to the level of a "basic policy decision."

We also noted in *Johnson* that federal courts have consistently categorized failures to warn of latent dangers as falling outside the scope of discretionary omissions immunized by the Federal Tort Claims Act. [22] (See *United Air Lines, Inc. v. Wiener (9th Cir. 1964) 335 F.2d 379, 397-398*, cert. den. *sub nom. United Air Lines, Inc. v. United States, 379 U.S. 951* [***31] *[13 L.Ed.* [**351] *2d 549, 85 S.Ct. 452]* (decision to conduct military training flights was discretionary but failure to warn commercial airline was not); *United States v. State of Washington (9th Cir. 1965) 351 F.2d 913, 916* (decision where to place transmission lines spanning canyon was assumed to be discretionary but failure to warn pilot was not); *United States v. White (9th Cir. 1954) 211 F.2d 79, 82* (decision not to "dedud" army firing range assumed to be discretionary but failure to warn person about to go onto range of unsafe condition was not); *Bulloch v. United States (D.Utah 1955) 133 F.Supp. 885, 888* (decision how and when to conduct nuclear test deemed discretionary but failure to afford proper notice was not); *Hernandez v. United States (D.Hawaii 1953) 112 F.Supp. 369, 371* (decision to erect road block characterized as discretionary but failure to warn of resultant hazard was not).

22 By analogy, *section 830.8 of the Government Code* furnishes additional support for our conclusion that a failure to warn does not fall within the zone of immunity created by *section 820.2. Section 830.8* provides: "Neither a public entity nor a public employee is liable . . . for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device . . . was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care." The Legislature thus concluded at least in another context that the failure to warn of a latent danger is not an immunized discretionary omission. (See *Hilts v. County of Solano (1968) 265 Cal.App.2d 161, 174 [71 Cal.Rptr. 275].*)

We conclude, therefore, that the therapist defendants' failure to warn Tatiana or those who reasonably could have been expected to notify her of her peril does not fall within the absolute protection afforded by *section 820.2 of the Government Code.* We emphasize that our conclusion [*447] does not raise the specter of therapists employed by the government indiscriminately being held liable for damage despite their exercise of sound professional judgment. We require of publicly employed therapists only that quantum of care which the common law requires of private therapists. The imposition of liability in those rare cases in which a public employee falls short of this standard does not contravene the language or purpose of *Government Code section 820.2.*

4. **(8)** *Defendant therapists are immune from liability for failing to confine Poddar.*

We sustain defendant therapists' contention that *Government Code section 856* insulates them from liability under plaintiffs' first and fourth causes of action for failing to confine Poddar. *Section 856* affords public entities and their employees absolute protection from liability for "any injury resulting from determining in accordance with any applicable enactment . . . whether to confine a person for mental illness." Since this section refers to a determination to confine "in accordance with any applicable enactment," plaintiffs suggest that the immunity is limited to persons designated under *Welfare and Institutions Code section 5150* as authorized finally to adjudicate a patient's confinement. Defendant therapists, plaintiffs point out, are not among the persons designated under *section 5150.*

The language and legislative history of *section 856*, however, suggest a far broader immunity. In 1963, when *section 856* was enacted, the Legislature had not established the statutory structure of the Lanterman-Petris-Short Act. Former *Welfare and Institutions Code section 5050.3* (renumbered as *Welf. & Inst. Code, § 5880*; repealed July 1, 1969) which resembled present *section 5150*, authorized emergency detention at the behest only of peace officers, health officers, county physicians, or assistant county physicians; former section 5047 (re-

numbered as Welf. & Inst. Code, § 5551; repealed July 1, 1969), however, authorized a petition seeking commitment by any person, including the "physician attending the patient." The Legislature did not refer in *section 856* only to those persons authorized to institute emergency proceedings under *section 5050.3*; it broadly extended immunity to all employees who acted in accord with "any applicable enactment," thus granting immunity not only to persons who are empowered to confine, but also to those authorized to request or recommend confinement.

[*448] The Lanterman-Petris-Short Act, in its extensive revision of the procedures for commitment of the mentally ill, eliminated any specific statutory reference to petitions by treating physicians, but it did not limit the authority of a therapist in government employ to request, recommend or initiate actions which may lead to commitment of his patient under the act. We believe that the language of *section 856*, [**352] [***32] which refers to any action in the course of employment and in accordance with any applicable enactment, protects the therapist who must undertake this delicate and difficult task. (See Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 Cal.L.Rev. 1025, 1064.) Thus the scope of the immunity extends not only to the final determination to confine or not to confine the person for mental illness, but to all determinations involved in the process of commitment. (Cf. *Hernandez v. State of California (1970) 11 Cal.App.3d 895, 899-900 [90 Cal.Rptr. 205]*.)

Turning first to Dr. Powelson's status with respect to *section 856*, we observe that the actions attributed to him by plaintiffs' complaints fall squarely within the protections furnished by that provision. Plaintiffs allege Powelson ordered that no actions leading to Poddar's detention be taken. This conduct reflected Powelson's determination not to seek Poddar's confinement and thus falls within the statutory immunity.

Section 856 also insulates Dr. Moore for his conduct respecting confinement, although the analysis in his case is a bit more subtle. Clearly, Moore's decision that Poddar *be* confined was not a proximate cause of Tatiana's death, for indeed if Moore's efforts to bring about Poddar's confinement had been successful, Tatiana might still be alive today. Rather, any confinement claim against Moore must rest upon Moore's failure to overcome Powelson's decision and actions opposing confinement.

Such a claim, based as it necessarily would be, upon a subordinate's failure to prevail over his superior, obviously would derive from a rather onerous duty. Whether to impose such a duty we need not decide, however, since we can confine our analysis to the question whether Moore's failure to overcome Powelson's decision realistically falls within the protection afforded by *section 856*. Based upon the allegations before us, we conclude that Moore's conduct is protected.

Plaintiffs' complaints imply that Moore acquiesced in Powelson's countermand of Moore's confinement recommendation. Such acquiescence [*449] is functionally equivalent to determining not to seek Poddar's confinement and thus merits protection under *section 856*. At this stage we are unaware, of course, precisely how Moore responded to Powelson's actions; he may have debated the confinement issue with Powelson, for example, or taken no initiative whatsoever, perhaps because he respected Powelson's judgment, feared for his future at the hospital, or simply recognized that the proverbial handwriting was on the wall. None of these possibilities constitutes, however, the type of careless or wrongful behavior subsequent to a decision respecting confinement which is stripped of protection by the exception in *section 856*. [23] Rather, each is in the nature of a decision not to continue to press for Poddar's confinement. No language in plaintiffs' original or amended complaints suggests that Moore determined to fight Powelson, but failed successfully to do so, due to negligent or otherwise wrongful acts or omissions. Under the circumstances, we conclude that plaintiffs' second amended complaints allege facts which trigger immunity for Dr. Moore under *section 856*. [24]

23 *Section 856* includes the exception to the general rule of immunity "for injury proximately caused by . . . negligent or wrongful acts or omission in carrying out or failing to carry out . . . a determination to confine or not to confine a person for mental illness . . . ."

24 Because Dr. Gold and Dr. Yandell were Dr. Powelson's subordinates, the analysis respecting whether they are immune for having failed to obtain Poddar's confinement is similar to the analysis applicable to Dr. Moore.

5. **(9)** *Defendant police officers are immune from liability for failing to confine Poddar in their custody.*

Confronting, finally, the question whether the defendant police officers are [**353] [***33] immune from liability for releasing Poddar after his brief confinement, we conclude that they are. The source of their immunity is *section 5154 of the Welfare and Institutions Code*, which declares that: "[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 . . . ." (Italics added.)

Although defendant police officers technically were not "peace officers" as contemplated by the Welfare and Institutions Code, [25] [*450] plaintiffs' assertion that the officers incurred liability by failing to continue Poddar's confinement clearly contemplates that the officers were "responsible for the detainment of [Poddar]." We could not impose a duty upon the officers to keep Poddar confined yet deny them the protection furnished by a statute immunizing those "responsible for . . . [confinement]." Because plaintiffs would have us treat defendant officers as persons who were capable of performing the functions of the "peace officers" contemplated by the Welfare and Institutions Code, we must accord defendant officers the protections which that code prescribed for such "peace officers."

25 *Welfare and Institutions Code section 5008, subdivision (i)*, defines "peace officer" for purposes of the Lanterman-Petris-Short Act as a person specified in *sections 830.1* and *830.2 of the Penal Code*. Campus police do not fall within the coverage of *section 830.1* and were not included in *section 830.2* until 1971.

6. *Plaintiffs' complaints state no cause of action for exemplary damages.*

Plaintiff's third cause of action seeks punitive damages against defendant Powelson. The California statutes and decisions, however, have been interpreted to bar the recovery of punitive damages in a wrongful death action. (See *Pease v. Beech Aircraft Corp. (1974) 38 Cal.App.3d 450, 460-462 [113 Cal.Rptr. 416]* and authorities there cited.)

7. *Conclusion*

For the reasons stated, we conclude that plaintiffs can amend their complaints to state a cause of action against defendant therapists by asserting that the therapists in fact determined that Poddar presented a serious danger of violence to Tatiana, or pursuant to the standards of their profession should have so determined, but nevertheless failed to exercise reasonable care to protect her from that danger. To the extent, however, that plaintiffs base their claim that defendant therapists breached that duty because they failed to procure Poddar's confinement, the therapists find immunity in *Government Code section 856*. Further, as to the police defendants we conclude that plaintiffs have failed to show that the trial court erred in sustaining their demurrer without leave to amend.

The judgment of the superior court in favor of defendants Atkinson, Beall, Brownrigg, Hallernan, and Teel is affirmed. The judgment of the superior court in favor of defendants Gold, Moore, Powelson, Yandell, and the Regents of the University of California is reversed, and the cause remanded for further proceedings consistent with the views expressed herein.

CONCUR BY: MOSK (In Part)

DISSENT BY: MOSK (In Part); CLARK

DISSENT

[*451] **Mosk, J.,** Concurring and Dissenting I concur in the result in this instance only because the complaints allege that defendant therapists did in fact predict that Poddar would kill and were therefore negligent in failing to warn of that danger. Thus the issue here is very narrow: we are not concerned with whether the therapists, pursuant to the standards of their profession, "should have" predicted potential [**354] [***34] violence; they allegedly did so in actuality. Under these limited circumstances I agree that a cause of action can be stated.

Whether plaintiffs can ultimately prevail is problematical at best. As the complaints admit, the therapists *did* notify the police that Poddar was planning to kill a girl identifiable as Tatiana. While I doubt that more should be required, this issue may be raised in defense and its determination is a question of fact.

I cannot 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. The question is, what standards? Defendants and a responsible amicus curiae, supported by an impressive body of literature discussed at length in our recent opinion in *People v. Burnick (1975) 14 Cal.3d 306 [121 Cal.Rptr. 488, 535 P.2d 352]*, demonstrate that psychiatric predictions of violence are inherently unreliable.

In *Burnick, at pages 325-326*, we observed: "In the light of recent studies it is no longer heresy to question the reliability of psychiatric predictions. Psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession. It must be conceded that psychiatrists still experience considerable difficulty in confidently and accurately *diagnosing* mental illness. Yet those difficulties are multiplied manyfold when psychiatrists venture from diagnosis to prognosis and undertake to predict the consequences of such illness: '" A diagnosis of mental illness tells us nothing about whether the person so diagnosed is or is not dangerous. Some mental patients are dangerous, some are not. Perhaps the psychiatrist is an expert at deciding whether a person is mentally ill, but is he an expert at predicting which of the persons so diagnosed are dangerous? Sane people, too,

are dangerous, and it may legitimately be inquired whether there is anything in the education, training or experience of psychiatrists which renders them particularly adept at predicting dangerous behavior. Predictions of dangerous behavior, no [*452] 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.'" (*Murel v. Baltimore City Criminal Court (1972) . . . 407 U.S. 355, 364-365, fn. 2 [32 L.Ed.2d 791, 796-797, 92 S.Ct. 2091]* (Douglas, J., dissenting from dismissal of certiorari).)" (Fns. omitted.) (See also authorities cited at p. 327 & fn. 18 of 14 Cal.3d.)

* The majority confidently claim their opinion is not offensive to *Burnick*, on the stated ground that *Burnick* involved proceedings to commit an alleged mentally disordered sex offender and this case does not. I am not so sanguine about the distinction. Obviously the two cases are not factually identical, but the similarity in issues is striking: in *Burnick* we were likewise called upon to appraise the ability of psychiatrists to predict dangerousness, and while we declined to bar all such testimony (*id., at pp. 327-328*) we found it so inherently untrustworthy that we would permit confinement even in a so-called civil proceeding only upon proof beyond a reasonable doubt.

* I would restructure the rule designed by the majority to eliminate all reference to conformity to standards of the profession in predicting violence. If a psychiatrist does in fact predict violence, then a duty to warn arises. The majority's expansion of that rule will take us from the world of reality into the wonderland of clairvoyance.

Clark, J. Until today's majority opinion, both legal and medical authorities have agreed that confidentiality is essential to effectively treat the mentally ill, and that imposing a [**355] [***35] duty on doctors to disclose patient threats to potential victims would greatly impair treatment. Further, recognizing that effective treatment and society's safety are necessarily intertwined, the Legislature has already decided effective and confidential treatment is preferred over imposition of a duty to warn.

The issue whether effective treatment for the mentally ill should be sacrificed to a system of warnings is, in my opinion, properly one for the Legislature, and we are bound by its judgment. Moreover, even in the absence of clear legislative direction, we must reach the same conclusion because imposing the majority's new duty is certain to result in a net increase in violence.

The majority rejects the balance achieved by the Legislature's Lanterman-Petris-Short Act. (*Welf. & Inst. Code, § 5000 et seq.*, [*453] hereafter the act.) [1] In addition, the majority fails to recognize that, even absent the act, overwhelming policy considerations mandate against sacrificing fundamental patient interests without gaining a corresponding increase in public benefit.

1 All statutory references, unless otherwise stated, are to the Welfare and Institutions Code.

Statutory Provisions

Although the parties have touched only briefly on the nondisclosure provisions of the act, amici have pointed out their importance. The instant case arising after ruling on demurrer, the parties must confront the act's provisions in the trial court. In these circumstances the parties' failure to fully meet the provisions of the act would not justify this court's refusal to discuss and apply the law.

Having a grave impact on future treatment of the mentally ill in our state, the majority opinion clearly transcends the interests of the immediate parties and must discuss all applicable law. It abdicates judicial responsibility to refuse to recognize the clear legislative policy reflected in the act.

Effective 1 July 1969, the Legislature created a comprehensive statutory resolution of the rights and duties of both the mentally infirm and those charged with their care and treatment. The act's purposes include ending inappropriate commitment, providing prompt care, protecting public safety, and safeguarding personal rights. (§ 5001.) The act applies to both voluntary and involuntary commitment and to both public and private institutions; it details legal procedure for commitment; it enumerates the legal and civil rights of persons committed; and it spells out the duties, liabilities and rights of the psychotherapist. Thus the act clearly evinces the Legislature's weighing of the countervailing concerns presently before us -- when a patient has threatened a third person during psychiatric treatment.

Reflecting legislative recognition that disclosing confidences impairs effective treatment of the mentally ill, and thus is contrary to the best interests of society, the act establishes the therapist's duty to *not* disclose. *Section 5328* provides in part that "[all] information and records obtained in the course of providing services . . . to either voluntary or involuntary recipients of services *shall* be confidential." (Italics added.) Further, a patient may enjoin disclosure in violation of statute and may [*454] recover the greater of $ 500 or three times the amount of actual damage for unlawful disclosure. (§ 5330.)

However, recognizing that some private and public interests must override the patient's, the Legislature established several limited exceptions to confidentiality. [2] The [**356] [***36] limited nature of these excep-

tions and the [*455] legislative concern that disclosure might impair treatment, thereby harming both patient and society, are shown by section 5328.1. The section provides that a therapist may disclose "to a member of the family of a patient the information that the patient is presently a patient in the facility or that the patient is seriously physically ill . . . if the professional person in charge of the facility determines that the release of such information is in the best interest of the patient." Thus, disclosing even the fact of treatment is severely limited.

2 *Section 5328* provides: "All information and records obtained in the course of providing services under Division 5 (commencing with *Section 5000*), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7000), to either voluntary or involuntary recipients of services shall be confidential. Information and records may be disclosed only: [para.] (a) In communications between qualified professional persons in the provision of services or appropriate referrals, or in the course of conservatorship proceedings. The consent of the patient, or his guardian or conservator must be obtained before information or records may be disclosed by a professional person employed by a facility to a professional person not employed by the facility who does not have the medical responsibility for the patient's care. [para.] (b) When the patient, with the approval of the physician in charge of the patient, designates persons to whom information or records may be released, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family; [para.] (c) To the extent necessary for a recipient to make a claim, or for a claim to be made on behalf of a recipient for aid, insurance, or medical assistance to which he may be entitled; [para.] (d) If the recipient of services is a minor, ward, or conservatee, and his parent, guardian, or conservator designates, in writing, persons to whom records or information may be disclosed, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family; [para.] (e) For research, provided that the Director of Health designates by regulation, rules for the conduct of research. Such rules shall include, but need not be limited to, the requirement that all researchers must sign an oath of confidentiality as follows:

Date

As a condition of doing research concerning persons who have received services from (fill in the facility, agency or person), I, , agree not to divulge any information obtained in the course of such research to unauthorized persons, and not to publish or otherwise make public any information regarding persons who have received services such that the person who received services is identifiable. I recognize that unauthorized release of confidential information may make me subject to a civil action under provisions of the Welfare and Institutions Code.

Signed

[para.] (f) To the courts, as necessary to the administration of justice. [para.] (g) To governmental law enforcement agencies as needed for the protection of federal and state elective constitutional officers and their families. [para.] (h) To the Senate Rules Committee or the Assembly Rules Committee for the purposes of legislative investigation authorized by such committee. [para.] (i) If the recipient of services who applies for life or disability insurance designates in writing the insurer to which records or information may be disclosed. [para.] (j) To the attorney for the patient in any and all proceedings upon presentation of a release of information signed by the patient, except that when the patient is unable to sign such release, the staff of the facility, upon satisfying itself of the identity of said attorney, and of the fact that the attorney does represent the interests of the patient, may release all information and records relating to the patient except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family. [para.] The amendment of subdivision (d) of this section enacted at the 1970 Regular Session of the Legislature does not constitute a change in, but is declaratory of, the preexisting law."

Subdivisions (g), (h), and (i) were added by amendment in 1972. Subdivision (j) was added by amendment in 1974.

Section 5328, specifically enumerating exceptions to the confidentiality requirement, does not admit of an interpretation importing implied exceptions. (*County of Riverside v. Superior*

Court, 42 Cal.App.3d 478, 481 [116 Cal.Rptr. 886].)

As originally enacted the act contained no provision allowing the therapist to warn anyone of a patient's threat. In 1970, however, the act was amended to permit disclosure in two limited circumstances. *Section 5328* was amended, in subdivision (g), to allow disclosure "[*to*] *governmental* [**357] [***37] *law enforcement agencies* as needed for the protection of federal and state elective constitutional officers and their families." (Italics added.) In addition, section 5328.3 was added to provide that when "necessary for the protection of the patient or *others* due to the patient's disappearance from, without prior notice to, a designated facility and his whereabouts is unknown, notice of such disappearance *may* be made to *relatives and governmental law enforcement agencies* designated by the physician in charge of the patient or the professional person in charge of the facility or his designee." (Italics added.)

Obviously neither exception to the confidentiality requirement is applicable to the instant case.

Not only has the Legislature specifically dealt with disclosure and warning, but it also has dealt with therapist and police officer liability for acts of the patient. The Legislature has provided that the therapist and the officer shall not be liable for prematurely releasing the patient. (§§ 5151, 5154, 5173, 5278, 5305, 5306.)

[*456] Ignoring the act's detailed provisions, the majority has chosen to focus on the "dangerous patient exception" to the psychotherapist-patient privilege in *Evidence Code sections 1014, 1024* as indicating that "the Legislature has undertaken the difficult task of balancing the countervailing concerns." (*Ante*, p. 440.) However, this conclusion is erroneous. The majority fails to appreciate that when disclosure is permitted in an evidentiary hearing, a fourth interest comes into play -- the court's concern in judicial supervision. Because they are necessary to the administration of justice, disclosures to the courts are excepted from the nondisclosure requirement by *section 5328, subdivision (f)*. However, this case does not involve a court disclosure. Subdivision (f) and the Evidence Code sections relied on by the majority are clearly inapposite.

The provisions of the act are applicable here. *Section 5328* (see fn. 2, *ante*) provides, "*All information and records obtained in the course of providing services under division 5 . . . shall be confidential.*" (Italics added.) Dr. Moore's letter describing Poddar's mental condition for purposes of obtaining 72-hour commitment was undisputedly a transmittal of information designed to invoke application of division 5. As such it constituted information obtained in providing services under division 5. This is true regardless of whether Dr. Moore has been designated a professional person by the County of Alameda. Although *section 5150* provides that commitment for 72 hours' evaluation shall be based on a statement by a peace officer or person designated by the county, *section 5328* prohibits disclosure of *all information*, not just disclosure of the committing statement or disclosure by persons designated by the county. In addition, section 5330 gives the patient a cause of action for disclosure of confidential information by "an individual" rather than the persons enumerated in *section 5150.*

Moreover, it appears from the allegations of the complaint that Dr. Moore is in fact a person designated by the county under *section 5150.* The complaint alleges that "On or about August 20, 1969, defendant Dr. Moore notified Officers Atkinson and Teel, he would give the campus police a letter of diagnosis on Prosenjit Poddar, so the campus police could pick up Poddar and take him to Herrick Hospital in Berkeley where Dr. Moore would assign a 72-hour Emergency Psychiatric Detention on Prosenjit Poddar." Since there is no allegation that Dr. Moore was not authorized to sign the document, it must be concluded that under the allegations of the complaint he was authorized and thus a professional person designated by the county.

[*457] Whether we rely on the facts as stated in the complaint that Dr. Moore is a designated person under *section 5150* or on the strict prohibitions of *section 5328* prohibiting disclosure of "*all information,*" the imposition of a duty to warn by the majority [**358] [***38] flies directly in the face of the Lanterman-Petris-Short Act.

Under the act, there can be no liability for Poddar's premature release. It is likewise clear there exists no duty to warn. Under *section 5328*, the therapists were under a duty *to not disclose*, and no exception to that duty is applicable here. Establishing a duty to warn on the basis of general tort principles imposes a Draconian dilemma on therapists -- either violate the act thereby incurring the attendant statutory penalties, or ignore the majority's duty to warn thereby incurring potential civil liability. I am unable to assent to such.

If the majority feels that it must impose such a dilemma, then it has an obligation to specifically enumerate the circumstances under which the Lanterman-Petris-Short Act applies as opposed to the circumstances when "general tort principles" will govern. The majority's failure to perform this obligation -- leaving to the therapist the subtle questions as to when each opposing rule applies -- is manifestly unfair.

Duty to Disclose in the Absence of Controlling Statutory Provision

Even assuming the act's provisions are applicable only to conduct occurring after commitment, and not to prior conduct, the act remains applicable to the most dangerous patients -- those committed. The Legislature having determined that the balance of several interests requires nondisclosure in the graver public danger commitment, it would be anomalous for this court to reweigh the interests, requiring disclosure for those less dangerous. Rather, we should follow the legislative direction by refusing to require disclosure of confidential information received by the therapist either before or in the absence of commitment. The Legislature obviously is more capable than is this court to investigate, debate and weigh potential patient harm through disclosure against the risk of public harm by nondisclosure. We should defer to its judgment.

Common Law Analysis

Entirely apart from the statutory provisions, the same result must be reached upon considering both general tort principles and the public [*458] policies favoring effective treatment, reduction of violence, and justified commitment.

Generally, a person owes no duty to control the conduct of another. (*Richards v. Stanley (1954) 43 Cal.2d 60, 65 [271 P.2d 23]*; *Wright v. Arcade School Dist. (1964) 230 Cal.App.2d 272, 277 [40 Cal.Rptr. 812]*; *Rest.2d Torts (1965) § 315.*) Exceptions are recognized only in limited situations where (1) a special relationship exists between the defendant and injured party, or (2) a special relationship exists between defendant and the active wrongdoer, imposing a duty on defendant to control the wrongdoer's conduct. The majority does not contend the first exception is appropriate to this case.

Policy generally determines duty. (*Dillon v. Legg (1968) 68 Cal.2d 728, 734 [69 Cal.Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316].*) Principal policy considerations include foreseeability of harm, certainty of the plaintiff's injury, proximity of the defendant's conduct to the plaintiff's injury, moral blame attributable to defendant's conduct, prevention of future harm, burden on the defendant, and consequences to the community. (*Rowland v. Christian (1968) 69 Cal.2d 108, 113 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496].*)

Overwhelming policy considerations weigh against imposing a duty on psychotherapists to warn a potential victim against harm. While offering virtually no benefit to society, such a duty will frustrate psychiatric treatment, invade fundamental patient rights and increase violence.

The importance of psychiatric treatment and its need for confidentiality have been recognized by this court. (*In re Lifschutz (1970) 2 Cal.3d 415, 421-422 [85 Cal.Rptr. 829, 467 P.2d 557, 44 A.L.R.3d 1].*) "It is clearly recognized that the very practice of psychiatry vitally depends upon the reputation in the community that the psychiatrist will not tell." (Slovenko, *Psychiatry and a Second* [**359] [***39] *Look at the Medical Privilege* (1960) 6 Wayne L.Rev. 175, 188.)

Assurance of confidentiality is important for three reasons.

Deterrence From Treatment

First, without substantial assurance of confidentiality, those requiring treatment will be deterred from seeking assistance. (See Sen. Judiciary Com. comment accompanying *§ 1014 of Evid. Code*; Slovenko, *supra*, 6 [*459] Wayne L.Rev. 175, 187-188; Goldstein & Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute* (1962) 36 Conn.Bar J. 175, 178.) It remains an unfortunate fact in our society that people seeking psychiatric guidance tend to become stigmatized. Apprehension of such stigma -- apparently increased by the propensity of people considering treatment to see themselves in the worst possible light -- creates a well-recognized reluctance to seek aid. (Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications* (1964) 10 Wayne L.Rev. 609, 617; Slovenko, *supra*, 6 Wayne L.Rev. 175, 188; see also Rappeport, *Psychiatrist-Patient Privilege* (1963) 23 Md.L.J. 39, 46-47.) This reluctance is alleviated by the psychiatrist's assurance of confidentiality.

Full Disclosure

Second, the guarantee of confidentiality is essential in eliciting the full disclosure necessary for effective treatment. (*In re Lifschutz, supra, 2 Cal.3d 415, 431*; *Taylor v. United States (D.C.Cir. 1955) 222 F.2d 398, 401 [95 App.D.C. 373]*; Goldstein & Katz, *supra*, 36 Conn.Bar J. 175, 178; Heller, *Some Comments to Lawyers on the Practice of Psychiatry* (1957) 30 Temp.L.Q. 401; Guttmacher & Weihofen, *Privileged Communications Between Psychiatrist and Patient* (1952) 28 Ind.L.J.32, 34.) [3] The psychiatric patient approaches treatment with conscious and unconscious inhibitions against revealing his innermost thoughts. "Every person, however well-motivated, has to overcome resistances to therapeutic exploration. These resistances seek support from every possible source and the possibility of disclosure would easily be employed in the service of resistance." (Goldstein & Katz, *supra*, 36 Conn.Bar J. 175, 179; see also, 118 Am.J.Psych. 734, 735.) Until a patient can trust his psychiatrist not to violate their confidential relationship, "the unconscious psychological control mechanism of repression will prevent the recall of past experiences." (Butler, *Psychotherapy and Griswold: Is Confidentiality a Privilege or a Right?* (1971) 3 Conn.L.Rev. 599, 604.)

3 One survey indicated that five of every seven people interviewed said they would be less likely to make full disclosure to a psychiatrist in the absence of assurance of confidentiality. (See, Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine* (1962) 71 Yale L.J. 1226, 1255.)

Successful Treatment

Third, even if the patient fully discloses his thoughts, assurance that the confidential relationship will not be breached is necessary to [*460] maintain his trust in his psychiatrist -- the very means by which treatment is effected. "[The] essence of much psychotherapy is the contribution of trust in the external world and ultimately in the self, modelled upon the trusting relationship established during therapy." (Dawidoff, *The Malpractice of Psychiatrists*, 1966 Duke L.J. 696, 704.) Patients will be helped only if they can form a trusting relationship with the psychiatrist. (*Id.*, at p. 704, fn. 34; Burham, *Separation Anxiety* (1965) 13 Arch.Gen.Psych. 346, 356; Heller, *supra*, 30 Temp.L.Q. 401, 406.) All authorities appear to agree that if the trust relationship cannot be developed because of collusive communication between the psychiatrist and others, treatment will be frustrated. (See, e.g., Slovenko (1973) Psychiatry and Law, p. 61; Cross, *Privileged Communications Between Participants in Group Psychotherapy* (1970) Law & Soc. Order, 191, 199; Hollender, *The* [**360] [***40] *Psychiatrist and the Release of Patient Information* (1960) 116 Am.J.Psych. 828, 829.)

Given the importance of confidentiality to the practice of psychiatry, it becomes clear the duty to warn imposed by the majority will cripple the use and effectiveness of psychiatry. Many people, potentially violent -- yet susceptible to treatment -- will be deterred from seeking it; those seeking it will be inhibited from making revelations necessary to effective treatment; and, forcing the psychiatrist to violate the patient's trust will destroy the interpersonal relationship by which treatment is effected.

Violence and Civil Commitment

By imposing a duty to warn, the majority contributes to the danger to society of violence by the mentally ill and greatly increases the risk of civil commitment -- the total deprivation of liberty -- of those who should not be confined. [4] The impairment of treatment and risk of improper commitment resulting from the new duty to warn will not be limited to a few patients but will extend to a large number of the mentally ill. [*461] Although under existing psychiatric procedures only a relatively few receiving treatment will ever present a risk of violence, the number making threats is huge, and it is the latter group -- not just the former -- whose treatment will be impaired and whose risk of commitment will be increased.

4 The burden placed by the majority on psychiatrists may also result in the improper deprivation of two other constitutionally protected rights. First, the patient's constitutional right of privacy (*In re Lifschutz, supra, 2 Cal.3d 415*) is obviously encroached upon by requiring the psychotherapist to disclose confidential communications. Secondly, because confidentiality is essential to effective treatment, the majority's decision also threatens the constitutionally recognized right to receive treatment. (*People v. Feagley (1975) 14 Cal.3d 338, 359 [121 Cal.Rptr. 509, 535 P.2d 373]*; *Wyatt v. Stickney (M.D.Ala. 1971) 325 F.Supp. 781, 784*, affd. *sub nom. Wyatt v. Aderholt (5th Cir. 1974) 503 F.2d 1305*; *Nason v. Superintendent of Bridgewater State Hosp. (1968) 353 Mass. 604 [233 N.E.2d 908]*.)

Both the legal and psychiatric communities recognize that the process of determining potential violence in a patient is far from exact, being fraught with complexity and uncertainty. (E.g., *People v. Burnick (1975) 14 Cal.3d 306, 326 [121 Cal.Rptr. 488, 535 P.2d 352]*, quoting from *Murel v. Baltimore City Criminal Court (1972) 407 U.S. 355, 364-365, fn. 2 [32 L.Ed.2d 791, 796-797, 92 S.Ct. 2091]* (Douglas, J., dissenting from dismissal of certiorari); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal.L.Rev. 693, 711-716; Rector, *Who Are the Dangerous?* (July 1973) Bull.Am.Acad.Psych. & L. 186; Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness* (1972) 18 Crime & Delinq. 371; Justice & Birkman, *An Effort to Distinguish the Violent From the Nonviolent* (1972) 65 So.Med.J. 703.) [5] In fact, precision has not even been [**361] [***41] attained in predicting who of those having already committed violent acts will again become violent, a task recognized to be of much simpler proportions. (Kozol, Boucher & Garofalo, *supra*, 18 Crime & Delinq. 371, 384.)

5 A shocking illustration of psychotherapists' inability to predict dangerousness, cited by this court in *People v. Burnick, supra, 14 Cal.3d 306, 326-327*, footnote 17, is cited and discussed in Ennis, Prisoners of Psychiatry: Mental Patients, Psychiatrists, and the Law (1972): "In a well-known study, psychiatrists predicted that 989 persons were so dangerous that they could not be kept even in civil mental hospitals, but would have to be kept in maximum security hospitals run by the Department of Corrections. Then, be-

cause of a United States Supreme Court decision, those persons were transferred to civil hospitals. After a year, the Department of Mental Hygiene reported that one-fifth of them had been discharged to the community, and over half had agreed to remain as voluntary patients. During the year, only 7 of the 989 committed or threatened any act that was sufficiently dangerous to require retransfer to the maximum security hospital. Seven correct predictions out of almost a thousand is not a very impressive record. [para.] Other studies, and there are many, have reached the same conclusion: psychiatrists simply cannot predict dangerous behavior." (*Id.*, at p. 227.) Equally illustrative studies are collected in Rosenhan, *On Being Sane in Insane Places* (1973) 13 Santa Clara Law. 379, 384; Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, supra*, 62 Cal.L.Rev. 693, 750-751.)

This predictive uncertainty means that the number of disclosures will necessarily be large. As noted above, psychiatric patients are encouraged to discuss all thoughts of violence, and they often express such thoughts. However, unlike this court, the psychiatrist does not enjoy the benefit of [*462] overwhelming hindsight in seeing which few, if any, of his patients will ultimately become violent. Now, confronted by the majority's new duty, the psychiatrist must instantaneously calculate potential violence from each patient on each visit. The difficulties researchers have encountered in accurately predicting violence will be heightened for the practicing psychiatrist dealing for brief periods in his office with heretofore nonviolent patients. And, given the decision not to warn or commit must always be made at the psychiatrist's civil peril, one can expect most doubts will be resolved in favor of the psychiatrist protecting himself.

Neither alternative open to the psychiatrist seeking to protect himself is in the public interest. The warning itself is an impairment of the psychiatrist's ability to treat, depriving many patients of adequate treatment. It is to be expected that after disclosing their threats, a significant number of patients, who would not become violent if treated according to existing practices, will engage in violent conduct as a result of unsuccessful treatment. In short, the majority's duty to warn will not only impair treatment of many who would never become violent but worse, will result in a net increase in violence. [6]

6 The majority concedes that psychotherapeutic dialogue often results in the patient expressing threats of violence that are rarely executed. (*Ante*, p. 441.) The practical problem, of course, lies in ascertaining which threats from which patients will be carried out. As to this problem, the majority is silent. They do, however, caution that a therapist certainly "should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened." (*Id.*)

Thus, in effect, the majority informs the therapists that they must accurately predict dangerousness -- a task recognized as extremely difficult -- or face crushing civil liability. The majority's reliance on the traditional standard of care for professionals that "therapist need only exercise 'that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances'" (*ante*, p. 438) is seriously misplaced. This standard of care assumes that, to a large extent, the subject matter of the specialty is ascertainable. One clearly ascertainable element in the psychiatric field is that the therapist cannot accurately predict dangerousness, which, in turn, means that the standard is inappropriate for lack of a relevant criterion by which to judge the therapist's decision. The inappropriateness of the standard the majority would have us use is made patent when consideration is given to studies, by several eminent authorities, indicating that "[the] chances of a second psychiatrist agreeing with the diagnosis of a first psychiatrist 'are barely better than 50-50; or stated differently, there is about as much chance that a different expert would come to some different conclusion as there is that the other would agree.'" (Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, supra*, 62 Cal.L.Rev. 693, 701, quoting, Ziskin, Coping With Psychiatric and Psychological Testimony, p. 126.) The majority's attempt to apply a normative scheme to a profession which must be concerned with problems that balk at standardization is clearly erroneous.

In any event, an ascertainable standard would not serve to limit psychiatrist disclosure of threats with the resulting impairment of treatment. However compassionate, the psychiatrist hearing the threat remains faced with potential crushing civil liability for a mistaken evaluation of his patient and will be forced to resolve even the slightest doubt in favor of disclosure or commitment.

[*463] The second alternative open to the psychiatrist is to commit his patient rather than to warn. Even in

the absence of threat of civil liability, the doubts of psychiatrists [**362] [***42] as to the seriousness of patient threats have led psychiatrists to overcommit to mental institutions. This overcommitment has been authoritatively documented in both legal and psychiatric studies. (Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, supra*, 62 Cal.L.Rev. 693, 711 et seq.; Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 Cal.L.Rev. 1025, 1044-1046; Am. Psychiatric Assn. Task Force Rep. 8 (July 1974) Clinical Aspects of the Violent Individual, pp. 23-24; see Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U.Pa.L.Rev. 75, 84.) This practice is so prevalent that it has been estimated that "as many as twenty harmless persons are incarcerated for every one who will commit a violent act." (Steadman & Cocozza, *Stimulus/Response: We Can't Predict Who Is Dangerous* (Jan. 1975) 8 Psych. Today 32, 35.)

Given the incentive to commit created by the majority's duty, this already serious situation will be worsened, contrary to Chief Justice Wright's admonition "that liberty is no less precious because forfeited in a civil proceeding than when taken as a consequence of a criminal conviction." (*In re Gary W. (1971) 5 Cal.3d 296, 307 [96 Cal.Rptr. 1, 486 P.2d 1201]*.)

Conclusion

In adopting the act, the Legislature fully recognized the concerns that must govern our decision today -- adequate treatment for the mentally ill, safety of our society, and our devotion to individual liberty, making overcommitment of the mentally ill abhorrent. (§ 5001.) Again, the Legislature balanced these concerns in favor of nondisclosure (*§ 5328*), thereby promoting effective treatment, reducing temptation for overcommitment, and ensuring greater safety for our society. Psychiatric and legal expertise on the subject requires the same judgment.

The tragedy of Tatiana Tarasoff has led the majority to disregard the clear legislative mandate of the Lanterman-Petris-Short Act. Worse, the majority impedes medical treatment, resulting in increased violence from -- and deprivation of liberty to -- the mentally ill.

[*464] We should accept legislative and medical judgment, relying upon effective treatment rather than on indiscriminate warning.

The judgment should be affirmed.

LEXSEE 27 CAL 3D 741 (1980)

CLIFFORD K. THOMPSON, JR., et al., Plaintiffs and Appellants, v. COUNTY OF ALAMEDA, Defendant and Respondent

S.F. No. 24006

Supreme Court of California

27 Cal. 3d 741; 614 P.2d 728; 167 Cal. Rptr. 70; 1980 Cal. LEXIS 196; 12 A.L.R.4th 701

July 14, 1980

SUBSEQUENT HISTORY: Appellants' petition for a rehearing was denied August 21, 1980. Manuel, J., did not participate therein. Tobriner, J. and Mosk, J., were of the opinion that the petition should be granted. Time of grt. or den. rehg. extd. to September 12, 1980.

PRIOR HISTORY: Superior Court of Alameda County, No. 470490-6, John P. Sparrow, Judge.

DISPOSITION: The judgment of dismissal is affirmed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiffs, whose 5-year-old son was killed by a juvenile offender within 24 hours of his release on temporary leave, brought an action against a county alleging the death was caused by the county's negligence in releasing the offender into the community, and failing to advise or warn the juvenile's mother, the local police, or parents within the immediate vicinity of the juvenile's residence, in failing to exercise due care in maintaining custody and control over the juvenile through his mother, and failing to exercise reasonable care in selecting the mother to serve as the county's agent in maintaining custody and control over the juvenile. Plaintiffs alleged that the county knew the juvenile was dangerous and had violent propensities regarding young children and also knew he had indicated he would, if released, take the life of a young child residing in the neighborhood. The trial court entered a judgment of dismissal in favor of defendant after its general demurrer was sustained without leave to amend. (Superior Court of Alameda County, No. 470490-6, John P. Sparrow, Judge.)

The Supreme Court affirmed. The court held the county enjoyed a statutory immunity for any liability based on its decision to release the juvenile, under *Gov. Code, § 820.2*, providing the decision of whether or not to release an offender is a discretionary decision clothed with immunity when made by the proper authorities, and under *Gov. Code, § 845.8*, providing immunity from any injury resulting from determining whether to parole or release a prisoner. The court further held the county was immune from liability for its selection of the mother as custodian as well as for the determination of the appropriate degree of supervision of the custodian's efforts. The court noted that whenever a potentially dangerous offender is released and thereafter commits a crime, the possibility of the commission of that crime is statistically foreseeable, yet the Legislature has concluded that the benefits to society from rehabilitative release programs mandate their continuance. Thus, the court held within that context and for policy reasons, the duty to warn depends on and arises from the existence of a prior threat to a specific identifiable victim. In those instances in which the released offender poses a predictable threat of harm to a named or readily identifiable victim or group of victims who can be effectively warned of the danger, the court held a releasing agent may well be liable for failure to warn such persons. Accordingly, because plaintiffs' decedent was not a known, identifiable victim, but rather a member of a large amorphous public group of potential targets, the court held the county had no affirmative duty to warn plaintiffs, the police, or the mother of the juvenile, or other local parents of the juvenile's release. (Opinion by Richardson, J., with Bird, C. J., Clar, New-

man, JJ., and Caldecott, J., * concurring. Separate dissenting opinion by Tobriner, J., with Mosk, J., concurring.)

* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) Government Tort Liability § 11 -- Grounds for Relief -- Liability Arising From Governmental Activities -- Police and Correctional Activities -- Immunity -- Prisoners. --In an action against a county for damages for the wrongful death of plaintiffs' five-year-old son at the hands of a juvenile offender released on temporary leave in the custody of his mother, *Gov. Code, § 844.6, subd. (a)(1)*, providing governmental immunity for injuries caused by a "prisoner," was inapplicable; a private residence utilized for the custody of delinquent children may not be deemed the equivalent of a prison, nor is a minor placed in the custody of his family or foster parents a "prisoner" for purposes of the statute.

(2) Government Tort Liability § 11 -- Grounds for Relief -- Liability Arising From Governmental Activities -- Police and Correctional Activities -- Immunity -- Release of Juvenile Delinquent. --In an action against a county for damages for the wrongful death of plaintiffs' five-year-old son at the hands of a juvenile offender released on temporary leave in the custody of his mother, the county was immune from liability based on its decision to release the juvenile, under *Gov. Code, § 820.2*, which provides that the determination of whether or not to release an offender is a discretionary decision clothed with immunity when made by proper authorities, and *Gov. Code, § 845.8*, which provides that a public entity or employee is not liable for any injury resulting from determining whether to parole or release a prisoner.

(3) Government Tort Liability § 5 -- Grounds for Relief -- As Dependent on Liability of Employee -- Discretionary Activities -- Immunity -- Release of Juvenile Offender. --In an action against a county for damages for the wrongful death of plaintiffs' five-year-old son at the hands of a juvenile offender released on temporary leave in the custody of his mother, the county was immune from liability based on its selection of the juvenile's mother as custodian and its alleged failure adequately to supervise her activities, under *Gov. Code, § 820.2*, providing immunity to a public employee for an injury resulting from an act or omission that was the result of the exercise of the discretion vested in him. The selection of custodians for potentially dangerous minors and the determination of the requisite level of governmental supervision for such custodians is a discretionary act within the meaning of the statute.

(4) Government Tort Liability § 11 -- Grounds for Relief -- Liability Arising From Governmental Activities -- Police and Correctional Activities -- Immunity -- Release of Juvenile -- Selection of Custodian. --In an action against a county for damages for the wrongful death of plaintiffs' five-year-old son at the hands of a juvenile offender released on temporary leave in the custody of his mother, *Gov. Code, § 845.8*, providing governmental immunity for any injury resulting from determining the terms and conditions of a prisoner's release, immunized the county from liability based on its selection of the juvenile's mother as custodian and the degree of supervision to be exercised over her. Immunity under the statute is provided when the questioned acts involve policy decisions made prior to or as an integral part of the decision to release.

(5) Negligence § 92 -- Actions -- Questions of Law and Fact -- Duty of Care. --In an action for negligence, the existence of "duty" is a question of law. Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done.

(6) Negligence § 1 -- Liability for Negligence. --It is a fundamental proposition of tort law that one is liable for injuries caused by a failure to exercise reasonable care.

(7) Negligence § 9 -- Elements of Actionable Negligence -- Duty of Care -- Determination of Duty -- Public Agencies. --In considering the existence of "duty" in a negligence action, several factors require consideration, including 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 injuries 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. When public agencies are involved, additional elements include the extent of the agency's powers, the role imposed on it by law, and the limitations imposed on it by budget.

(8) Government Tort Liability § 11 -- Grounds for Relief -- Liability Arising From Governmental Activi-

ties -- Police and Correctional Activities -- Release of Inmate -- Duty to Warn. --Public entities and employees have no affirmative duty to warn of the release of an inmate with a violent history who has made nonspecific threats of harm directed at nonspecific victims. The duty to warn depends on and arises from the existence of a prior threat to a specific identifiable victim. In those instances in which the released offender poses a predictable threat of harm to a named or readily identifiable victim or group of victims who can be effectively warned of the danger, a releasing agent may well be liable for failure to warn such persons.

(9) Government Tort Liability § 11 -- Grounds for Relief -- Liability Arising From Governmental Activities -- Police and Correctional Activities -- Release of Inmate -- Duty to Warn -- Scope. --In an action against a county for damages for the wrongful death of plaintiffs' five-year-old son at the hands of a juvenile offender released on temporary leave in the custody of his mother, based on allegations the county knew the juvenile was dangerous and had violent propensities regarding young children, and that the county knew the juvenile had indicated he would, if released, take the life of a young child residing in the neighborhood, the trial court properly sustained the county's demurrer to the complaint without leave to amend. The county had no affirmative duty to warn plaintiffs, the police, the mother of the juvenile, or other local parents of the juvenile's release since plaintiffs' decedent was not a known, identifiable victim, but rather was a member of a large amorphous public group of potential targets.

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JUDGES: Opinion by Richardson, J., with Bird, C. J., Clark, Newman, JJ., and Caldecott, J., * concurring. Separate dissenting opinion by Tobriner, J., with Mosk, J., concurring.

* Assigned by the Chairperson of the Judicial Council.

OPINION BY: RICHARDSON

OPINION

[*745] [**730] [***72] Plaintiffs appeal from a judgment of dismissal entered in favor of defendant County of Alameda (County) after County's [*746] general demurrer was sustained without leave to amend. We will affirm the judgment.

For purposes of this appeal, those factual allegations of the complaint which are properly pleaded are deemed admitted by defendant's demurrer. (*White v. Davis (1975) 13 Cal.3d 757, 765 [120 Cal. Rptr. 94, 533 P.2d 222].*) We recite the gravamen of plaintiffs' causes of action as contained in their amended complaint. Plaintiffs, husband and wife, and their minor son lived in the City of Piedmont, a few doors from the residence of the mother of James F. (James), a juvenile offender. Prior to the incident in question, James had been in the custody and under the control of County and had been confined in a county institution under court order. County knew that James had "latent, extremely dangerous and violent propensities regarding young children and that sexual assaults upon young children and violence connected therewith were a likely result of releasing [him] into the community." County also knew that James had "indicated that he would, if released, take the life of a young child residing in the neighborhood." (James gave no indication of which, if any, young child he intended as his victim.) County released James on temporary leave into his mother's custody at her home, and "[at] no time did [County] advise and/or warn [James' mother], the local police and/or parents of young children within the immediate vicinity of [James' mother's] house of the known facts . . . ." Within 24 hours of his release on temporary leave, James murdered plaintiffs' son in the garage of James' mother's home.

The complaint further alleges that the death was caused by County's "reckless, wanton and grossly negligent" actions in releasing James into the community (first cause of action); failing to advise and/or warn James' mother, the local police, or "parents of young children within the immediate vicinity" of the residence of James' mother (second cause of action); failing to exercise due care in maintaining custody and control over James through his mother in her capacity as County's

agent (third cause of action); and failing to exercise reasonable care in selecting James' mother to serve as County's agent in maintaining custody and control over James (fourth cause of action).

County demurred on the ground that the complaint failed to state a cause of action (*Code Civ. Proc., § 430.10, subd. (e)*), contending that *Government Code sections 818.2, 820.2, 844.6, subdivision (a) (1), 845, 845.8, subdivision (a)*, and *846*, granted County immunity.

[*747] We consider, nonsequentially, the validity of each of the alleged causes of action.

I. The Decision To Release

We note preliminarily that *Government Code sections 818.2, 845*, and *846* afford the County no immunity. The [**731] [***73] alleged failures of County do not invoke these statutory immunities because the claimed omissions of County do not involve the adoption or failure to adopt any enactment or lack of enforcement of any law (*§ 818.2*), the failure to provide police protection (*§ 845*), or the failure to make an arrest or retain an arrested person in custody (*§ 846*). (1) Similarly inapplicable is *section 844.6, subdivision (a) (1)*, applicable only to liability for injuries caused by a "prisoner," because a private residence utilized for the custody of delinquent children may not be deemed the equivalent of a prison (*Patricia J. v. Rio Linda Union Sch. Dist. (1976) 61 Cal. App. 3d 278, 287 [132 Cal. Rptr. 211]*); nor is a minor placed in the custody of his family or foster parents a "prisoner" for purposes of *section 844.6*.

(2) County asserts additionally, however, that *sections 820.2* and *845.8* immunize County's release of James into the community. We agree.

In *Johnson v. State of California (1968) 69 Cal.2d 782, 795 [73 Cal. Rptr. 240, 447 P.2d 352]*, we characterized the determination of whether or not to release an offender as a discretionary decision clothed with immunity under *section 820.2* when made by the appropriate authorities. We explained, "The decision to parole thus comprises the resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial reexamination." (*Johnson, supra, at p. 795*; see also *Welf. & Inst. Code, § 1176.*) In the present case, plaintiffs fail to allege that the releasing agent was not empowered to make the determination to release James. It follows that the decision to release James is immune from tort liability under *section 820.2*.

A further specific immunity within this context is conferred by *section 845.8*, which explicitly provides that "Neither a public entity nor a public employee is liable for: [para.] (a) Any injury resulting from determining whether to *parole or release* a prisoner . . . ." (Italics added.)

[*748] Each of these sections extends to County a statutory immunity for any liability based upon its decision to "release."

II. The Selection of a Custodian and Supervision of Her Activities

The third and fourth causes of action involve County's selection of James' mother as custodian and its alleged failure adequately to supervise her activities. Plaintiffs assert that these matters are beyond the scope of any decision to release which is immunized by *section 845.8, subdivision (a)*, but rather constitute mere ministerial implementations of a prior discretionary decision and accordingly are not immunized by *section 820.2*. We disagree.

(3) *Section 820.2* recites "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." In *Johnson* we rejected a purely mechanical analysis of the term "discretionary." Rather, we both emphasized and evaluated those policy considerations which underlie grants of immunity in order to determine which acts are protected. As we subsequently declared in *McCorkle v. City of Los Angeles (1969) 70 Cal.2d 252, 260-261 [74 Cal. Rptr. 389, 449 P.2d 453]*, contentions such as those which are made here "have frequently required judicial determination of the category into which the particular act falls: i.e., whether it was ministerial because it amounted 'only to an obedience to orders, or the performance of a duty in which the officer is left no choice of his own," or discretionary because it required 'personal deliberation, decision and judgment.' (*Morgan v. County of Yuba (1964) 230 Cal. App. 2d 938, 942-943 . . .* [citations].)"

The discretionary nature of the selection of custodians for potentially dangerous minors and the determination of the requisite level of governmental supervision for such custodians becomes apparent when the underlying [**732] [***74] policy considerations are analyzed. Choosing a proper custodian to direct the attempted rehabilitation of a minor with a prior history of antisocial behavior is a complex task. (See Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System* (1976) 64 Cal. L. Rev. 984, 1003-1015; Nejelski, *Diversion: Unleashing the Hound of Heaven*? in Pursuing Justice for the Child (Rosenheim edit. 1976) p. 94, at pp. 104-116.) The determination involves a careful [*749] consideration and balancing of such fac-

tors as the protection of the public, the physical and psychological needs of the minor, the relative suitability of the home environment, the availability of other resources such as halfway houses and community centers, and the need to reintegrate the minor into the community. The decision, requiring as it does, comparisons, choices, judgments, and evaluations, comprises the very essence of the exercise of "discretion" and we conclude that such decisions are immunized under *section 820.2*.

(4) Moreover, as previously noted, *section 845.8* immunizes County from liability for "Any injury resulting from determining . . . the terms and conditions of [a prisoner's] release . . . ." As established in *County of Santa Barbara v. Superior Court (1971) 15 Cal. App. 3d 751, 757 [93 Cal. Rptr. 406]*, immunity under this section is provided when the questioned acts involve policy decisions made prior to or as an integral part of the decision to release. (Accord, *Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 713 [141 Cal. Rptr. 189]*.) The selection of James' mother as custodian and the degree of supervision to be exercised over her clearly involved such protected policy decisions.

Accordingly, we conclude that County is immune from liability for its selection of a custodian as well as for its determination of the appropriate degree of supervision of the custodian's efforts.

III. Duty to Warn the Local Police, the Neighborhood Parents, or the Juvenile's Custodian

We now examine the principal and most troublesome contentions of plaintiffs, namely, that County is liable for its failure to warn the local police and the parents of neighborhood children that James was being released or, alternatively, to warn James' mother of his expressed threat. We first inquire whether there would be liability in the absence of immunity (*Smith v. Alameda County Social Services Agency (1979) 90 Cal. App. 3d 929, 935 [153 Cal. Rptr. 712]*) and determine initially whether in any event County had a duty to warn for the protection of plaintiffs.

As we observed in *Dillon v. Legg (1968) 68 Cal.2d 728 [69 Cal. Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316]*, duty "'is a shorthand statement of a conclusion, rather than an aid to analysis in itself . . . . But it should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the [*750] law to say that the particular plaintiff is entitled to protection.' (Prosser, Law of Torts [3d ed.] at pp. 332-333.)" (P. 734.) Courts, however, have invoked the concept of duty to limit generally "the otherwise potentially infinite liability which would follow every negligent act, . . ." (*Id., at p. 739.*)

(5) The existence of "duty" is a question of law. (*Richards v. Stanley (1954) 43 Cal.2d 60, 66-67 [271 P.2d 23]*.) "[Legal] duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." (*Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425, 434 [131 Cal. Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166]*.)

(6) It is a fundamental proposition of tort law that one is liable for injuries caused by a failure to exercise reasonable care. (7) We have said, however, that in considering the existence of "duty" in a given case several factors require consideration including "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of [**733] [***75] 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. [Citations.] " (*Rowland v. Christian (1968) 69 Cal.2d 108, 113 [70 Cal. Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496]*; compare *Richards v. Stanley, supra*, and *Hergenrether v. East (1964) 61 Cal.2d 440 [39 Cal. Rptr. 4, 393 P.2d 164]*.) When public agencies are involved, additional elements include "the extent of [the agency's] powers, the role imposed upon it by law and the limitations imposed upon it by budget; . . ." (*Raymond v. Paradise Unified School Dist. (1963) 218 Cal. App. 2d 1, 8 [31 Cal. Rptr. 847]*; see *Smith v. Alameda County Social Services Agency, supra, 90 Cal. App. 3d 929*.)

Bearing in mind the foregoing controlling considerations, we examine the propriety of imposing on those responsible for releasing or confining criminal offenders a duty to warn of the release of a potentially dangerous offender who, as here, has made a generalized threat to a segment of the population. Our earlier rulings in *Johnson v. State of California, supra, 69 Cal.2d 782*, and *Tarasoff v. Regents of University of California, supra, 17 Cal.3d 425*, furnish considerable guidance in our inquiry and plaintiffs rely heavily on both cases in support of their view that [*751] County had an affirmative duty to warn someone (the police, the offender's parent, or neighborhood parents) of the dangers arising from James' release.

In *Johnson*, the state, acting through a Youth Authority placement officer, placed a minor with "homicidal tendencies and a background of violence and cruelty" in the plaintiff's home. Following his attack on the plaintiff, she sued the state. In sustaining plaintiff's cause of action, we held "[at] the outset, we can dispose

summarily of the contention, not strenuously pressed by defendant, that the judgment should be affirmed because the state owed no duty of care to plaintiff. As the party placing the youth with Mrs. Johnson, the state's relationship to plaintiff was such that its duty extended to warning of latent, dangerous qualities suggested by the parolee's history or character. [Citations.] These cases impose a duty upon those who create a *foreseeable peril*, not readily discoverable by endangered persons, to warn them of such potential peril. Accordingly, the state owed a duty to inform Mrs. Johnson of any matter that its agents knew or should have known that might endanger the Johnson family . . . . " (*Johnson, supra, 69 Cal.2d at pp. 785-786*, italics added.)

In *Johnson* we emphasized the *relationship* between the state and plaintiff-victim, and the fact that the state by its conduct placed the specific plaintiff in a position of clearly foreseeable danger. In contrast with the situation in *Johnson*, in which the risk of danger focused precisely on plaintiff, here County bore no special and continuous relationship with the specific plaintiffs nor did County knowingly place the specific plaintiffs' decedent into a foreseeably dangerous position. Thus the reasoning of our holding in *Johnson* would not sustain the complaint in this action.

Likewise in *Tarasoff* we were concerned with the duty of therapists, after determining that a patient posed a serious threat of violence, to protect the "foreseeable victim of that danger." (*Tarasoff, supra, 17 Cal.3d at p. 439*.) In reaching the conclusion that the therapists had a duty to warn either "the endangered party or those who can reasonably be expected to notify him, . . ." (*id., at p. 442*), we relied on an exception to the general rule that one owes no duty to control the conduct of another. (*Id., at p. 435*; see *Rest.2d Torts (1965) §§ 315-320*.) As declared in *section 315 of the Restatement,* such a duty may arise if "(a) a special [**734] [***76] relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or [*752] (b) a special relation exists between the actor and the other which gives the other a right to protection."

We noted in *Tarasoff* that a special relationship existed between the defendant therapists and the patient which "*may* support affirmative duties for the benefit of third persons." (*17 Cal.3d at p. 436*, italics added.) The *Tarasoff* decedent was the known and specifically foreseeable and identifiable victim of the patient's threats. We concluded that under such circumstances it was appropriate to impose liability on those defendants for failing to take reasonable steps to protect her.

In *Tarasoff*, in reference to the police defendants who had been requested by defendant therapists to detain the patient, we further held that the police had no duty of care to the decedent because there was no "special relationship" between them and either the victim or the patient. We also rejected any application of the principle enunciated in the Restatement to the effect that "If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect." (*Rest.2d Torts, supra, § 321*.) We reasoned that "The assertion of a cause of action against the police defendants under this theory would raise difficult problems of causation and of public policy, . . ." (*17 Cal.3d at p. 444, fn. 18*.)

We recognized in *Tarasoff* that "the open and confidential character of psychotherapeutic dialogue encourages patients to express threats of violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened." (*17 Cal.3d at p. 441*.) We further concluded that "the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger. [Citation.]" (*Ibid.*) Thus, we made clear that the therapist has no *general* duty to warn of each threat. Only if he "does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, [does he bear] a duty to exercise reasonable care to protect the *foreseeable victim* of that danger." (*17 Cal.3d at p. 439*, italics added.) Although the intended victim as a [*753] precondition to liability need not be specifically named, he must be "readily identifiable." (*Ibid.*, fn. 11; see *Mavroudis v. Superior Court (1980) 102 Cal. App. 3d 594, 599-601 [162 Cal. Rptr. 724]*.)

Unlike *Johnson* and *Tarasoff*, plaintiffs here have alleged neither that a direct or continuing relationship between them and County existed through which County placed plaintiffs' decedent in danger, nor that their decedent was a foreseeable or readily identifiable target of the juvenile offender's threats. Under such circumstances, while recognizing the continuing obligation of County, as with all public entities, to exercise reasonable care to protect *all* of its citizens, we decline to impose a blanket liability on County for failing to warn plaintiffs, the parents of other neighborhood children, the police or James' mother of James' threat. As will appear, our conclusion is based in part on policy considerations and in part upon an analysis of "foreseeability" within the context of this case.

By their very nature parole and probation decisions are inherently imprecise. According to a recent study by the California Probation Parole and Correction Association, during 1977 in California a total of 315,143 persons (225,331 adults and 89,912 [**735] [***77] juveniles) were supervised on probation. (The Future of Probation, A Report of the CPPCA Committee on the Future of Probation (July 1979) p. 15.) During the same year, cases removed from probation because of violations totaled 13.4 percent in the superior courts, 14.8 percent in the lower courts, and 11.5 percent in the juvenile courts. (*Id., at pp. 27-28.*) Additionally, a large number of parole violations occur. National parole violation rates reflect that 18-20 percent of parolees fail on one-year follow-up, 25 percent on two-year follow-up, and 26 percent on three-year follow-up. (*Id., at p. 35.*) Although we fully recognize that not all violations involve new or violent offenses, a significant proportion do.

Notwithstanding the danger illustrated by the foregoing statistics, parole and probation release nonetheless comprise an integral and continuing part in our correctional system authorized by the Legislature, serving the public by rehabilitating substantial numbers of offenders and returning them to a productive position in society. The result, as we observed in *Johnson*, is that "each member of the general public who chances to come into contact with a parolee [bears] the risk that the rehabilitative effort will fail . . . ." (*69 Cal.2d at p. 799.*) The United States Supreme Court very recently reached a similar conclusion in *Martinez v. California (1980) 444 U.S. 277 [62 L. Ed. 2d 481,* [*754] *100 S. Ct. 553, 557].* In *Martinez*, the high court rejected a contention that the California governmental immunity statutes (*Gov. Code, § 845.8* in particular) deprived plaintiffs' decedent of her life without due process of law because of a parole decision that led indirectly to her death. (*Martinez, 444 U.S. at p. 280-281 [62 L. Ed. 2d at pp. 486-487, 100 S. Ct. at p. 557*].) The Supreme Court observed that "the basic risk that repeat offenses may occur is always present in any parole system." (*Ibid.*)

(8) Bearing in mind the ever present danger of parole violations, we nonetheless conclude that public entities and employees have no affirmative duty to warn of the release of an inmate with a violent history who has made *nonspecific threats of harm directed at nonspecific victims*. Obviously aware of the risk of failure of probation and parole programs the Legislature has nonetheless as a matter of public policy elected to continue those programs even though such risks must be borne by the public. (See *Beauchene v. Synanon Foundation, Inc. (1979) 88 Cal. App. 3d 342, 347 [151 Cal. Rptr. 796].*)

Similar general public policy considerations were described in a recent analysis of the *Tarasoff* issue. The author reasoned: "Assume that one person out of a thousand will kill. Assume also that an exceptionally accurate test is created which differentiates with 95% effectiveness those who will kill from those who will not. If 100,000 people were tested, out of the 100 who would kill 95 would be isolated. Unfortunately, of the 99,900 who would not kill, 4,995 people would also be isolated as potential killers. In these circumstances, it is clear that we could not justify incarcerating all 5,090 people. If, in the criminal law, it is better that ten guilty men go free than that one innocent man suffer, how can we say in the civil commitment area that it is better that fifty-four harmless people be incarcerated lest one dangerous man be free? [Citation.]" (Comment, *Tarasoff and the Psychotherapist's Duty to Warn* (1975) 12 San Diego L. Rev. 932, 942-943, fn. 75.)

Furthermore, we foresee significant practical obstacles in the imposition of a duty in the form that plaintiffs seek, concluding that it would be unwieldy and of little practical value. As previously indicated a large number of persons are released and supervised on probation and parole each year in this state. Notification to the public at large of the release of each offender who has a history of violence and who has made a generalized threat at some time during incarceration or while under supervision would, in our view, produce a cacophony of warnings that [*755] by reason of their sheer volume would add little to the effective protection of the public.

The issues herein presented are difficult and we are very sensitive to the tragic [***78] consequences herein presented, and the necessity, [**736] to the extent possible, of preventing their repetition. Plaintiffs assert that if County had made the requested warnings, a different result would have ensued. In deciding whether a duty to warn should be imposed, we inquire under our *Rowland v. Christian, supra*, formulation concerning the probable beneficial effect if such warnings were routinely and generally given.

We are skeptical of any net benefit which might flow from a duty to issue a generalized warning of the probationary release of offenders. In our view, the generalized warnings sought to be required here would do little to increase the precautions of any particular members of the public who already may have become conditioned to locking their doors, avoiding dark and deserted streets, instructing their children to beware of strangers and taking other precautions. By their very numbers the force of the multiple warnings required to accompany the release of all probationers with a potential for violence would be diluted as to each member of the public who by such release thereby becomes a potential victim. Such a warning may also negate the rehabilitative purposes of the parole and probation system by stigmatizing the released offender in the public's eye.

Unlike members of the general public, in *Tarasoff* and *Johnson* the potential victims were specifically known and designated individuals. The warnings which we therein required were directed at making those individuals aware of the danger to which they were uniquely exposed. The threatened targets were precise. In such cases, it is fair to conclude that warnings given discreetly and to a limited number of persons would have a greater effect because they would alert those particular targeted individuals of the possibility of a specific threat pointed at them. In contrast, the warnings sought by plaintiffs would of necessity have to be made to a broad segment of the population and would be only general in nature. In addition to the likelihood that such generalized warnings when frequently repeated would do little as a practical matter to stimulate increased safety measures, as we develop below, such extensive warnings would be difficult to give.

[*756] a.) *Warning the Police.* In our view, warnings to the police as urged by plaintiffs ordinarily would be of little benefit in preventing assaults upon members of the public by dangerous persons unless we were simultaneously and additionally to impose a concurrent duty on the police to act upon such warnings. As we noted in *Tarasoff, supra*, no such duty to act exists. (*17 Cal.3d at p. 444*; see also *Gov. Code, §§ 845, 846.*)

In *Tarasoff* we required that warnings be given directly to the *identifiable* potential victim or to those who, in turn, would advise such individuals of potential danger. In contrast, the requirement that local police be warned would not, in our view, guarantee effective notice to potential victims unless the police also, upon receipt of the warning, were thereupon required to knock on individual doors in the community and give warning, or to provide a 24-hour police escort either for the offender or for all possible victims. Requiring such police action to attend every release of every person who had expressed a generalized intent to commit a violent act against society at large would necessitate the diversion of an inordinate expenditure of time and manpower.

In a somewhat parallel situation, we note that the Legislature has expressly spoken in requiring those who have been convicted of certain sex crimes to inform the police of their presence in the community. (See *Pen. Code, § 290.*) No similar requirement exists for other kinds of offenders or for persons temporarily released on probation or parole. Furthermore, even *section 290* does not require the police to take any specific action to warn the community of the offender's presence, or to supervise the offender's movements. All that is required under the section is recordkeeping by the police which, at the discretion of the police, may be utilized when appropriate. Similar recordkeeping which would be required if regular and numerous warnings such as are requested [***79] here were given to the police would [**737] create a mass of paper, the upkeep and review of which might well divert police personnel from more effective activities.

Thus, unlike the situation in *Tarasoff*, requiring warning to the police ordinarily would result in no benefit to any potential victims of possible violence.

b.) *Warnings to Parents of Neighborhood Children.* In similar fashion, requiring the releasing agent to warn all neighborhood parents of small children that a potentially dangerous offender had been released [*757] in the area would require an expenditure of time and limited resources that parole and probation agencies cannot spare and would be of questionable value. The magnitude of the problem may be understood in the light of statistics contained in the above cited CPPCA report. In 1978 California probation departments employed a total of 18,331 persons, including professional probation officers, group counselors, clerical staff, business management professionals, psychiatrists, psychologists, medical specialists, other treatment personnel, and 5,156 part-time or volunteer staff members. As previously noted, these personnel exercised supervision over 315,000 probationers "on the streets" during that year. (CPPCA Rep., at p. 16; see also Keldgor & Norris, *New Directions for Correction* (Mar. 1972) 36 Fed. Probation, at p. 3 [a study of California's correctional system].)

Furthermore, such notice might substantially jeopardize rehabilitative efforts both by stigmatizing released offenders and by inhibiting their release. It is also possible that, in addition, parole or probation authorities would be far less likely to authorize release given the substantial drain on their resources which such warnings might require. A stated public policy favoring innovative release programs would be thwarted. (See *Whitcombe v. County of Yolo, supra, 73 Cal. App. 3d 698, 716*; *Beauchene v. Synanon Foundation, Inc., supra, 88 Cal. App. 3d 342, 347.*)

c.) *Warning to the Juvenile's Mother.* Finally, notification to the offender's mother of James' threat in our opinion would not have the desired effect of warning potential victims, at least in a case such as that herein presented. In the usual instance we doubt that the mother of the juvenile offender would be likely voluntarily to inform other neighborhood parents or children that her son posed a general threat to their welfare, thereby perhaps thwarting any rehabilitative effort, and also effectively stigmatizing both the mother and son in the community. The imposition of an affirmative duty on the County to warn a parent of generalized threats without additionally requiring, in turn, some affirmative action by the parent would prove ineffective.

The dissent speculates that the mother "might" have taken special care to control her son had she been warned of James' threats, inferring thereby that she would have maintained such constant surveillance over her son as to prevent any possible harm. Such attenuated conjecture, however, cannot alone support the imposition of civil liability. This is particularly true inasmuch as the County's original decision to release [*758] James from close confinement into the obviously less restrictive custody of his mother is a decision we already hold is immunized from liability.

In *Johnson*, cited by the dissent as authority for an obligation to warn, we required notification to those placed in imminent danger by the state's action. There the county had placed a *stranger* into the home and we noted that the failure "to warn the foster parents of latent dangers facing *them* . . ." (*69 Cal.2d at p. 795*, italics added) presented a "classic case for the imposition of tort liability" (p. 797). In contrast, the duty sought to be imposed here is that of warning a mother, aware of her son's incarceration for the previous 18 months and not herself endangered, for the remote benefit of a third party, an unidentifiable potential victim. Furthermore, it is contrary to the very purpose of such a release to speculate that a mother in whose care a nearly 18-year-old offender has been [***80] temporarily placed would thereby assume [**738] the constant minute-to-minute supervision that would have been required to prevent the tragedy.

In summary, whenever a potentially dangerous offender is released and thereafter commits a crime, the possibility of the commission of that crime is statistically foreseeable. Yet the Legislature has concluded that the benefits to society from rehabilitative release programs mandate their continuance. Within this context and for policy reasons the duty to warn depends upon and arises from the existence of a prior threat to a specific identifiable victim. (Cf. *Morgan v. County of Yuba (1964) 230 Cal. App. 2d 938 [41 Cal. Rptr. 508]*.) In those instances in which the released offender poses a predictable threat of harm to a named or readily identifiable victim or group of victims who can be effectively warned of the danger, a releasing agent may well be liable for failure to warn such persons. (9) Despite the tragic events underlying the present complaint, plaintiffs' decedent was not a known, identifiable victim, but rather a member of a large amorphous public group of potential targets. Under these circumstances we hold that County had no affirmative duty to warn plaintiffs, the police, the mother of the juvenile offender, or other local parents.

Because we have concluded that County was either statutorily immunized from liability or, alternatively, bore no affirmative duty that it failed to perform, we need not reach the other contentions raised by County.

[*759] The judgment of dismissal is affirmed.

DISSENT BY: TOBRINER

DISSENT

Tobriner, J. I dissent from the conclusion in part III of the majority opinion that plaintiffs' complaint states no cause of action arising from Alameda County's negligence in failing to warn James' mother that he might harm neighborhood children. In holding that the county is not legally responsible for its negligence, the majority in effect amend the Government Code, creating an immunity from liability which the Legislature has not enacted.

The complaint alleges that the county released James, a juvenile in county custody, to the custody of James' mother. The county knew that James had "extremely dangerous and violent propensities regarding young children and that sexual assaults upon young children and violence . . . were a likely result of releasing [him] into the community"; it knew also that James had "indicated that he would, if released, take the life of a young child residing in the neighborhood." Nevertheless the county failed to warn either James' mother, the local police, or the parents of neighborhood children of the impending danger. Within 24 hours of James' release to the custody of his mother, he assaulted and murdered Jonathan Thompson, plaintiffs' son.

The issue before us is whether the foregoing allegations state a cause of action for wrongful death against the county. The basis for upholding the complaint is clear and straightforward. The county, having custody of James, stood in a "special relationship" to James that imports a duty to control his conduct and to warn of danger. (*Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425, 435-437 [131 Cal. Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166]*.) The county placed James in the temporary custody of his mother without informing her that James had threatened to kill a neighborhood child. Whether that failure to warn was negligent and proximately caused Jonathan's death are questions of fact which cannot be resolved on demurrer. Since under the alleged facts the county can claim no statutory immunity from liability arising from its failure to warn (see *Johnson v. State of California (1968) 69 Cal.2d 782, 797 [73 Cal. Rptr. 240, 447 P.2d 352]*), the complaint states a cause of action.

[*760] The majority opinion in reaching a contrary result misreads controlling precedent. [***81] Although both *Johnson v. State of California,* [**739] *supra, 69 Cal.2d 782* and *Tarasoff v. Regents of University of California, supra, 17 Cal.3d 425*, involved a failure to warn an identifiable victim, the reasoning of those

decisions cannot be confined to that narrow scope. Instead, the cases stand for the principle that a special relationship, such as that between the state and a person in its custody, establishes a duty to use reasonable care to avert danger to foreseeable victims. If the victim can be identified in advance, a warning to him may discharge that duty; if he cannot be identified, reasonable care may require other action. But the absence of an identifiable victim does not postulate the absence of a duty of reasonable care.

Our opinion in *Tarasoff* makes clear that failure to warn a victim who is identifiable does not constitute an essential element of the cause of action. We noted that the duty of care requires the defendant "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 victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." (*17 Cal.3d at p. 431.*)

In upholding plaintiffs' cause of action in *Tarasoff*, we relied on a federal district court decision, *Merchants Nat. Bank & Trust Co. of Fargo v. United States (D.N.D. 1967) 272 F. Supp. 409.* In that case the Veterans Administration arranged for a patient to work on a local farm, but did not inform the farmer of the patient's threats to kill the patient's wife. The farmer, unaware of the danger to the wife, permitted the patient to come and go freely during nonworking hours. The patient borrowed a car, drove to his wife's residence, and killed her. The court held the Veteran's Administration liable, not because it failed to warn the wife, but because it failed to notify the farmer of the need to supervise the patient closely.

The principles underlying the *Tarasoff* decision indicate that even the existence of an identifiable victim is not essential to the cause of action. Our decision rested upon the basic tenet of tort law that a "'defendant owes a duty of care to all persons who are *foreseeably* endangered by his conduct.'" (Pp. 434-435, quoting *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal.3d 382, 399 [115 Cal. Rptr. 765, 525 P.2d 669].*) (Italics added.) The "avoidance of foreseeable harm," we explained, "requires a defendant to control the conduct of another person, or to [*761] warn of such conduct . . . if the defendant bears some special relationship to the dangerous person or to the potential victim." (P. 435.) The relationship between therapist and patient fulfilled this requirement in *Tarasoff*; the relationship between the county and a juvenile under its custody suffices in the present case. [1]

1 *Buford v. State of California (1980) 104 Cal. App. 3d 811 [164 Cal. Rptr. 264]*, also involved an assault upon an allegedly foreseeable but not identifiable victim. The Court of Appeal stated that "[the] complaint shows that Daniels [the assailant] was confined to Atascadero State Hospital for commission of several criminal offenses and that various personnel were assigned to his rehabilitative care both during commitment and during his leave of absence. The nature of the relationship here resembles those cases [*Tarasoff v. Regents of University of California, supra, 17 Cal.3d 425*; *Harland v. State of California (1977) 75 Cal. App. 3d 475 (142 Cal. Rptr. 201)* (state and resident of veteran's home)] in which a duty was imposed as a matter of law. Although there are substantial questions about the foreseeability of potential victims and the reasonableness of making a public warning about Daniels' release, these are questions for the trier of fact and should not be resolved against plaintiffs at the complaint stage." (*104 Cal. App. 3d at p. 824.*)

At no point did we hold that such duty of care runs only to identifiable victims. We cited numerous examples to the contrary. (See *17 Cal.3d at p. 436*, cases cited fns. 7 & 8.) One example makes the point particularly clear: "[a] doctor must . . . warn a patient if the patient's condition or medication renders certain conduct, such as driving a car, dangerous to others." (*17 Cal.3d at p. 436*; [***82] cf. *Harland v. State of California, supra, 75 Cal. App. 3d at pp. 475, 482.*) It would be absurd to confine that duty to motorists or pedestrians whom the doctor could identify in advance.

Thus under the reasoning of *Tarasoff* and the principles of tort law endorsed in the case, the proper inquiry turns on whether Jonathan Thompson was a foreseeable victim. The complaint alleges that James had threatened to "take the life of a young child residing in the neighborhood"; since Jonathan falls within that description his killing was clearly a foreseeable consequence of James' release and subsequent lack of supervision. Whether Jonathan was also an identifiable victim is relevant not to the existence of a duty of care, but only to whether a warning to Jonathan personally was a reasonable means of discharging that duty. If, as the majority claim, a warning to the neighborhood families was not a reasonable way to reduce the danger, that fact cannot absolve the state of the duty to employ other methods. In particular, it cannot absolve the state from its failure to warn James' mother so that she could exercise proper care in observing and supervising James and thereby preventing the harm that ensued.

[*762] Thus no precedent supports the majority's unique attempt to limit the imposition upon defendant of a duty of due care to warn only to a situation in which a person commits a tort upon a victim who can be identified in advance of the wrongful conduct. Even the read-

ing of precedent most favorable to the majority will reveal only that most, but not all, prior cases did involve identifiable victims. Thus the majority position must stand, if it can stand at all, upon the policy considerations it advances.

As to policy considerations, the majority first state that although parole and probation decisions are imprecise, and necessarily present an element of danger to the public, "the Legislature has nonetheless as a matter of public policy elected to continue those programs even though such risks must be borne by the public." (Majority opn. p. 754.) We appreciate the majority's fear that imposition of liability might interfere with the discretion of agencies who must decide whether to grant parole or probation. The Legislature, however, has considered that subject and determined that providing immunity to the state for basic policy decisions is a sufficient safeguard, and that it is unnecessary further to shield the state from liability for implementation of those decisions. As we explained in *Johnson v. State of California, supra, 69 Cal.2d 782, 799*: "once the proper authorities have made the basic policy decision -- to place a youth with foster parents, for example -- the role of . . . immunity ends; subsequent negligent actions, such as the failure to give reasonable warnings to the foster parents actually selected, are subject to legal redress." [2]

> 2 The majority opinion implicitly recognizes the distinction drawn in the quoted language from *Johnson*. In holding plaintiffs' complaint states no cause of action for negligence in releasing James or in selecting his mother as custodian, the majority rely squarely upon statutory immunities; in finding no cause of action for failure to warn the mother, they speak in terms of policy considerations which, presumably, did not persuade the Legislature to enact a corresponding immunity.

Twelve years have passed since we filed the decision in *Johnson*. The Legislature has not amended the Government Code to enlarge governmental immunity beyond that described in *Johnson*. We have heard no outcry that *Johnson* imperils the state's parole and probation programs, no claim that the liability for failure to warn imposed by that case has interfered with legislative policy. We thus perceive no need for judicial creation of an expanded immunity. [3]

> 3 It is arguable that imposition of a duty to warn the *general public* whenever a prisoner who might possibly be dangerous is released on parole or probation might, through the impact of repeated warnings, arouse the public to curtail parole and probation programs. Imposition of numerous sizable judgments for breach of that duty could have the same effect. But neither consideration has any significant bearing upon liability for failure to warn the person to whose custody the prisoner is released.

[*763] [**741] [***83] In sum, whatever policy considerations impelled the Legislature to establish parole and probation programs, the Legislature did not believe those considerations preclude liability for negligent failure to warn. The majority cannot rely on legislative policy to grant a larger immunity than the Legislature has elected to provide. In rejecting the Legislature's judgment, the majority protect the government from liability for its own negligence when the Legislature finds such protection unnecessary.

The policy considerations favoring plaintiffs' cause of action in the present setting -- considerations not taken into account by the majority -- are weighty and substantial. The principle of compensating victims of negligence in order to recompense their injury and to deter future negligence is fundamental in our judicial system. Thus as a general principle, a plaintiff injured as a proximate result of a defendant's negligence is entitled to compensation. (See *Civ. Code, § 1714, subd. (a)*; *Rodriguez v. Bethlehem Steel Corp., supra, 12 Cal.3d 382, 399*.) Even if the government is the tortfeasor, "when there is negligence, the rule is liability, immunity is the exception." (*Muskopf v. Corning Hospital Dist. (1961) 55 Cal.2d 211, 219 [11 Cal. Rptr. 89, 359 P.2d 457]*; *Baldwin v. State of California (1972) 6 Cal.3d 424, 435 [99 Cal. Rptr. 145, 491 P.2d 1121]*.) Consequently "[unless] the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail." (*Ramos v. Madera (1971) 4 Cal.3d 685, 692 [94 Cal. Rptr. 421, 484 P.2d 93]*.) In the balance, I believe these basic precepts outweigh the majority's anxiety that the Legislature did not go far enough in immunizing implementation of parole and probation programs.

The other policy considerations advanced by the majority are of less moment. The majority quote a student comment (*Tarasoff and the Psychotherapist's Duty to Warn* (1975) 12 San Diego L. Rev. 932, 942-943, fn. 75) to the effect that predictions of dangerousness are not sufficiently reliable to justify civil commitment of persons as dangerous to others. [4] The present case does not involve civil commitment. Moreover, [*764] the argument that predictions of danger are so unreliable that they should not serve as a basis for a warning was expressly rejected in *Tarasoff* (*17 Cal.3d at pp. 438-439*) and is contrary to legislative policy. (See *Evid. Code, § 1024*.)

4 The quoted language from the San Diego Law Review, while only of tangential relevance to the present case, has serious implications. It implies (a) that *Tarasoff* was wrongly decided, and (b) that the Lanterman-Petris-Short Act (*Welf. & Inst. Code, § 5000 et seq.*) and other statutes providing for commitment of persons dangerous to others are unwise and probably unconstitutional. I doubt that the justices of the majority subscribe to either proposition.

Finally, the majority note the practical problems of warning the public at large. When it comes to warning James' mother, however, the majority say only that she would be unlikely to relay that warning to others in the neighborhood. They do not consider that a mother, when warned that her son is a serious danger to young children, might take special care to watch him, to control his activities, to know his whereabouts, and to make sure he is not alone with small children. Neither do they consider that James' mother as his legal custodian would, given proper warnings, have a legal duty to so control James' behavior. Confined by their narrow concept of warning identifiable victims, the majority do not consider the obvious.

In sum, the policy considerations discussed by the majority relate to the discretionary decision whether to grant parole or probation, the wisdom of civil commitment of dangerous persons, and the practical problems of warning large classes of possible victims. It is striking how little relevance these considerations have to the present case. None bear significantly on the question whether the county should have warned James' mother.

I believe that as a matter of law and common sense the county, before it released [**742] [***84] James to his mother's custody, had a duty to tell her of his homicidal threats and inclinations. The complaint alleges that the county's failure to warn her was negligent, and proximately caused Jonathan's death. Thus under settled principles of tort law as explained in our prior opinion in *Tarasoff*, the complaint states a cause of action. I would therefore reverse the judgment dismissing plaintiffs' complaint and remand the cause to the superior court for further proceedings.

LEXSEE 34 CAL 3D 695 (1983)

BONNIE HEDLUND et al., Petitioners, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; DARRYL JEFFREY WILSON, a Minor, etc., et al., Real Parties in Interest

L.A. No. 31676

Supreme Court of California

34 Cal. 3d 695; *669 P.2d 41*; *194 Cal. Rptr. 805*; *1983 Cal. LEXIS 237*; *41 A.L.R.4th 1063*

September 29, 1983

SUBSEQUENT HISTORY: Petitioners' Application for a Rehearing was Denied December 15, 1983. Mosk, J., was of the Opinion that the Application should be Granted.

DISPOSITION: The alternative writ is discharged, and the petition for writ of mandamus is denied.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Two psychologists petitioned the Supreme Court for a writ of mandate after the trial court overruled their demurrer to two counts of a complaint by a woman and her minor son. The action arose when the woman was shot by defendants' patient in April 1979. The child, who was seated beside his mother at the time, allegedly suffered emotional injuries as a result of witnessing the attack. The complaint, which was filed in November 1980, alleged that defendants negligently failed to warn the woman of threats against her by their patient and that the duty of care owed to the woman extended to her minor child. Defendants asserted that the woman's claim was barred by the one-year statute of limitations for personal injury actions (*Code Civ. Proc., § 340, subd. (3)*, and that the child's claim failed to state a cause of action.

The Supreme Court denied the petition for a writ of mandate. The court held that a therapist's negligent failure to comply with the duty to warn a potential victim of a threat by a patient constitutes professional negligence within the meaning of *Code Civ. Proc., § 340.5* (three-year statute of limitations for personal injury actions against health care providers based on professional negligence), since therapists are unquestionably health care providers, and since a failure to warn a third person of a danger posed by a patient is an omission to act in the rendering of professional services for which the provider is licensed. The duty to diagnose or recognize a danger posed by a patient and the duty to take appropriate steps to protect a potential victim are not separate or severable, but together constitute the duty giving rise to a cause of action based on a failure to warn. Thus, the court held that the woman's action was not time barred. The court also held that the duty defendants owed to the woman extended to her minor child, since the risk of harm to him was foreseeable as a matter of law and since he was identifiable as a person who might be injured if the patient attacked the woman. The court held that it is foreseeable that when a therapist negligently fails to warn a mother of a patient's threat of injury to her, and she is injured as a proximate result, that her young child will not be far distant and may be injured, or, upon witnessing the incident, may suffer emotional trauma. Thus, in alleging his age and relationship to the woman, and defendants' negligent failure to diagnose and/or warn her of the danger posed by their patient, the court held that the child stated a cause of action. (Opinion by Grodin, J., with Bird, C. J., Kaus and Broussard, JJ., concurring. Separate dissenting opinion by Mosk, J., with Richardson and Reynoso, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a) (1b) (1c) (1d) Healing Arts and Institutions § 47--Physicians, Surgeons, and Other Medical Practitioners--Duties and Liabilities--Defenses and Limitations--Limitation of Actions--Therapist's Failure to Warn Third Person of Danger. --A psychiatrist's or psychologist's negligent failure to comply with the duty to warn a potential victim of a threat to the victim by a patient constitutes professional negligence within the meaning of *Code Civ. Proc., § 340.5* (statute of limitations for personal injury actions against health care providers based on professional negligence), since therapists are unquestionably health care providers, and since a failure to warn a third person of a danger posed by a patient is an omission to act in the rendering of professional services for which the provider is licensed. The duty to diagnose or recognize a danger posed by a patient and the duty to take appropriate steps to protect a potential victim are not separate or severable, but together constitute the duty giving rise to a cause of action based on a failure to warn. This conclusion is consistent with and furthers the purpose of the Medical Injury Compensation Reform Act. Thus, an action against two psychologists by a woman who was severely injured by one of defendants' patients, alleging a negligent failure to warn her of the danger, was subject to the three-year period of limitations of *§ 340.5*, and not the one-year statute of limitations for personal injury actions (*Code Civ. Proc., § 340*).

(2) Healing Arts and Institutions § 47--Physicians, Surgeons, and Other Medical Practitioners--Duties and Liabilities--Limitation of Actions--Therapist's Failure to Warn Third Person of Danger--Accrual of Cause of Action. --Although a therapist's negligent act or omission in failing to warn a potential victim of a threat to the victim by a patient occurs when the therapist has, or should have, diagnosed dangerousness and fails to warn or take other appropriate steps to protect the identifiable victim, the injury which gives rise to the victim's cause of action against the therapist occurs only when the patient actually causes harm to a foreseeable victim.

(3) Negligence § 9.4--Elements of Actionable Negligence--Duty of Care--Special Relationship--Duty Owed by Psychotherapist. --A psychotherapist, due to his special relationship with his patient, whose conduct may need to be controlled, has a duty first to exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of that professional specialty under similar circumstances in predicting whether the patient poses a serious danger to others, and second, to exercise reasonable care to protect a foreseeable victim of that danger. Among the alternative means by which a therapist may fulfill the duty to protect a potential victim is by warning the victim of the peril.

(4) Limitation of Actions § 17--Period of Limitation--Determination of Which Period Is Applicable. --The applicable statute of limitations is determined by the nature of the right sued upon.

(5a) (5b) (5c) Negligence § 9--Elements of Actionable Negligence--Duty of Care--Therapist's Duty to Warn Potential Victim of Danger--Extension of Duty to Potential Victim's Minor Child. --The duty owed by two psychologists to warn a woman of threats of violence made against her by their patient extended to the woman's minor child, as to whom the risk of harm was foreseeable as a matter of law and who was identifiable as a person who might be injured if the patient attacked the woman. It is foreseeable that when a therapist negligently fails to warn a mother of a patient's threat of injury to her, and she is injured as a proximate result, her young child will not be far distant and may be injured or, upon witnessing the incident, may suffer emotional trauma. Thus, in alleging his age and relationship to the woman, and the psychologists' negligent failure to diagnose and/or warn her of the danger posed by their patient, the child stated a cause of action against the psychologists for the emotional trauma he suffered when his mother was shot by the patient as he sat beside her. However, such action could not succeed without proof that the child would not have been injured but for defendants' failure to warn the mother of the threat against her.

(6) Negligence § 92--Actions--Trial and Judgment--Questions of Law and Fact--Duty of Care. --Duty of care is primarily a question of law in which the foreseeability of risk to another is the principal consideration.

(7) Negligence § 94--Actions--Trial and Judgment--Questions of Law and Fact--Foreseeability of Harm. --Although foreseeability of risk to another is most often a question of fact for the jury, when there is no room for a reasonable difference of opinion it may be decided as a question of law.

(8) Negligence § 9--Elements of Actionable Negligence--Duty of Care--Effect of Foreseeability of Risk. --In the absence of overriding policy considerations, foreseeability of risk is of primary importance in establishing duty of care.

(9) Negligence § 9--Elements of Actionable Negligence--Duty of Care--Duty Owed to Bystanders. --In

determining whether a duty of due care is owed to a person who witnesses an accident and suffers emotional trauma and/or physical injury as a result, the factors to be considered include whether the plaintiff was located near the scene of the accident; whether the shock resulted from a direct emotional impact on plaintiff from the sensory and contemporaneous observance of the accident; and whether plaintiff and the victim were closely related.

(10) Negligence § 14--Elements of Actionable Negligence--Injury Without Impact--Emotional Injury. -- In an action by a minor child against two psychologists based on defendants' alleged negligent failure to warn his mother of threats against her by their patient, an allegation that the child suffered emotional injuries and psychological trauma when his mother was shot by the patient as he sat beside her was sufficient to state a cause of action, since physical injury is no longer a prerequisite to recovery for mental distress.

COUNSEL: John G. Kerr, Laurie Lessing-Barre, Turner & Sullivan and Mary A. O'Gara for Petitioner.

No appearance for Respondent.

Horton, Barbaro & Reilly and S. James Colloran for Real Parties in Interest.

JUDGES: Opinion by Grodin, J., with Bird, C. J., Kaus and Broussard, JJ., concurring. Separate dissenting opinion by Mosk, J., with Richardson and Reynoso, JJ., concurring.

OPINION BY: GRODIN

OPINION

[*699] [**42] [***806] By this petition for writ of mandate Bonnie Hedlund and Peter Ebersole, licensed psychologists, seek to compel respondeat superior court to vacate an order overruling their demurrer to two counts of a complaint by real parties in interest LaNita Wilson and her minor son Darryl Jeffrey Wilson, of whom she is guardian ad litem, and to enter orders sustaining the demurrer and dismissing the action against them. They contend that LaNita's claim is barred on the face of the complaint by *Code of Civil Procedure section 340, subdivision (3)*, [1] which establishes a one-year statute of limitations for actions for personal injury, and that Darryl's count fails to state a cause of action. We shall conclude that neither claim has merit and deny the petition.

1 Unless otherwise indicated, all references herein to code sections are to the Code of Civil Procedure.

Section 340 provides in relevant part: "Within one year: . . . [para.] (3) An action for . . . injury to or for the death of one caused by the wrongful act or neglect of another . . . ."

LaNita's Cause of Action

(1a) The question posed by petitioners' first contention is whether the statute of limitations of *section 340*, or that of *section 340.5* [2] governs a cause of action against a psychiatrist or psychologist for injuries suffered as a result of a therapist's negligence in failing to warn a potential victim of a threat to the victim made by the therapist's patient.

2 *Section 340.5* provides in relevant part:

"In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first . . . . Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period . . . .

"For the purposes of this section:

"(1) 'Health care provider' means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. 'Health care provider' includes the legal representatives of a health care provider;

"(2) 'Professional negligence' means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital."

[*700] **(2) (See fn. 3.) (1b)** To determine whether, as real parties in interest contend, *section 340.5* governs, [3] we must decide whether a negligent failure to comply with the duty recognized in *Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166]*, constitutes "professional negligence" within the meaning of *section 340.5*.

3 Although the negligent act or omission in failing to warn occurs when the therapist has, or should have, diagnosed dangerousness and fails to warn or to take other appropriate steps to protect the identifiable victim, the injury which gives rise to the cause of action occurs only when the patient actually causes harm to a foreseeable victim. Petitioners do not contend here, and did not contend in their demurrer to plaintiffs' third amended complaint, that the action is barred by the statute of limitations if *section 340.5* is applicable.

The original complaint in the underlying action was filed on November 12, 1980.

[***807] In her third amended complaint against petitioners styled as one for "Professional Malpractice," LaNita alleges as her cause of [**43] action that petitioners had rendered health care services to herself and to Stephen Wilson [4] in the form of psychotherapy, counseling and treatment; that prior to April 9, 1979, Stephen told petitioners of his intent to commit serious bodily injury upon her, and that from his communications to them petitioners, in the exercise of the professional skill, knowledge, and care possessed by members of their specialty, should have known that Stephen presented a serious danger of violence to her. She further alleges that petitioners owed her and other foreseeable victims a duty to diagnose Stephen's condition, to realize that he presented a serious threat of violence to her, and to recognize that the requirements of their profession required them to notify her of the danger. Allegedly this duty was breached when petitioners failed to warn her of the danger. Thereafter, on April 9, 1979, Stephen used a shotgun to inflict serious bodily injury on LaNita.

4 The common last name is a coincidence. LaNita and Stephen were never married.

Applicability of Section 340.5 to LaNita's Action

(3) In *Tarasoff*, this court held that because a psychotherapist stands in a special relationship with a person whose conduct may need to be controlled -- the patient -- the therapist has a duty first to exercise "'that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances'" in predicting whether the patient poses a serious danger to others, and second, "to exercise reasonable care to protect the foreseeable victim of that danger." (*17 Cal.3d at pp. 438-439.*) Among the alternative means by which the therapist may fulfill the duty to protect the victim is warning the [*701] victim of the peril. **(1c)** LaNita's cause of action is founded upon an alleged breach of this duty to predict, or diagnose, dangerousness, and to warn of a danger posed by a therapist's patient. We must determine whether this breach constitutes professional negligence within the meaning of *section 340.5*.

Petitioners, claiming that a breach of the duty is "ordinary," not "professional" negligence, rely in part on language used by the court in *Tarasoff* stating that a therapist must exercise "reasonable care" to protect the victim once "under applicable professional standards" he determines or should have determined that the patient poses a danger. Inasmuch as this question was not before us in *Tarasoff*, however, that case is not dispositive. In order to define the scope of *section 340.5*, we look both to the language and the history of the section.

In 1975 the Legislature, as part of the Medical Injury Compensation Reform Act (Stats. 1975, Second Ex. Sess., ch. 1, § 1, p. 3949; Stats. 1975, Second Ex. Sess., ch. 2, § 1, p. 3978; hereinafter M.I.C.R.A.) adopted definitions of "health care provider" and "professional negligence." These definitions, used throughout M.I.C.R.A., [5] were added to *section 340.5* which establishes a three-year period of limitation on actions "for injury or death against a health care provider based upon such person's alleged professional negligence." Petitioners unquestionably are health care providers since they are "licensed or certified pursuant to Division 2 . . . of the Business and Professions Code . . . ." (*§ 340.5*, subpar. (1). See *Bus. & Prof. Code, § 2900 et seq.*) A failure to warn a third person is "professional negligence," however, only if this was an omission to act "in the rendering of professional services . . . provided that such services are within the scope of services for [***808] which the provider is licensed . . . ." (*§ 340.5*, subpar. (2).) The "practice of psychology" and "psychotherapy" for which a [**44] license is required and issued pursuant to division 2 of the Business and Professions Code are defined by that code as follows:

"[Rendering] or offering to render for a fee to individuals, groups, organizations or the public any psychological service involving the application of psychological principles, methods, and procedures of understanding, predicting, and influencing behavior, such as the principles pertaining to learning, perception, motivation, emotions, and interpersonal relationships; and [*702] the methods and procedures of interviewing, counseling, psychotherapy, behavior modification, and hypnosis; and

of constructing, administering, and interpreting tests of mental abilities, interests, attitudes, personality characteristics, emotions, and motivations.

"The application of such principles and methods includes, but is not restricted to: diagnosis, prevention, treatment, and amelioration of psychological problems and emotional and mental disorders of individuals and groups.

"Psychotherapy within the meaning of this chapter means the use of psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive.

"As used in this chapter, 'fee' means any charge, monetary or otherwise, whether paid directly or paid on a prepaid or capitation basis by a third party, or a charge assessed by a facility, for services rendered." (*Bus. & Prof. Code, § 2903.*)

5 The definition of "professional negligence" was included in the following M.I.C.R.A. provisions: *Business and Professions Code section 6146* (limitation on attorney contingency fees); *Civil Code section 3333.1* (admissibility of evidence of recovery from collateral sources); *section 3333.2* (limitation on noneconomic damages); *Code of Civil Procedure sections 340.5, 364* (notice of intent to file action); section 667.7 (periodic payment of damage award); section 1295 (notice regarding arbitration provision in contract).

Petitioners do not deny that the duty to recognize "dangerousness" arises in their rendering of professional services in the practice of psychology, and thus injury to a patient proximately caused by a negligent failure to diagnose or predict such behavior constitutes "professional negligence" as defined in *section 340.5.* They argue, however, that the duty to warn a third person does not involve the rendering of professional services. In sum, petitioners' position is that "professional negligence" involves only acts in the course of diagnosis or treatment resulting in injury to the patient. An injury to a third person resulting from a failure to warn is "ordinary negligence" governed by *section 340.*

In support of their argument, petitioners rely on *Tresemer v. Barke (1978) 86 Cal.App.3d 656 [150 Cal.Rptr. 384, 12 A.L.R.4th 27].* There, discussing one count of a complaint alleging injury resulting from a physician's failure to warn the plaintiff-patient of hazards related to the use of the Dalkon Shield intrauterine device that were discovered subsequent to its insertion, the court distinguished that cause of action from those for medical malpractice: "A cause of action is stated for failure to warn plaintiff. This would arise by virtue of a confidential relationship between doctor and patient. It is not a malpractice cause of action in the commonly understood sense but rather a malpractice action from the imposed continuing status of physician-patient where the danger arose from that relationship. It is also a cause of action for common negligence. The statute of limitations of *section* [*703] *340.5* would not apply even though the basic 'injury' resulted from a medical treatment for it is a separate duty to act which is involved." (*86 Cal.App.3d at p. 672.*)

We need not decide if *Tresemer* is correct in stating that *section 340.5* would not apply to a failure to warn of the kind involved there. That statement is dictum since the action was commenced within one year of the date the plaintiff learned of her injury and its cause (*86 Cal.App.3d at p. 665*) and was barred by neither *section 340.5* nor *340, subdivision (3).* The case is also distinguishable in that the duty to warn was based on the defendant/physician's past professional relationship and arose long after he had treated plaintiff. Whether a failure to warn in those circumstances occurs "in the rendering of professional services" is not determinative of the question posed here where the duty arose [***809] and the omission to act occurred during the time that defendants were rendering professional services to Stephen.

[**45] Relying principally on *Tarasoff,* LaNita notes that the statutory definition of professional negligence is not limited to injury or wrongful death of a "patient." She argues that her cause of action sounds in professional negligence because the duty imposed on a therapist in that case is first to diagnose or recognize the danger posed by the patient and only then to warn. The warning aspect of this duty, she claims, is inextricably interwoven with the diagnostic function. We agree.

We held in *Tarasoff* that diagnoses and predictions about the danger of violence presented by a patient must be rendered under accepted rules of professional responsibility, and that in so doing therapists must exercise the "'reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of [the profession].'" (*17 Cal.3d at p. 438.*) Diagnosis of "psychological problems and emotional and mental disorders" is a professional service for which a psychologist is licensed, and a negligent failure in this regard is therefore "professional negligence" as that term is defined in *section 340.5.* This diagnosis and prediction is an essential element of a cause of action for failure to warn. It is the basis upon which the duty to the third party victim is found. A negligent failure to diagnose dangerousness in a *Tarasoff* action is as much a basis for liability as is a negligent failure to warn a known victim once such diagnosis has been made. As LaNita notes, the decision to

warn and the manner in which the warning is given may also involve professional judgment. Were we to accept petitioners' argument, the period of limitation would differ if, and could be established only when the jury determined whether, there had been a negligent failure to diagnose. The applicable statute of limitations may not be subject to such uncertainties. It must be determined on the nature of the cause of action itself, not on the basis of its components.

[*704] **(4)** Under well established principles the applicable statute of limitations is determined by the nature of the right sued upon. (*Davies v. Krasna (1975) 14 Cal.3d 502, 515 [121 Cal.Rptr. 705, 535 P.2d 1161, 79 A.L.R.3d 807]*; *Day v. Greene (1963) 59 Cal.2d 404, 411 [29 Cal.Rptr. 785, 380 P.2d 385, 94 A.L.R.2d 802].*) **(1d)** *Tarasoff* recognizes a right to expect that a licensed psychotherapist will realize when a patient poses a serious danger to another and, if that potential victim is identifiable, will act reasonably to protect the victim. The diagnosis and the appropriate steps necessary to protect the victim are not separate or severable, but together constitute the duty giving rise to the cause of action.

Our conclusion that the term "professional negligence" encompasses a failure to warn third persons is consistent with and furthers the legislative purpose in adopting M.I.C.R.A. Because they involve "professional negligence," actions based on failure to warn are subject to the several other restrictions on recovery that are part of M.I.C.R.A., including the limits on attorney contingent fees and recovery for noneconomic losses (*Bus. & Prof. Code, § 6146*; *Civ. Code, § 3333.2*), and reduction of damages to reflect payments received from collateral sources. (*Civ. Code, § 3333.1.*) [6]

> 6 See footnote 5, *ante*. In attempting to ascertain the legislative intent as an aid to construing these provisions we necessarily assume, but do not decide, that they are valid.

The Legislature stated the purpose of M.I.C.R.A. is "to provide an adequate and reasonable remedy" for the "major health care crisis . . . attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state." (Stats. 1975, Second Ex. Sess., ch. 2, § 12.5, p. 4007.) When a health care provider's professional negligence results in harm to parties other than a patient the legislative purpose of reducing health care costs by reducing the dollar amount of [***810] judgments in actions for failure to warn would be frustrated if the M.I.C.R.A. restrictions [**46] were not applicable. It would be anomalous, too, if a third party's cause of action based on the same negligent act were treated differently than an action by the patient.

We conclude therefore that LaNita's cause of action is one for professional negligence and as such is governed by *section 340.5*.

Darryl's Cause of Action

(5a) Darryl, incorporating the allegations of LaNita's cause of action by reference, alleges that he was born on June 5, 1976. He was seated next to [*705] his mother when she was shot by Stephen. She threw herself over him thereby saving his life and preventing serious physical injury to him, but, as a result of the attack he has suffered serious emotional injuries and psychological trauma. Darryl alleges that because it was foreseeable that Stephen's threats, if carried out, posed a risk of harm to bystanders and particularly to those in close relationship to LaNita, petitioners' duty extended to him, and that this duty was breached when they failed to act to protect LaNita and such foreseeable individuals.

Because Darryl commenced his action before his eighth birthday, the action was filed within the period expressly allowed by *section 340.5*, and was not barred by *section 340* since the limitation period was tolled during his minority (§ 352). The demurrer to his cause of action asserted only that, and may be sustained only if, the allegations failed to state a cause of action because petitioners owed him no duty.

Petitioners claim that because Stephen made no threat against Darryl, and they had no duty to warn him of the threat against LaNita, his complaint fails to state a cause of action in negligence. **(6)** Duty is primarily a question of law in which the foreseeability of risk to another is the principal consideration. (*Weirum v. RKO General, Inc. (1975) 15 Cal.3d 40, 46 [123 Cal.Rptr. 468, 539 P.2d 36].*) **(7)** Although foreseeability is most often a question of fact for the jury, when there is no room for a reasonable difference of opinion it may be decided as a question of law. (*Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal.3d 49, 56 [192 Cal.Rptr. 857, 665 P.2d 947].*)

(5b) The question here is whether a therapist who negligently fails to fulfill his duty to warn an identifiable potential victim that a patient has threatened violence may be liable not only to the person against whom the threat is made, but also to persons who may be injured if the threat is carried out. [7] We need not decide here whether a duty exists as to all bystanders who might be injured, the foreseeability of such injury is not before us. The question posed by Darryl's claim is narrower because there can be no reasonable difference of opinion that the risk of harm to him was foreseeable. Foresee-

ability therefore exists as a matter of law. (*Bigbee v. Pacific Tel. & Tel. Co., supra, 34 Cal.3d 49, 56.*)

7 Darryl does not allege that petitioners had a duty to warn or protect him. He claims instead that because it was foreseeable that if Stephen carried out his threat against LaNita a risk of harm to bystanders and those in close relationship to LaNita existed, they owed a duty which "extended" to him. That duty was breached, he claims, when petitioners failed to protect LaNita.

Darryl was both foreseeable and identifiable as a person who might be injured if Stephen assaulted LaNita. The conclusion that a young child injured [*706] during a violent assault on his mother may state a cause of action under *Tarasoff* as a foreseeable and identifiable potential victim is compelled by *Dillon v. Legg (1968) 68 Cal.2d 728 [69 Cal.Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316]*. In *Dillon*, a mother alleged that she was present when the defendant, driving negligently, ran over and killed her young child, and that she suffered emotional trauma and physical injury as a result. **(8) (9)** Noting that "[i]n the absence of 'overriding policy considerations . . . foreseeability of risk [is] of . . . primary importance in establishing the element of duty' [citations]" (*68 Cal.2d at p. 739*), [***811] we stated: "In determining, [**47] in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship." (*68 Cal.2d at pp. 740-741.*) We found in *Dillon* that all three factors were present, observing: "Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma." (*68 Cal.2d at p. 741.*)

(5c) (10) (See fn. 8.) It is equally foreseeable when a therapist negligently fails to warn a mother of a patient's threat of injury to her, and she is injured as a proximate result, that her young child will not be far distant and may be injured or, upon witnessing the incident, suffer emotional trauma. [8] Nor is it unreasonable to recognize the existence of a duty to persons in close relationship to the object of a patient's threat, for the therapist must consider the existence of such persons both in evaluating the seriousness of the danger posed by the patient and in determining the appropriate steps to be taken to protect the named victim.

8 Darryl's allegation that he suffered emotional injuries and psychological trauma is adequate to state a cause of action. In *Molien v. Kaiser Foundation Hospitals (1980) 27 Cal.3d 916 [167 Cal.Rptr. 831, 616 P.2d 813]*, this court abrogated the rule which required physical injury as a prerequisite to recovery for mental distress. There we concluded, in considering an action for negligent infliction of mental distress, that the distinction between physical and psychological injury clouded the issue and concluded that "the essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme." (*27 Cal.3d at pp. 929-930.*) For purposes of such recovery there is no basis on which to distinguish the emotional distress endured by a person who is a victim of an assault on another from the emotional distress of a mother viewing an injury to her child (*Dillon v. Legg, supra, 68 Cal.2d 728*) or from that suffered by the plaintiff in *Molien*.

[*707] In the analogous circumstance of a physician who treats a patient suffering from a communicable disease it is well established that the physician's breach of his duty to warn or protect others from the danger posed by the patient may result in liability to close family members and others who the practitioner knows or should anticipate will be in close proximity to the patient. (See, e.g., *Wojcik v. Aluminum Co. of America (1959) 18 Misc.2d 740 [183 N.Y.S.2d 351, 357-358]*; see also *Davis v. Rodman (1921) 147 Ark. 385 [227 S.W. 612, 13 A.L.R. 1459]*; *Hofmann v. Blackmon (Fla.App. 1970) 241 So.2d 752*; *Skillings v. Allen (1919) 143 Minn. 323 [173 N.W. 663, 5 A.L.R. 922]*; *Jones v. Stanko (1928) 118 Ohio St. 147, 152 [160 N.E. 456].*)

This court, too, has recognized that because a negligent misdiagnosis of a communicable disease may foreseeably cause injury to close members of the patient's family, the physician's duty extends to them. (*Molien v. Kaiser Foundation Hospitals, supra, 27 Cal.3d 916, 923.*) The possibility of injury to Darryl if Stephen carried out his threat to harm LaNita was no less foreseeable than the harm to the mother in *Dillon* v. *Legg* and to the husband in *Molien*. We conclude, therefore, that in alleging his age and relationship to LaNita, and defendants' negligent failure to diagnose and/or warn LaNita of the danger posed by Stephen, Darryl has stated a cause of action. [9]

9 We have no occasion in this proceeding, in which we examine only the propriety of the trial court's order overruling petitioners' demurrer, to consider issues related to proximate cause. (*Landeros v. Flood (1976) 17 Cal.3d 399, 407-408 [131 Cal.Rptr. 69, 551 P.2d 389, 97 A.L.R.3d 324].*) We note, however, that Darryl could not succeed without proof that but for petitioners' failure to warn LaNita of Stephen's threat, he would not have been injured.

[***812] The [**48] alternative writ is discharged, and the petition for writ of mandamus is denied.

DISSENT BY: MOSK

DISSENT

MOSK, J. I dissent.

The majority opinion unfortunately perpetuates the myth that psychiatrists and psychologists inherently possess powers of clairvoyance to predict violence. There is no evidence to support this remarkable belief, and, indeed, all the credible literature in the field discounts the existence of any such mystical attribute in those who practice the mind-care professions.

The serious flaw in the majority opinion is its acceptance of the claim that a failure to diagnose "dangerousness" may be a basis for liability. In its text, the opinion employs such terms as failure to "predict" behavior, and [*708] flatly declares that a negligent act occurs "when the therapist has, or *should have* diagnosed dangerousness" (italics added), as if that subjective characteristic would be revealed through a stethoscope or by an X-ray.

In *People v. Burnick (1975) 14 Cal.3d 306 [121 Cal.Rptr. 488, 535 P.2d 352]*, we discussed at considerable length the virtually unanimous authorities in the field of psychiatry who concede their inability to predict violence. "In the light of recent studies it is no longer heresy to question the reliability of psychiatric predictions. Psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession. It must be conceded that psychiatrists still experience considerable difficulty in confidently and accurately *diagnosing* mental illness. Yet those difficulties are multiplied manyfold when psychiatrists venture from diagnosis to prognosis and undertake to predict the consequences of such illness: '"A diagnosis of mental illness tells us nothing about whether the person so diagnosed is or is not dangerous. Some mental patients are dangerous, some are not. Perhaps the psychiatrist is an expert at deciding whether a person is mentally ill, but is he an expert at predicting which of the persons so diagnosed are dangerous? Sane people, too, are dangerous, and it may legitimately be inquired whether there is anything in the education, training or experience of psychiatrists which renders them particularly adept at predicting dangerous behavior. 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."' (*Murel v. Baltimore City Criminal Court (1972) . . . 407 U.S. 364-365, fn. 2 [32 L.Ed.2d 791, 797, 92 S.Ct. 2091]* (Douglas, J., dis. from dismissal of cert.).)

"During the past several years further empirical studies have transformed the earlier trend of opinion into an impressive unanimity: 'The evidence, as well as the consensus of opinion by responsible scientific authorities, is now unequivocal.' (Diamond, *The Psychiatric Prediction of Dangerousness* (1975) 123 U.Pa.L.Rev. 439, 451.) In the words of spokesmen for the psychiatric profession itself, 'Unfortunately, this is the state of the art. Neither psychiatrists nor anyone else have reliably demonstrated an ability to predict future violence or "dangerousness." Neither has any special psychiatric "expertise" in this area been established.' (Task Force Report, Clinical Aspects of the Violent Individual (American Psychiatric Assn., 1974) p. 28.) And the same studies which proved the inaccuracy of psychiatric predictions have demonstrated beyond dispute the no less disturbing manner in which such prophecies consistently err: they predict acts of violence which will not in fact take place ('false positives'), thus branding as [*709] 'dangerous' many persons [**49] who are in reality totally harmless." (*Id., pp. 325-327*, fns. omitted.)

[***813] Because of the inherent undependability of such predictions, we adopted in *Burnick* the beyond-a-reasonable-doubt standard for commitment to mental facilities.

Unfortunately a year later in *Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166]*, a thin majority of this court employed a loose and ill-conceived dictum that encourages a dilution of *Burnick.* Although the case involved *actual* knowledge of planned violence, the four-to-three majority spoke expansively in terms of what the doctor "knew or should have known." My separate opinion pointed out that there are no professional standards for forecasting violence (*id. at p. 451*), and concluded that any rule should "eliminate all reference to conformity to standards of the profession in predicting violence. If a psychiatrist does in fact predict violence, then a duty to warn arises. The majority's expansion of that rule will take us from the world of reality into the wonderland of clairvoyance." (*Id. at p. 452.*)

The dictum in *Tarasoff* has been largely ignored by the profession and by potential plaintiffs, for few cases have arisen that followed its elastic provisions. (Cf. *Mavroudis v. Superior Court (1980) 102 Cal.App.3d 594, 599 [162 Cal.Rptr. 724]*.) It has been almost universally recognized that the state of the art has not reached a pinnacle at which forecasts of future violence can be made with unerring accuracy. [1] Thus no standard of predictability has developed against which professional conduct can be measured. [*710] (See the representative sample of literature on the subject cited in *Burnick, supra, 14 Cal.3d at p. 328, fn. 18*; see also *People v. Murtishaw (1981) 29 Cal.3d 733, 768 [175 Cal.Rptr. 738, 631 P.2d 446]*.)

1 This perceptive analysis was made by a distinguished journalist (Peter Schrag, *Predicting Dangerousness*, Sacramento Bee, Apr. 13, 1983):

"The hazards of the California [*Tarasoff*] standard are obvious. Among other things, it encourages breach of a necessarily confidential relationship and places subtle pressure on every practitioner to resolve doubts in favor of a prediction of dangerousness and the appropriate measures that follow; efforts to lock up the patient, to warn others of the danger that the patient may -- but in reality probably doesn't -- represent, and to generally play it safe, even at the risk of effective therapy.

"Should the psychiatrist warn the patient -- give a kind of Miranda warning -- that anything he says may be used against him? If, indeed, he does give such warning (or if the patient is informed enough to make the warning unnecessary), what kind of effective therapy, what sort of trust, remains possible? Confounding the problem even further are the contrary injunctions, both in law and ethics, against divulging professional confidences. At what point does a physician become liable for issuing warnings about his patients too casually?

"There is probably no alternative to something like the standard Mosk proposed in his [separate *Tarasoff*] opinion. Where a psychiatrist, or anyone else for that matter, is genuinely convinced that a person is dangerous and particularly that he intends harm to a specific individual -- failure to warn simply can't be justified. Yet even with this narrow standard, it wouldn't take an excessively paranoid individual to be extremely cautious about consulting a psychiatrist in the first place or, if he does, about the way he discusses his thoughts and feelings."

The regrettable aspect of the majority opinion is that its expansive view of the duty of defendants is probably unnecessary to the result. For in each of her successive complaints, the original and three amended complaints, plaintiff LaNita Wilson alleged that the defendant psychologists had been told that Stephen Wilson intended to commit serious bodily injury on her. Thus it can be argued that defendants had *actual knowledge* and therefore should have communicated a warning to the potential victim. There is no reason to muse, as the majority do, about the result that would follow if defendants merely *should have known* of the threatened violence.

The question then arises as to whether the failure to warn after actual knowledge is malpractice or simple negligence. Since it is not the medical care or treatment of a patient that is involved, but a species of civilian duty that has arisen to a third party, the acts or omissions of the doctors are [**50] not malpractice, but simple negligence. I agree with *Tresemer v. Barke (1978) 86 Cal.App.3d 656, 672* [***814] *[150 Cal.Rptr. 384, 12 A.L.R.4th 27]*, that the applicable statute of limitations is one year. Of course, inability to discover the facts or concealment of the facts -- which might occur due to physician-patient confidentiality -- may under appropriate circumstances toll the statute. That is not this case.

Therefore the petitioning defendants are entitled to have their demurrer sustained. As the Court of Appeal below held in a unanimous opinion, a peremptory writ of mandate to that end should issue.

LEXSEE 218 CAL. APP 3D 1241 (1990)

MARGARET C. BARRY, Plaintiff and Appellant, v. PETER TUREK, Defendant and Respondent

No. A043977

Court of Appeal of California, First Appellate District, Division Two

218 Cal. App. 3d 1241; 267 Cal. Rptr. 553; 1990 Cal. App. LEXIS 264

March 20, 1990

PRIOR HISTORY: [***1] Superior Court of the City and County of San Francisco, No. 876371, Maxine M. Chesney, Judge.

DISPOSITION: Accordingly, the judgment is affirmed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A hospital worker who was sexually assaulted by a patient who was being treated on the floor of the hospital where she worked brought an action against the patient's psychiatrist, alleging negligence and negligent infliction of emotional distress. The trial court granted the psychiatrist's motion for summary judgment on the ground that he was immune from liability under *Civ. Code, § 43.92, subd. (a)*, which limits psychotherapists' liability to situations where a patient has communicated a serious threat of physical violence against a reasonably identifiable victim. (Superior Court of the City and County of San Francisco, No. 876371, Maxine M. Chesney, Judge.)

The Court of Appeal affirmed, holding that although the nurse had established that she was one of a group of reasonably identifiable victims within the terms of *Civ. Code, § 43.92, subd. (a)*, based on the patient's past pattern of making sexual advances to any available woman on the floor where she worked, she had failed to show that the psychiatrist should have been aware that the patient was likely to commit such a serious sexual assault. The patient's previous sexual advances had been annoying but not physically violent, and did not constitute a serious threat of physical violence under *§ 43.92*. (Opinion by Kline, P. J., with Smith, J., concurring. Separate concurring and dissenting opinion by Benson, J.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) Healing Arts and Institutions § 47.8--Statutory Limitation of Psychotherapist's Liability--Purpose. --*Civ. Code, § 43.92, subd. (a)*, was enacted to limit the liability of psychotherapists under prevailing case law for failing to warn a person threatened with violence by a patient.

(2a) (2b) Healing Arts and Institutions § 47.8--Statutory Limitation of Psychotherapist's Liability--Reasonably Identifiable Victim--Psychiatrist's Awareness of Threat of Violence. --In an action against a psychiatrist by a nurse sexually assaulted by the psychiatrist's patient, who was being treated on the hospital floor where the nurse worked, the trial court properly granted the psychiatrist's motion for summary judgment based on his immunity from liability under *Civ. Code, § 43.92, subd. (a)*, limiting psychotherapists' liability to situations where a patient has communicated a serious threat of physical violence against a reasonable identifiable victim. While the nurse was a reasonably identifiable victim, given the patient's past pattern of inappropriate sexual behavior with women in the hospital, making it reasonable to assume that he might assault any accessible woman, there was insufficient evidence that the psychiatrist should have been aware that the patient was likely to commit the serious assault suffered by

the nurse. The previous incidents of harassment had not involved physical violence, and other nurses' notes showed that they were not frightened by the patient and that he had complied with restrictions on his behavior.

(3) Summary Judgment § 26--Appellate Review. --On appeal from a summary judgment the appellate court must determine whether a triable issue of material fact exists. Where summary judgment has been granted in favor of a defendant, the court must consider whether there is any possibility that the plaintiff may be able to establish her case, and in making this decision the court must construe strictly the defendant's declarations and construe liberally those of the plaintiff.

COUNSEL: Aubrey W. A. Weldon for Plaintiff and Appellant.

Janet L. Grove, William B. McCoy and O'Connor, Cohn, Dillon & Barr for Defendant and Respondent.

JUDGES: Opinion by Kline, P. J., with Smith, J., concurring. Separate concurring and dissenting opinion by Benson, J.

OPINION BY: KLINE

OPINION

[*1243] [**553] Appellant Margaret Barry appeals the grant of summary judgment against her. She asserts the trial court erroneously found that respondent psychiatrist, Dr. Peter Turek, was immune from liability under *Civil Code section 43.92, subdivision (a).*

I. Statement of the Facts [1]

1 The facts as set forth herein are construed as favorably as possible for appellant for the purposes of reviewing the grant of summary judgment. (*Slaughter v. Legal Process & Courier Service (1984) 162 Cal.App.3d 1236, 1244 [209 Cal.Rptr. 189]*; *Sheffield v. Eli Lilly & Co. (1983) 144 Cal.App.3d 583, 611-612 [192 Cal.Rptr. 870].*)

[***2] Respondent provided psychological care to Bismillah Jan at St. Mary's Hospital (St. Mary's) in San Francisco starting on May 14, 1986. Jan, a male Afghani, suffered severe injuries to the head and neck in the Afghanistan war, and was brought to St. Mary's for reconstructive surgery by the California Committee for a Free Afghanistan. At that time, Jan was 17 or 18 years old, 5 feet 4 inches tall, and weighed approximately 105 pounds. He wore a mask which covered most of his face. He spoke no English and communicated through interpreters.

Jan roamed freely on the seventh floor of St. Mary's. On a number of occasions, he followed nurses in "inappropriately close ways" and "grab[ed] nurses and [tried] to [**554] kiss and fondle them." These incidents appear to have occurred between May 15 and May 25 of 1986. [2] Respondent and his assistants instructed Jan not to touch the nursing staff and, on at least one occasion, Jan nodded affirmatively after such instructions were given.

2 It is impossible to verify the exact dates by reference to the record.

[***3] Jan never made verbal threats of violence within the hearing of respondent or his assistants, and appellant does not point to any evidence that respondent knew Jan had any violent tendencies.

Appellant worked on the seventh floor of St. Mary's as office manager in the social services department. Jan entered her office on a number of occasions, leaned over her and touched her with his shoulder. On each occasion, Jennifer Root, a clerical worker in the same office, had been present.

On the afternoon of June 6, 1986, Jan again came into appellant's office when she and Root were there. Appellant was on the telephone and Jan stood at her shoulder. Root left the office to run an errand. When appellant hung up the phone and stood up, Jan pushed his body against her and pinned her against the wall. He attempted to simultaneously fondle her [*1244] breast and force her legs open while he masturbated. Appellant was wearing a pants outfit at the time; none of her clothes were removed during the assault. Root returned to the office while the assault was still occurring and Jan ran out of the room.

The assault aggravated appellant's bursitis of the shoulder and caused her to suffer [***4] psychological trauma.

II. Statement of the Case

On June 1, 1987, appellant filed suit against respondent, the California Committee for a Free Afghanistan, and others, alleging negligence and negligent infliction of emotional distress. [3] On August 17, 1988, respondent moved for summary judgment on the grounds that Jan did not communicate to him a serious threat of violence; that appellant was not a reasonably identifiable victim, and that respondent was exempt from liability because he was rendering medical care as a "Good Samaritan." The trial court rejected respondent's claim of immunity under the Good Samaritan statute. However, the court specifically held that appellant had not met her burden of showing the case was within the exception to the immunity provided under *Civil Code section 43.92.*

3 Neither the hospital, nor the committee or its members were ever served.

This timely appeal followed.

III. Discussion

Civil Code section 43.92, subdivision (a) provides that: "There shall be no monetary liability on the [***5] part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in *Section 1010 of the Evidence Code* in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims."

(1) *Section 43.92, subdivision (a)* was enacted to limit the liability of psychotherapists under *Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166].* [4] [*1245] The legislative history to *Civil Code section 43.92, subdivision (a)* states: "[C]ase law has held that a psychiatrist may be liable for negligently failing to protect a person when a patient presents a serious danger to that person. [para.] [**555] This bill would provide for immunity from liability for a psychotherapist who fails to warn of and protect from, or predict and warn of and protect from a patient's threatened violent behavior, except where the patient [***6] has communicated to the psychotherapist a serious threat of violence against a reasonably identifiable victim." (Legis. Counsel's Dig., Assem. Bill. No. 1133, 4 Stats. 1985 (Reg. Sess.) Summary Dig., pp. 227-228.)

4 In *Tarasoff* the parents of a murdered woman sued the murderer's therapist for failing to warn them of the danger his patient presented. The court held that "When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger." (*17 Cal.3d at p. 431.*) The court determined that a psychotherapist's duty may include warning the intended victim. (*Ibid.*)

(2a) Psychotherapists thus have immunity from *Tarasoff* claims except where the plaintiff proves that the patient has communicated to his or her psychotherapist a serious threat of physical violence against a reasonably [***7] identifiable victim or victims. We are satisfied that appellant has established she was part of a group of "reasonably identifiable victims." Based on Jan's past pattern of conduct, any female working full-time on the seventh floor of St. Mary's was reasonably identifiable as a victim of Jan's inappropriate sexual behavior. Appellant was not an occasional visitor to the hospital: she was regularly employed as the office manager in the social service department at St. Mary's, and her office was on the seventh floor. As such, she was within the group of women to whom Jan had daily access and was clearly part of an identifiable group of potential victims. While Jan primarily had confined his sexual advances to nurses before the June 6 incident, his persistence in pursuing the available women made it reasonable for one familiar with his actions to assume he might assault any accessible woman. [5]

5 Respondent relies upon *Thompson v. County of Alameda (1980) 27 Cal.3d 741 [167 Cal.Rptr. 70, 614 P.2d 728, 12 A.L.R.4th 701]* to support his claim that appellant was not a reasonably identifiable victim of Jan's conduct. In *Thompson*, a juvenile offender being held in custody threatened to kill a young child and, within 24 hours of his release, murdered his 5-year-old neighbor. The Supreme Court affirmed the dismissal of the parents' failure to warn claim and characterized the communication as "a generalized threat to a segment of the population" and a threat to "a member of a large amorphous public group of potential targets." (*Id., at pp. 750, 758.*) The court reasoned that "[in situations where the identities of the threatened targets are known] it is fair to conclude that warnings given discreetly and to a limited number of persons would have a greater effect because they would alert those particular targeted individuals of the possibility of a specific threat pointed at them. In contrast, the warnings sought by plaintiffs would of necessity have to be made to a broad segment of the population and would be only general in nature. In addition to the likelihood that such generalized warnings when frequently repeated would do little as a practical matter to stimulate increased safety measures . . . such extensive warnings would be difficult to give." (*Id., at p. 755.*)

In comparison to *Thompson*, where an entire neighborhood would have had to be alerted to the potential danger, here only the female employees on a single floor of the hospital would have been implicated. Moreover, such a warning could have been issued discreetly and effectively at minimal cost. Unlike the panic which might ensue if a "large amorphous public group" was warned of a possible murder, it is unlikely that the hospital workers would have been unduly alarmed if they had been warned of Jan's propen-

sities. For these reasons, the rationale of *Thompson* is not applicable to this case.

* In that portion of his separate opinion dissenting from this conclusion, Justice Benson argues that the potential victims Jan might conceivably encounter in the hospital are not limited to readily identifiable female employees assigned to the seventh floor. Justice Benson may be right about this but his point is irrelevant. For purposes of appellant's claim it is sufficient that *she* was part of an identifiable group of victims (female employees working in Jan's immediate environs), even if that group represents only a portion of a larger number of conceivable victims who could not so easily be warned.

* [***8] [*1246] The much more difficult question is whether appellant has sufficiently shown that respondent ought to have been aware that Jan presented a serious threat of physical violence. Before Jan's assault on appellant his inappropriate conduct with women was limited to incidents in which he attempted to grab and kiss the nurses: his medical chart states that he followed the nurses in "inappropriately close ways." Although the nurses quite properly found this behavior annoying, no physical violence was involved in these incidents and the nurses' notes suggest they were not frightened by Jan's conduct. The nursing staff attempted to correct the problem by setting limits Jan could comprehend and abide by. On May 25 Jan tried to kiss and fondle the nurses and was ordered back to his room. Later that day, however, the nurse noted that Jan displayed no inappropriate sexual behavior during her time with [**556] him. The record shows that the assault on appellant was by far the most serious incident involving Jan.

(3) On appeal from a summary judgment we must determine whether a triable issue of material fact exists. Where, as here, summary judgment has been granted in favor of the defendant, [***9] we must consider whether there is any possibility that the plaintiff may be able to establish her case. In making this decision we must construe strictly the defendant's declarations and construe liberally those of the plaintiff. (*Slaughter v. Legal Process & Courier Service, supra, 162 Cal.App.3d at p. 1244.*) **(2b)** With these principles in mind we nonetheless have concluded that there is insufficient evidence to suggest that, based on Jan's prior conduct, respondent should have been aware Jan was likely to commit such a serious sexual assault.

In sum, because Jan's conduct in the hospital prior to the assaults on appellant did not constitute a "serious threat of physical violence" for the purposes of establishing an exception to the immunity provided by *Civil Code section 43.92, subdivision (a)*, the court correctly granted respondent's motion for summary judgment.

Accordingly, the judgment is affirmed.

CONCUR BY: BENSON (In Part)

DISSENT BY: BENSON (In Part)

DISSENT

[*1247] **BENSON, J.,** Concurring and Dissenting.

I concur in the judgment because I agree there was not sufficient evidence to establish a patient/psychotherapist communication of serious threat of physical violence.

[***10] However, I dissent from the majority's conclusion that appellant was "part of a group of 'reasonably identifiable victims.'" (Maj. opn., *ante*, p. 1245.)

In my judgment *Thompson v. County of Alameda (1980) 27 Cal.3d 741 [167 Cal.Rptr. 70, 614 P.2d 728, 12 A.L.R.4th 701]*, provides compelling authority precluding characterization of appellant as a "reasonably identifiable victim." (*Civ. Code, § 43.92, subd. (a).*) The majority discusses *Thompson* in footnote 5 of its opinion and in the interest of brevity I refer the reader to that discussion. It is sufficient to note that the *Thompson* court in affirming dismissal of the failure to warn claim described the communication as "a generalized threat to a segment of the population" and a threat to "a member of a large amorphous public group of potential targets." Appellant here fits within the category described in *Thompson.*

The majority recognizes that the patient's sexual attentions were directed to *women* for they acknowledge that ". . . his [Jan's] persistence in pursuing the available women made it reasonable for one familiar with his actions to assume *he* [***11] *might assault any accessible woman.*" (Maj. opn., p. 1245, italics added.)

* The majority seeks to distinguish the *Thompson* rationale by employing the unreasonable predicate that "here only the female employees on a single floor of the hospital would have been implicated." (Maj. opn., p. 1245, fn. 5.) This is an unduly restrictive view of the scope of the threatened population for several reasons. First, it assumes a fact on which the record is silent, i.e., that the patient Jan was confined to the hospital's seventh floor. Second, it concludes that "any accessible woman" is limited to female "employees," thus ignoring the presence of female patients, visitors and various categories of volunteers who frequent hospital hallways and rooms. Finally, it seemingly overlooks the reality of patient service and care in a large metropolitan hospital where food handlers, cleaning and maintenance personnel, doctors,

aides, therapists, suppliers, engineers, clerical and administrative workers, all services performed by women as well as men, are brought into proximity with patients throughout the hospital. Moreover, hospitals function 24 hours a day, everyday, and patients and their visitors [***12] are constantly changing.

Just as in *Thompson*, where it was unreasonable to require the county to warn all parents of young children in the parolee's neighborhood (*27 Cal.3d, at p. 756*), so here it would be unreasonable to require the psychotherapist [*1248] to warn all women who might become exposed to the threatening patient. I am [**557] confident that the Legislature, in limiting a psychotherapist's duty to warn to "reasonably identifiable victim or victims," did not intend to extend the duty to situations where it is impracticable or impossible to comply.

Justice Tobriner, author of the majority opinion in *Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166]*, the decision which prompted the legislative response set forth in *Civil Code section 43.92, subdivision (a)*, was cognizant of the dangers attendant to imposing on the psychotherapist a duty to warn where identification of the victim was uncertain. In footnote 11 the Justice observes: "Defendant therapists and amicus also argue that warnings must [***13] be given only in those cases in which the therapist knows the identity of the victim. *We recognize that in some cases it would be unreasonable to require the therapist to interrogate his patient to discover the victim's identity or to conduct an independent investigation. But there may also be cases in which a moment's reflection will reveal the victim's identity.* The matter thus is one which depends upon the circumstances of each case and should not be governed by any hard and fast rule." (*Id., at p. 439*, italics added.) *Tarasoff* involved a victim who although unnamed was readily identifiable. (*Id., at p. 432.*)

Concluding that appellant is a reasonably identifiable victim by relying on a myopic analysis which ignores the realities of hospital routine, the majority seeks to establish precedent [1] despite the caveat of *Tarasoff*, the guidance of *Thompson*, and clear legislative direction that the victim be reasonable identifiable. Appellant is merely a "member of a large amorphous public group of potential targets." The effort by the majority to extend [***14] the duty to warn under circumstances where warning is certainly impractical if not impossible places an intolerable burden on psychotherapists and guts the legislative intent of *Civil Code section 43.92, subdivision (a)*.

1 I recognize that the majority's discussion regarding appellant as a reasonably identifiable victim is unnecessary to their judgment and therefore dicta. However, as they seek to promulgate their highly disputed point of view despite the lack of need to do so, I can only assume they intend their views to influence the future development of the law in this area. I am thus forced to write in an effort to highlight the mischief I perceive exists in their opinion.

2 of 2 DOCUMENTS

WAYNE BOYNTON, SR., individually, as father and next best friend of WAYNE BOYNTON, JR., deceased, and as personal representative and survivor of the Estate of WAYNE BOYNTON, JR., and DOROTHY BOYNTON, individually, as mother, next best friend, and survivor of the Estate of WAYNE BOYNTON, JR., Appellants, v. MILTON BURGLASS, M.D., and MILTON BURGLASS, M.D., P.A., Appellees

Case No. 89-1409

Court of Appeal of Florida, Third District

590 So. 2d 446; 1991 Fla. App. LEXIS 9437; 16 Fla. L. Weekly D 2499

September 24, 1991, Filed

SUBSEQUENT HISTORY: [**1] As Amended December 24, 1991. Rehearing Denied December 24, 1991, Reported at *1991 Fla. App. LEXIS 12747*. Released for Publication December 24, 1991.

PRIOR HISTORY: An Appeal from the Circuit Court for Dade County, George Orr, Judge.

DISPOSITION: Affirmed.

COUNSEL: Friedman & Friedman, P.A., and John S. Seligman, for appellants.

Simon, Schindler & Sandberg, P.A., and Neil Rose, for appellees.

Scott Mager, for Academy of Florida Trial Lawyers as amicus curiae; John Hedrick, Assistant General Counsel, for the Florida Department of Health and Rehabilitative Services as amicus curiae; Mathews, Osborne, McNatt & Cobb and Jack W. Shaw, for Florida Defense Lawyers Association as amicus curiae.

JUDGES: Schwartz, C.J., Barkdull, Hubbart, Nesbitt, Baskin, Ferguson, Jorgenson, Cope, Levy, Gersten, and Goderich, JJ. Barkdull, Hubbart, Nesbitt, and Dogerich, JJ., concur. Cope, Judge, specially concurring, Gersten, J., concurs, with Cope, Judge. Schwartz, Chief Judge, dissenting, Baskin, Ferguson, and Levy, JJ., concur with Schwartz, Chief Judge.

OPINION BY: JORGENSON

OPINION

[*447] ON REHEARING EN BANC

By this appeal we are asked to adopt the rule announced by the California Supreme Court in Tarasoff v. Regents of University of California [1] and hold that a psychiatrist who allegedly "knows, or should know," that a patient of [**2] his presents a serious threat of violence to a third party has a duty to warn the intended victim. Because this case is of great public importance, the court, on its own motion, granted rehearing en banc. For the reasons which follow, we decline to recognize such a duty and affirm the order of the trial court dismissing plaintiffs' complaint with prejudice for failure to state a cause of action. [2]

1 *Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976).*

2 The court thanks the Florida Department of Health & Rehabilitative Services, the Academy of Florida Trial Lawyers, and the Florida Defense Lawyers Association -- the Amici Curiae that a in this case -- for their valuable assistance.

On May 13, 1986, Lawrence Blaylock shot and killed Wayne Boynton, Jr. [3] Blaylock had been an outpatient of psychiatrist Milton Burglass, M.D. Boynton's parents sued Dr. Burglass for malpractice. The complaint alleged that Dr. Burglass failed to hospitalize Blaylock, [**3] failed to warn Boynton, Boynton's family, or the police that Blaylock was violence-prone and had threat-

ened serious harm to Boynton, and failed to prescribe the proper medications for Blaylock. [4] Because Dr. Burglass refused to release his patient's medical records to the plaintiffs, the complaint did not contain allegations of specific threats made by Blaylock against the victim. Instead, plaintiffs alleged simply that the psychiatrist "knew, or in the exercise of reasonable due care, should have known that prior to May 13, 1986, Lawrence Blaylock, Jr. had threatened serious harm to a specific victim, to wit: Wayne Boynton, Jr." [5] The complaint further alleged that, as a direct and proximate consequence of the psychiatrist's negligence, Blaylock shot and killed Boynton.

3 The criminal case stemming from this incident is *Blaylock v. State, 537 So. 2d 1103 (Fla. 3d DCA 1988)*, rev. denied, *547 So. 2d 1209 (Fla. 1989)*.

4 In this court, plaintiffs assert only that Dr. Burglass had a duty to warn Boynton, his family, or the police that Blaylock posed a serious threat to Boynton's safety.

[**4]

5 For the purpose of deciding this appeal, we take as true all facts pled in the complaint, and thus assume that Blaylock made an actual, specific threat against Wayne Boynton. See *Connolly v. Sebeco, 89 So. 2d 482 (Fla. 1956)*.

Dr. Burglass moved to dismiss the complaint for failure to state a claim for relief. The trial court granted the motion with prejudice; we affirm.

This is a case of first impression in Florida. Although other jurisdictions [6] have [*448] followed the lead of the California Supreme Court in the landmark decision of *Tarasoff v. Regents of Univ. of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976)*, we reject that "enlightened" approach. [7]

6 For an overview of decisions from other jurisdictions that have addressed Tarasoff, see generally Annotation, Liability of One Treating Mentally Afflicted Patient for Failure to Warn or Protect Third Persons threatened by *Patient, 83 ALR3d 1201* (1978 & Supp. 1990).

7 In Tarasoff, the California Supreme Court held that "when a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger." *131 Cal. Rptr. at 20, 551 P.2d at 340*. Four years later, the California Supreme Court Court narrowed the scope of its holding in Tarasoff, and held that a county's duty to warn of the imminent release from confinement of a dangerous and violent individual "depends upon and arises from the existence of a prior threat to a specific identifiable victim." *Thompson v. County of Alameda, 27 Cal. 3d 741, 759, 167 Cal. Rptr. 70, 80, 614 P.2d 728, 738 (1980)*.

[**5]

Florida courts have long been loathe to impose liability based on a defendant's failure to control the conduct of a third party. See, e.g., *Bankston v. Brennan, 507 So. 2d 1385 (Fla. 1987)* (social host not liable for serving alcoholic beverages to individual who then injures another); *Paddock v. Chacko, 522 So. 2d 410 (Fla. 5th DCA 1988)* (psychiatrist had no duty to forcibly detain patient who later attempted to commit suicide); *Vic Potamkin Chevrolet, Inc. v. Horne, 505 So. 2d 560 (Fla. 3d DCA 1987)* (automobile dealer not liable for buyer's negligent driving once ownership of automobile transferred to buyer), approved, *533 So. 2d 261 (Fla. 1988)*. When the duty sought to be imposed is dependent upon standards of the psychiatric profession, we are asked to embark upon a journey that "will take us from the world of reality into the wonderland of clairvoyance." *Tarasoff, 551 P.2d at 354, 131 Cal. Rptr. at 34* (Mosk, J., concurring and dissenting). Psychiatry "represents the penultimate grey [**6] area . . . particularly with regard to issues of foreseeability and predictability of future dangerousness." *Lindabury v. Lindabury, 552 So. 2d 1117, 1118 (Fla. 3d DCA 1989)* (Jorgenson, J., dissenting) (citations omitted); *Fischer v. Metcalf, 543 So. 2d 785, 787 n.1* ("Unlike other branches of medicine in which diagnoses and treatments evolve from objective, empirical, methodological foundations, 'psychiatry is at best an inexact science, if, indeed, it is a science. . . .'") (citations omitted). It is against the backdrop of this uncertain and inexact science that we address the legal issues presented by this appeal.

I. The Duty to Warn

Plaintiffs contend that Dr. Burglass had a duty, under the common law, to warn Boynton (or the police, or Boynton's family) that Blaylock intended to harm him. In our view, imposing on psychiatrists [8] the duty that plaintiffs urge is neither reasonable nor workable and is potentially fatal to effective patient-therapist relationships.

8 Although we use the term "psychiatrist" throughout this opinion, our decision today applies equally to psychologists, psychotherapists, and other mental health practitioners.

[**7]

Under the common law, a person had no duty to control the conduct of another or to warn those placed in danger by such conduct; however, an exception to that general rule can arise when there is a special relationship between the defendant and the person whose behavior needs to be controlled or the person who is a foreseeable victim of that conduct. See *Fischer v. Metcalf, 543 So. 2d 785, 787 n.1 (Fla. 3d DCA 1989)*; *Department of Health & Rehab. Servs. v. Whaley, 531 So. 2d 723 (Fla. 4th DCA 1988)*; *Garrison Retirement Home Corp. v. Hancock, 484 So. 2d 1257 (Fla. 4th DCA 1985)*; see also *Rest. 2d Torts §§ 314-320*. Implicit in the creation of that exception, however, is the recognition that the person on whom the duty is to be imposed has the ability or the right to control the third party's behavior. Restatement §§ 316-319. "Thus, in the absence of a relationship involving such control, the exception to the general rule, that there is no duty to control the conduct of a third party for the protection of others, should not be applicable." *Hasenei v. United States, 541 F. Supp. 999, 1009 (D. Md. 1982)* [**8] (psychiatrist who had no right or ability to control voluntary outpatient's [*449] behavior could not be held liable for failure to warn patient's victim, especially where psychiatrist unable to predict identifiable danger posed by patient to any person). In Tarasoff, the California Supreme Court characterized the relationship between the psychiatrist and the patient or the intended victim of the patient by stating that "there now seems to be sufficient authority to support the conclusion that by entering into a doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient." *Tarasoff, 131 Cal. Rptr. at 24, 551 P.2d at 344*, citing Fleming & Maximov, The Patient or His Victim: The Therapist's Dilemma, 62 Cal. L. Rev. 1025, 1030 (1974). The Tarasoff court did not address the issue of the psychiatrist's control over the patient but simply opined that "such a relationship may support affirmative duties for the benefit of third persons." *131 Cal. Rptr. at 24, 551 P.2d at 343.*

In this case, [**9] Blaylock was a voluntary psychiatric outpatient treated by Dr. Burglass. A federal court has described the relationship between a psychiatrist and a voluntary outpatient as lacking "sufficient elements of control necessary to bring such relationship within the rule of § 315." *Hasenei, 541 F. Supp. at 1009.* We agree. "Once the suggestion of control is eliminated, there is nothing in the nature of the relationship between a psychiatrist and his patient to support an exception to the tort law presumption." Stone, The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society, 90 Harv. L. Rev. 358, 366 (1976). The complaint nowhere alleges that Dr. Burglass had either the right or the ability to control Blaylock's behavior. Dr. Burglass, therefore, cannot be charged with the duty to control. Compare *Nova Univ., Inc. v. Wagner, 491 So. 2d 1116 (Fla. 1986)* (where institution that housed and rehabilitated children with behavioral and emotional problems had taken charge of persons likely to harm others, institution had duty to exercise reasonable care to avoid foreseeable attacks by its charges upon third persons). [9]

9 Plaintiff's failure to allege that Dr. Burglass had the ability to control Blaylock's behavior also goes to the issue of proximate cause. If Dr. Burglass lacked the ability to control Blaylock's behavior, his failure to control cannot be said to be the proximate cause of the criminal act. See *Hasenei, 541 F. Supp. at 1012, n.22.*

[**10] The nature of the relationship between Dr. Burglass and the victim does not become any less tenuous or give rise to a more definable duty by attempting to transform the duty to control Blaylock's behavior into a duty to warn Boynton or others about Blaylock's behavior or to otherwise protect them. "The duty to warn is an expression of humanitarianism and the spirit of the Good Samaritan. . . ." *Currie v. United States, 836 F.2d 209, 213 (4th Cir. 1987).* The creation, by process of law, of such a duty would be no more than a recognition that "our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal." *Tarasoff, 131 Cal. Rptr. at 27, 551 P.2d at 347.* By imposing such duties, courts recognize the responsibilities inherent in social living and human relations. *McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500, 507 (N.J. Sup. Ct. 1979).* However, imposition of such a duty must be reasonable, and must give the parties on whom the duty is imposed fair [**11] notice of what is required of them. We decline to fashion a rule of law from such social duties.

II. Predictions of Dangerousness

Because psychiatry is, at best, an inexact science, courts should be reluctant to impose liability upon psychiatrists. "Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on the likelihood of future dangerousness." *Ake v. Oklahoma, 470 U.S. 68, 81, 105 S. Ct. 1087, 1095, 84 L. Ed. 2d* [*450] *53, 64-65 (1985).* Although Florida courts recognize that a physician owes a duty to warn members of a patient's immediate family of the existence and dangers of a communicable disease, *Hofmann v. Blackmon, 241 So. 2d 752 (Fla. 4th DCA 1970)*, cert. denied, *245 So. 2d 257 (Fla. 1971)*, "unlike a

physician's diagnosis, which can be verified by x-ray, surgery, etc., the psychiatrist cannot verify his diagnosis, treatment or predicted prognosis except by long-term follow-up and reporting." *Nesbitt v. Community Health of South Dade, Inc., 467 So. 2d 711, 717 (Fla. 3d DCA 1985)* [**12] (Jorgenson, J., concurring and dissenting), quoting Almy, Psychiatric Testimony: Controlling the "Ultimate Wizardry" in Personal Injury Actions, 19 The Forum 233, 243 (1984).

The outward manifestations of infectious diseases lend themselves to accurate and reliable diagnoses. However, the internal workings of the human mind remain largely mysterious. The "near-impossibility of accurately or reliably predicting dangerousness has been well-documented." *Hasenei v. United States, 541 F. Supp at 1011*, citing Diamond, The Psychiatric Prediction of Dangerousness, 123 U. Pa. L. Rev. 439 (1974); Ennis & Litwack, Psychiatry & The Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693 (1974); Stone, supra. [10]

> 10 For a useful discussion of social science methodology and its appropriate reception in the courts, see generally J. Monahan & L. Walker, Social Science in Law: Cases & Materials (2d Ed. 1990).

To impose [**13] a duty to warn or protect third parties would require the psychiatrist to foresee a harm which may or may not be foreseeable, depending on the clarity of his crystal ball. Because of the inherent difficulties psychiatrists face in predicting a patient's dangerousness, psychiatrists cannot be charged with accurately making those predictions and with sharing those predictions with others. Therefore, we decline to charge Dr. Burglass with such a duty.

III. Confidentiality and the Psychiatrist-Patient Relationship

Imposing on psychiatrists a duty to warn third parties would not only be unreasonable and unworkable, it would also wreak havoc with the psychiatrist-patient relationship.

Confidentiality is the cornerstone of the psychiatrist-patient relationship. The psychotherapist-patient privilege is codified in the Florida Evidence Code, *section 90.503, Florida Statutes* (1985), which provides that "[a] communication between psychotherapist and patient is 'confidential' if it is not intended to be disclosed to third persons. . . ." Had Dr. Burglass disclosed Blaylock's real or apparent threat to Boynton, he would have breached not only his ethical duty to his patient, but also *section* [**14] *90.503*.

In addition to holding that there is no common-law duty to warn, we further hold that the Florida legislature has not created such a duty. Plaintiffs argue that section 455.2415, Florida Statutes (1989), applies in this case and allows Dr. Burglass to divulge his patient's communications "to the extent necessary to warn a potential victim." Section 455.2415 provides, in pertinent part, that if:

(1) A patient is engaged in a treatment relationship with a psychiatrist;

(2) Such patient has made an actual threat to physically harm an identifiable victim or victims; and

(3) The treating psychiatrist makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat, the psychiatrist may disclose patient communications to the extent necessary to warn any potential victim or to communicate the threat to a law enforcement agency.

However, section 455.2415 became effective on February 8, 1988; the legislature specifically provided that "this act does not apply to causes of action arising prior to the effective date of this act." Chapter [*451] 88-1, § 10, Laws of [**15] Florida. Wayne Boynton was murdered on May 13, 1986, long before section 455.2415 was in force. Moreover, section 455.2415 does not require a psychiatrist to warn in these circumstances but is couched in permissive terms, and merely provides that a psychiatrist "may disclose patient communications. . . ." We conclude, therefore, that section 455.2415 has no effect on this case.

Imposing on Dr. Burglass a duty to warn would not only run afoul of the psychiatrist-patient confidentiality privilege, but would also severely hamper, if not destroy, the relationship of trust and confidence that is crucial to the treatment of mental illness.

By the very nature of psychotherapy, the patient is encouraged to freely vocalize his fantasies, repressed feelings, and desires. Requiring psychiatrists to warn potential victims every time a patient expresses feelings of anger toward someone would seriously interfere with the treatment, both because of the breach in confidentiality and the practical problem of determining whether a patient really intended to carry out his violent feelings.

Wolfe, The Scope of a Psychiatrists's Duty to Third Persons: The Protective Privilege Ends Where the [**16] Public Peril Begins, *59 Notre Dame L. Rev. 770, 785-86 (1984)*. Requiring a psychiatrist to breach that privilege in order to warn a third party would inhibit the free expression vital to diagnosis and treatment and would, thus, undermine the very goals of psychiatric treatment.

IV. Conclusion

The criminal act committed by Lawrence Blaylock resulted in the tragic and irreparable loss of Wayne Boynton's life. In the face of such a loss, we understand the need of the victim's family to blame an identifiable source and to ask this court to recognize that the psychiatrist who treated their son's killer had a legal obligation to warn them, their son, or the police of his patient's murderous intent. There is not sufficient science to allow the accurate prediction of future dangerousness. Because such predictions are fraught with uncertainty, we find that it would be fundamentally unfair to charge a psychiatrist with the duty to warn.

Based on the foregoing analysis, we affirm the dismissal, with prejudice, of plaintiff's complaint for failure to state a cause of action. [11]

11 We also affirm the denial of plaintiffs' motion to strike defendant's motion to dismiss.

[**17] Affirmed. [12]

12 We certify to the Supreme Court of Florida that the question resolved in this case is one of great public importance.

The motion for rehearing or certification is otherwise denied.

CONCUR BY: COPE

CONCUR

COPE, Judge (specially concurring).

I concur in the judgment.

The present case arose in 1986, prior to the enactment of section 455.2415, Florida Statutes (Supp. 1988). See ch. 88-1, § 10, Laws of Fla. The statute became effective in 1988 and "does not apply to causes of action arising prior to the effective date of this act." Ch. 88-1, § 86, Laws of Fla.

For the period prior to the 1988 enactment, the common law and statutory duties of confidentiality imposed upon psychotherapists constituted a barrier to the imposition of a duty to warn. I therefore join in affirming the judgment below. It is premature for us to express any view on the existence and scope of any duty subsequent to the 1988 amendment.

DISSENT BY: SCHWARTZ

DISSENT

SCHWARTZ, Chief Judge (dissenting).

During consultation with Dr. Burglass, Blaylock threatened to kill Boynton. The doctor did not warn Boynton or anyone else in any way. True to his word, Blaylock killed Boynton. [13] The court says that, no matter what the underlying circumstances, no matter how great the danger, no matter [*452] how trivial the effort required to prevent the harm, no matter what the proof concerning the likelihood that even a phone call might [**18] have saved a human life, no jury could properly hold Dr. Burglass civilly liable. I cannot agree with a conclusion which seems to me to be so contrary to the requirements of a civilized society and therefore to what should be the standards of our law.

13 This fact is well-known to us. See *Blaylock v. State, 537 So. 2d 1103 (Fla. 3d DCA 1988)*, review denied, *547 So. 2d 1209 (Fla. 1989)*.

The issue in this case has been the subject of a great number of decisions and commentary flowing from Justice Tobriner's seminal opinion in *Tarasoff v. Regents of Univ. of Cal., 17 Cal.3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976)*. It would be a useless waste of valuable space in the Southern Reporter to reproduce or reword the arguments already advanced in support of the conclusion that liability may arise in such a situation. I would simply hold:

that a psychiatrist or therapist may have a duty to take whatever steps are reasonably necessary to protect an intended [**19] or potential victim of his patient when he determines, or should determine, in the appropriate factual setting and in accordance with the standards of his profession established at trial, that the patient is or may present a probability of danger to that person. The relationship giving rise to that duty may be found either in that existing between the therapist and the patient, as was alluded to in Tarasoff II, or in the more broadly based obligation a practitioner may have to protect the welfare of the community, which is analogous to the obligation a physician has to warn third persons of infectious or contagious disease.

McIntosh v. Milano, 168 N.J. Super. 466, 489-90, 403 A.2d 500, 511-12 (Law Div. 1979); accord, e.g., *Lipari v. Sears, Roebuck & Co., 497 F.Supp. 185 (D.Neb. 1980)*; *Hamman v. County of Maricopa, 161 Ariz. 58, 775 P.2d 1122 (1989)*; *Hedlund v. Superior Court, 34 Cal.3d 695, 194 Cal.Rptr. 805, 669 P.2d 41 (1983)*; Naidu v. Laird v. *539 A.2d 1064 (Del. 1988)*; *Bardoni v. Kim, 151 Mich. App. 169, 390 N.W.2d 218 (1986)*; [**20] *Davis v. Lhim, 124 Mich.App. 291, 335 N.W.2d 481 (1983)*; *Littleton v. Good Samaritan Hospital & Health Center, 39 Ohio St.3d 86, 529 N.E.2d 449 (1988)*; *Peck v. Counseling Serv. of Addison County, Inc., 146 Vt. 61, 499 A.2d 422 (1985)*; cf. *Garrison Retirement Home Corp. v. Hancock, 484 So. 2d 1257 (Fla.*

4th DCA 1985) (retirement home owed duty to warn worker of senile resident's dangerous propensities for operating motor vehicle). See generally Note, The Psychotherapist's Duty to Warn, 40 Fed'n of Ins. & Couns. Q. 406 (1990); Hulteng, Commentary - The Duty to Warn or Hospitalize: The New Scope of Tarasoff Liability in Michigan, 67 U. Det. L. Rev. 1 (1989). I am content to emphasize only the basic premise of this authority: that there is every good reason in the protection of human life and safety -- to create and enforce the duty to warn, and no nearly sufficient policy or other ground to deny it As Tarasoff eloquently states:

*

> Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate [**21] the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest.

Tarasoff, 17 Cal.3d at 442, 131 Cal.Rptr. at 27-28, 551 P.2d at 347-48.

A mass of objections has been raised to the proposed "duty." Seemingly, all of them have been accepted by the majority. In my view, none of them -- again for reasons already stated in the decisions -- have merit. Treating them very briefly, however, it may be said:

1. The "finding" that there is no duty is nothing more than a tautology. The court finds no duty because it thinks there should be no liability; it does not conclude that there is no liability because it has "found" that there is no duty. See *Tarasoff, 17 Cal.3d at 425, 131 Cal.Rptr. at 14, 551 P.2d at 334*; *Carpenter v. City of Los* [*453] *Angeles, 230 Cal.App.3d 923, 281 Cal.Rptr. 500 (1991)*; [**22] W. Prosser, Law of Torts § 53 (4th ed. 1971) ("The statement that there is or is not a duty begs the essential question -- whether the plaintiff's interests are entitled to legal protection against the defendant's conduct."). I think to the contrary of the court's view.

2. The fact that the psychiatrist has no ability to "control" his patient is a straw argument which has nothing to do with this case. Dr. Burglass's liability is not based on any responsibility for the actions of his homicidal patient, but upon his own negligent failure to conduct himself as a reasonable member of the community by giving warning to a person in danger from a known peril.

3. The horrible that the dubious nature of psychiatric predictability might impose liability for consequences which were not reasonably foreseeable is likewise without foundation. As the cases recognize, liability should be imposed only when, on the basis of professional standards, the psychiatrist actually knows or should know that the threat is a viable one. See *Littleton, 39 Ohio St. 3d at 86, 529 N.E.2d at 449*; § 455.2415, Fla.Stat. (1989). [14] Our adoption of that rule would eliminate the majority's [**23] self-created fear on that ground.

> 14 *455.2415 Communications confidential; exceptions.* -- Communications between a patient and a psychiatrist, as defined in s. 394.455(2)(e), shall be held confidential and shall not be disclosed except upon the request of the patient or his legal representative. Provision of psychiatric records and reports shall be governed by s. 455.241. Notwithstanding any other provisions of this section or s. 90.503, where:
>
> (1) A patient is engaged in a treatment relationship with a psychiatrist.
>
> (2) Such patient has made an actual threat to physically harm an identifiable victim or victims; and
>
> (3) The treating psychiatrist makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out that threat.
>
> the psychiatrist may disclose patient communications to the extent necessary to warn any potential victim or to communicate the threat to a law enforcement agency. No civil or criminal action shall be instituted, and there shall be no liability on account of disclosure of otherwise confidential communications by a psychiatrist in disclosing a threat pursuant to this section.

[**24] 4. Along the same lines, the majority expresses its concern over the supposed effect of a warning rule upon the freedom and confidentiality of the psychiatric process. But we are not told, and it is difficult to imagine, how a warning to a potential victim or the authorities that one's patient has made a genuine threat, would compromise either of these principles. Moreover, it has been widely held that the psychiatrist-patient privilege is subject to a clear exception when the welfare of others makes it "necessary, in order to protect the patient or the community from imminent danger, to reveal confidential information disclosed by the patient. [Reprinted in 130 Am. Jur. Psych. 1058, at 1063 (1973)]." *McIntosh, 168 N.J.Super. at 491, 403 A.2d at 512* (citing Principles of Medical Ethics, § 9 (1957)).

5. Finally, I wholly disagree with the conclusion that "section 455.2415 has no effect on this case." Slip op. at 12. Notwithstanding that the statute did not formally become effective until February 8, 1988, I think its enactment is determinative to the contrary of the court's decision.

(a) In the first place, the statute has rendered the public policy grounds of the majority decision [**25] -- that is, the desire to encourage facility of communication between therapist and patient and to preserve the confidentiality of those remarks -- completely meaningless. The legislature has decided that, now and in the future, a warning may be communicated notwithstanding those concerns. While the effect of a judicial decision upon the day to day actions of real people is subject to grave doubt in almost every instance, see *South Florida Blood Service v. Rasmussen, 467 So. 2d 798, 804-07 (Fla. 3d DCA 1985)* (Schwartz, C.J., dissenting), aff'd, *500 So. 2d 533 (Fla. 1987)*, it is clear that the decision in this case cannot serve the court's independent purposes because, for better or worse, the legislature has disagreed with them.

[*454] (b) The later enactment of section 455.2415 has or should have an even more profound effect on our decision. In writing the common law of our state in this field, the court, like all courts in similar situations, has adopted a principle which it believes to be in accordance with sound public policy. But it is apodictic that it is ordinarily for the legislature to determine what policy is desirable and how it should be reflected [**26] in the law. See *10 Fla.Jur.2d Constitutional Law § 147* (1979). When the legislature has made such a determination, its view, even if not technically binding, should be entitled to great respect and weight by a court seeking to resolve the same problem. See *Van Beeck v. Sabine Towing Co., 300 U.S. 342, 349-51, 57 S. Ct. 452, 455, 456, 81 L.Ed. 685, 690 (1937)* (per Cardozo, J., "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. Its intimation is clear enough in the statutes now before us that their effects shall not be stifled, without the warrant of clear necessity, by the perpetuation of a policy which now has had its day.") (footnotes omitted); Singer, Norman J., 2A Sutherland Statutory Construction § 56.02 (4th ed. rev. 1984); *Dade County Medical Ass'n v. Hlis, 372 So. 2d 117, 119 (Fla. 3d DCA 1979)* ("The non-applicability of the statutory privilege does not mean, however, that we may or should ignore the considerations of public policy which informed the enactment of the statute and of which we have spoken. [**27] It). This approach finds special applicability when, as here, the precise issue is the subject of a statute which becomes effective only after the date in question. E.g., *United States v. Sweet, 245 U.S. 563, 38 S. Ct. 193, 62 L.Ed. 473 (1918)*. In other words, the legislature has already considered the issue before us and has decided that considerations of certainty and secrecy of doctor-patient communications are not served or outweighed when the conditions described in the statute are fulfilled. We should defer to the judgment of the branch of our government which has the primary duty, and the resources, to render that judgment.

Indeed, in following the principle of legislative deference to which I have just referred, I would adopt the statutory provision as the statement of the circumstances under which the duty to warn arises. Such a rule would, at the same time, reflect the will of the legislature and overcome any objections to a broader or more uncertain standard. See *Tarasoff v. Regents of Univ. of Cal., 17 Cal.3d at 438, 131 Cal.Rptr. at 25, 551 P.2d at 345*; *McIntosh, 168 N.J. Super. 466, 403 A.2d 500 (1979)*; [**28] see also Littleton, 39 Ohio St. 3d at , 529 N.E.2d at 458-461. In other words, I would hold that liability would arise when a

> patient has made an actual threat to physically harm an identifiable victim or victims;
>
> and a reasonable practitioner would make
>
> a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out that threat [;]
>
> and nonetheless fails to
>
> disclose [the] patient communications to the extent necessary to warn any potential victim or to communicate the threat to a law enforcement agency.
>
> § 455.2415, Fla.Stat. (1989).

It is true that the amended complaint, as presently drafted, does not conform to this standard. However, because the plaintiffs could not have previously anticipated the result in this case of first impression, they should now be given leave to amend the complaint accordingly, if they can conscientiously do so. See *Jennings v. Dade County, 589 So. 2d 1337* (Fla. 3d DCA Case nos. 88-1324 & 88-1325, opinion filed, August 6, 1991) [*16 Fla. Law W. D2059*]; *Gabriel v. Tripp, 576 So. 2d 404 (Fla. 2d DCA 1991)*.

Although the thought [**29] was expressed in a similarly losing effort, I continue to believe that "a common law duty exists when a court says it does because it thinks it should." *Robertson v. Deak Perera, Inc., 396 So. 2d 749, 752 (Fla. 3d DCA 1981)* (Schwartz, J., dissenting), review denied, *407 So. 2d 1105 (Fla. 1981)*. Rather than some, like the majority, who sound "the loud alarum bells," parade the horribles [*455] and ask why the duty to warn should exist, I think, bearing in mind the demands of common decency and the protection of life,

that we should ask why it should not. There is no reason why not, and I therefore dissent.

2 of 3 DOCUMENTS

CASSANDRA GREEN, Appellant, v. JEAN ROSS, Appellee.

CASE NO. 96-00489

COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

691 So. 2d 542; 1997 Fla. App. LEXIS 3510; 22 Fla. L. Weekly D 919

April 9, 1997, Opinion filed

SUBSEQUENT HISTORY: [**1] Released for Publication April 25, 1997.

PRIOR HISTORY: Appeal from the Circuit Court for Charlotte County; Darryl C. Casanueva, Judge.

DISPOSITION: Affirmed.

COUNSEL: Geoffrey D. Morris of Morris & Widman, P.A., Venice, for Appellant.

Scott A. Mager and Prince A. Donnahoe, IV of Mager & Associates, P.A., Fort Lauderdale, Amicus Curiae Academy of Florida Trial Lawyers.

Audrey B. Rauchway of Bavol, Bush & Sisco, P.A. Tampa, for Appellee.

JUDGES: CAMPBELL, Acting Chief Judge. SCHOONOVER and BLUE, JJ., Concur.

OPINION BY: CAMPBELL

OPINION

[*542] CAMPBELL, Acting Chief Judge.

Appellant, Cassandra Green, appeals the trial court order dismissing with prejudice her complaint and second amended complaint. Appellant asks us to determine that there exists in Florida a duty on the part of a mental health worker to warn a potential victim when a patient presents a serious threat of violence to that potential victim. A breach of that duty would then support a cause of action against the mental health worker by the victim, who suffers harm at the hands of the patient. The trial court dismissed with prejudice appellant's initial complaint for failure to state a common law cause of action. Appellant [**2] was granted leave to file an amended complaint in an effort to state a statutory cause of action under *section 491.0147, Florida Statutes* (1991). That second amended complaint was subsequently dismissed with prejudice for failure to state such a statutory cause of action. The trial judge stated, in dismissing the second amended complaint, that he was unable to conclude that the permissive language of *section 491.0147* created an affirmative duty to warn so as to support a cause of action for a failure to warn. We agree and affirm.

In affirming the dismissal of appellant's complaint for failure to state a common law cause of action, we agree with and rely upon the opinion of Judge Jorgenson, writing for the majority in the en banc decision of our colleagues, in *Boynton v. Burglass, 590 So. 2d 446 (Fla. 3d DCA 1991)*. It would not add to the jurisprudence of this state, or the understanding of it, to retrace or retread the ground so ably and adequately covered by Judge Jorgenson for the majority and Judge Schwartz for the dissent in *Boynton*. To decide between the two opposing points of view depends upon judicial philosophy. Florida has not heretofore recognized a common law cause [**3] of action such as appellant attempts to allege. If our society has progressed (or regressed) to such a point that there should now be recognized new causes of action where none have existed before, we conclude that it is the better part of judicial wisdom to await the establishment of such causes of action by legislative action after input as to all the variables from competing elements of society. We are unprepared and unwilling as jurists to declare that such a cause of action exists because we now conclude, with the more limited fact-finding resources at our disposal, that there is presently [*543] a sufficient societal interest to protect that requires judicial activism.

With that conclusion behind us, we now turn to the trial court's dismissal of appellant's attempt to allege a statutory cause of action based on *section 491.0147.* Judges Cope and Gersten in *Boynton* specially concurred in the majority opinion on the basis that it was premature to consider whether the enactment (subsequent to the date the cause of action in *Boynton* was alleged to have arisen) of section 455.2415, Florida Statutes (Supp. 1988) created a statutory cause of action that did not previously exist. Section [**4] 455. 2415, pertaining to communications between patients and psychiatrists, and the psychiatrist's obligations and duties relating to those communications, is similar in import to *section 491.0147*, relating to communications between patients and mental health workers and others licensed or certified under chapter 491. Those sections respectively provide as follows:

455.2415 Communications confidential; exceptions.--Communications between a patient and a psychiatrist, as defined in s. 394.455(2)(e), shall be held confidential and shall not be disclosed except upon the request of the patient or the patient's legal representative. Provision of psychiatric records and reports shall be governed by s. 455.241. Notwithstanding any other provisions of this section or s. 90.503, where:

(1) A patient is engaged in a treatment relationship with a psychiatrist;

(2) Such patient has made an actual threat to physically harm an identifiable victim or victims; and

(3) The treating psychiatrist makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out that threat, the psychiatrist [**5] may disclose patient communications to the extent necessary to warn any potential victim or to communicate the threat to a law enforcement agency. No civil or criminal action shall be instituted, and there shall be no liability on account of disclosure of otherwise confidential communications by a psychiatrist in disclosing a threat pursuant to this section.

. . . .

491.0147 Confidentiality and privileged communications.--Any communication between any person licensed or certified under this chapter and his patient or client shall be confidential. This secrecy may be waived under the following conditions:

(1) When the person licensed or certified under this chapter is a party defendant to a civil, criminal, or disciplinary action arising from a complaint filed by the patient or client, in which case the waiver shall be limited to that action.

(2) When the patient or client agrees to the waiver, in writing, or, when more than one person in a family is receiving therapy, when each family member agrees to the waiver, in writing.

(3) When there is a clear and immediate probability of physical harm to the patient or client, to other individuals, or to society and the person licensed [**6] or certified under this chapter communicates the information only to the potential victim, appropriate family member, or law enforcement or other appropriate authorities.

In finding that a cause of action based on a breach of * a duty to warn of possible actions of a mental health patient does not exist, some courts have relied, at least partially, on the fear of harm to the relationship between the professional and the mental health patient that is rooted in the confidentiality of the relationship. It appears that Judges Cope and Gersten had concern for future causes of action that might be implied from the legislative waiver of that confidentiality in sections 455.2415 and *491.0147.* In addressing that concern and that of the trial judge below, we conclude that the *permissive* language waiving confidentiality in sections 455.2415 and *491.0147* does not equate to the legislative creation of a cause of action not previously recognized in Florida. If we are unwilling to create such a cause of action by judicial fiat, and we are so unwilling, we should be and are just as unwilling to create such a cause of action by so interpreting nebulous legislative language that does not [*544] specifically [**7] and clearly address the issue. If the rules are to be changed in regard to the interaction between parties in our society and their resulting rights and obligations, then notice of the change should be clearly stated and the rules for the conduct of the parties precisely delineated.

We conclude, in regard to the issue before us, that * those changes and rules should come to fruition only after the matter has been exposed to the legislative fact-finding and policy-making process. Finding therefore that there presently exists in Florida no cause of action as appellant attempts to allege, we affirm the dismissal of her complaint and second amended complaint with prejudice.

SCHOONOVER and BLUE, JJ., Concur.

CAL EWING et al., Plaintiffs and Appellants, v. DAVID GOLDSTEIN, Defendant and Respondent.

B163112

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION EIGHT

120 Cal. App. 4th 807*; *15 Cal. Rptr. 3d 864*; *2004 Cal. App. LEXIS 1131*; *2004 Cal. Daily Op. Service 6427*; *2004 Daily Journal DAR 8707

July 16, 2004, Filed

SUBSEQUENT HISTORY: Time for Granting or Denying Review Extended *Ewing v. Goldstein, 2004 Cal. LEXIS 10038 (Cal., Oct. 18, 2004)*
Review denied by, Request granted, Request denied by *Ewing v. Goldstein, 2004 Cal. LEXIS 11307 (Cal., Nov. 10, 2004)*

PRIOR HISTORY: [***1] Superior Court of Los Angeles County, No. BC267552, Frances Rothschild, Judge.

DISPOSITION: Reversed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A murder victim's parents sued a therapist for wrongful death based on professional negligence. Plaintiffs alleged that the therapist's patient posed a foreseeable danger to the victim and the therapist failed to discharge his duty to warn the victim or a law enforcement agency. The patient's father told the therapist that the patient was suicidal and had expressed a desire to harm his former girlfriend's new boyfriend. The patient voluntarily admitted himself to a hospital, but was released even though the therapist called the staff psychologist and recommend against release. The patient murdered the boyfriend and committed suicide. The therapist moved for summary judgment, which the court granted. (Superior Court of Los Angeles County, No. BC267552, Frances Rothschild, Judge.)

The Court of Appeal reversed. The court held that a communication from a family member to a therapist, made for the purpose of advancing a patient's therapy, is a patient communication within the meaning of *Civ. Code, § 43.92*, and a therapist's duty to warn arises if the information communicated leads the therapist to believe or predict that the patient poses a serious risk of grave bodily injury to another. *Civ. Code, § 43.92*, requires a therapist to attempt to protect a victim under limited circumstances, imposed only after he or she determines that the patient has made a credible threat of serious physical violence against a person. Information in the form of an actual threat that the father shared with his son's therapist about the risk of grave bodily injury his son posed to another should have been considered a patient communication in determining whether the therapist's duty to warn was triggered under *§ 43.92*. A threat to take another's life, if believed, was sufficient to trigger the therapist's duty to warn the intended victim and the law enforcement agency. Since the trial court was required to consider the threat the patient communicated to his father, which was then communicated to the therapist, triable factual questions remained as to whether the therapist had sufficient information to trigger his duty to warn, and summary judgment should not have been granted. (Opinion by Boland, J., with Cooper, P. J., and Rubin, J., concurring.) [*808]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Healing Arts and Institutions § 30--Therapists--Duties and Liabilities--Patient Communication--Duty to Warn Victim.--A communication from a family member to a therapist, made for the purpose of advancing a patient's therapy, is a patient communication within the meaning of *Civ. Code, § 43.92*. A therapist's duty to warn a victim arises if the information communicated leads the therapist to believe or predict that the patient poses a serious risk of grave bodily injury to another.

(2) Healing Arts and Institutions § 30--Therapists--Duties and Liabilities--Confidential Information--Limited Duty to Warn Victim--Credible Threat of Serious Physical Violence.--*Civ. Code, § 43.92*, strikes a reasonable balance in that it does not compel the therapist to predict the dangerousness of a patient. Instead, it requires the therapist to attempt to protect a victim under limited circumstances, even though the therapist's disclosure of a patient confidence will potentially disrupt or destroy the patient's trust in the therapist. However, the requirement is imposed upon the therapist only after he or she determines that the patient has made a credible threat of serious physical violence against a person. Stated differently, otherwise confidential information conveyed to a therapist loses its protected status once it provides the reasonable cause for the therapist to believe the patient presents a significant danger to himself, herself or others.

(3) Healing Arts and Institutions § 27.2--Therapists--Relationship with Patients--Patients' Rights--Privileged Confidential Communication with Third Persons.--A statement between a therapist and third persons may be a confidential patient communication, and hence privileged, if it assists the therapist in the diagnosis, treatment or cure of a patient's mental or emotional illness. (*Evid. Code, § 1012.*) Thus, a communication between a patient and his or her therapist's staff or professional associates is presumed to be privileged if the communication occurs in order to further the therapeutic relationship. (*Evid. Code, §§ 917, subd. (a), 1014, subd (c).*) Similarly, information is considered a confidential communication between patient and psychotherapist, even if it is shared in the presence of third persons--such as participants in group or joint counseling, or marriage and family counseling--so long as the [*809] information is disclosed in confidence and in an effort to accomplish the purpose of the patient's therapy. (*Evid. Code, § 1012.*)

(4) Healing Arts and Institutions § 27.2--Therapists--Relationship with Patients--Patients' Right--Privileged Communication with Patient's Family.--A communication between a patient's family members and the patient's therapist, made in the course of or functionally related to the diagnosis and treatment of the patient, is protected by the psychotherapist-patient privilege.

(5) Healing Arts and Institutions § 30--Therapists--Duties and Liabilities--Patient Communication--Information Disclosed by Patient's Family--Duty to Warn a Victim.--Information conveyed to a therapist by a patient's parent or other family member is relevant and sufficiently important to be considered and incorporated into developing the best treatment for a patient, and is worthy of protection from disclosure. Despite its privileged nature, the therapist's duty to protect that information must yield once the therapist comes to believe the information must be revealed to prevent danger to his or her patient or another. (Evid Code, *§ 1024.*) Thus, an actual threat that a father communicated to his son's therapist about the risk of grave bodily injury his son posed to the new boyfriend of the son's former girlfriend, also should have been considered a patient communication in determining whether the therapist's duty to warn was triggered under *Civ. Code, § 43.92*.

[6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 861.]

(6) Healing Arts and Institutions § 30--Therapists--Duties and Liabilities--Duty to Warn--Risk of Grave Bodily Injury to Victim.--A therapist has a duty to warn if, and only if, the threat which the therapist has learned--whether from the patient or a family member--actually leads him or her to believe the patient poses a risk of grave bodily injury to another person. Regardless of the definition of "serious" applied to *Civ. Code, § 43.92*, there can be no question that a threat to take another's life, if believed, is sufficient to trigger a therapist's duty to warn the intended victim and a law enforcement agency. A therapist's duty to breach a patient's confidence in favor of warning an intended victim could also arise if the therapist becomes aware the patient intends [*810] to commit an act or acts of grave bodily injury short of murder, but akin to mayhem or serious bodily injury as defined by statute.

(7) Summary Judgment § 1--Existence of Triable Factual Questions.--In considering a motion for summary judgment in a wrongful death action brought by the victim's family against a therapist, based on the therapist's failure to warn the victim that the therapist's patient had threatened to kill or harm the victim, the trial court was required to consider the threat that the patient shared with his father, which the then father communicated to the therapist. If a fact finder, viewing this evidence and the therapist's conduct, believed the patient's father told the therapist about his son's stated intentions to do physical violence to the victim, it could conclude the therapist

had sufficient information to trigger his duty to warn. Because triable factual

COUNSEL: Stark, Rasak & Clarke and Edmund Willcox Clarke, Jr., for Plaintiffs and Appellants.

Callahan, McCune & Willis and Christopher J. Zopatti for Defendant and Respondent.

JUDGES: Boland, J., with Cooper, P. J., and Rubin, J., concurring.

OPINION BY: BOLAND

OPINION

[**866] **BOLAND, J.**--

SUMMARY

The parents of a victim killed by a therapist's patient sued the therapist for wrongful death based on the therapist's failure to warn the victim after the therapist received a communication that the patient threatened to kill or cause serious physical harm to the victim. The trial court granted the therapist's motion for summary judgment on the ground he was immune from liability under *Civil Code section 43.92* [1] because the threat was communicated to the therapist by the patient's father rather than by the patient himself.

1 All undesignated statutory references are to this code.

[*811] **(1)** We conclude the trial court too narrowly [***2] construed *section 43.92*. First, a communication from a family member to a therapist, made for the purpose of advancing a patient's therapy, is a "patient communication" within the meaning of *section 43.92*. Second, a therapist's duty to warn a victim arises if the information communicated leads the therapist to believe or predict that the patient poses a serious risk of grave bodily injury to another.

Summary judgment was erroneously granted inasmuch as the communication to the therapist by a member of the patient's family of the patient's threat to kill or cause grave bodily injury to the victim raised a triable issue concerning the therapist's duty to warn the victim.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Dr. David Goldstein is a marriage and family therapist. Between 1997 and June 2001, Goldstein provided personal therapeutic services to Geno Colello, a former member of the Los Angeles Police Department. Goldstein treated Colello for work-related emotional problems and problems concerning his former girlfriend, Diana Williams.

Beginning in early 2001, Colello became increasingly depressed and despondent over the termination of his relationship with Williams. [***3] Colello's feelings of depression significantly increased in mid-June, after learning of her romantic involvement with another man.

Goldstein last met with Colello at his office on June 19, 2001. [2] Goldstein spoke with Colello on the telephone on June 20, [**867] and again on June 21, when he asked Colello if he was feeling suicidal. Colello "was not blatantly suicidal, but did admit to thinking about it." Goldstein asked Colello to consider checking himself into a psychiatric hospital, and also sought and obtained Colello's permission to speak with his father, Victor Colello.

2 Unless otherwise indicated, all date references are to calendar year 2001.

Colello had dinner with his parents on June 21. He was extremely depressed. Colello talked to his father about how he had lost the desire to live, and about his building resentment toward Williams's new boyfriend. He told his father "he couldn't handle the fact that [Williams] was going with someone else," and said he "was considering causing harm to the young man that [***4] [Williams] was seeing." Colello's father contacted Goldstein and told [*812] him what Colello had said. Goldstein urged Colello's father to take Colello to Northridge Hospital Medical Center, where Goldstein arranged for him to receive psychiatric care. Colello was voluntarily admitted the evening of June 21, under the care of Dr. Gary Levinson, a staff psychiatrist. [3]

3 Both Levinson and the hospital are or were defendants in this action. Levinson is not involved in this appeal. The hospital is a party to a separate, pending appeal in this action. Colello's parents, Victor and Anita Colello, are also defendants in this action but are not involved in this appeal.

On June 22, Levinson told Colello's father he planned to discharge Colello. Concerned that his son was being released prematurely, Colello's father called Goldstein. Goldstein contacted Levinson, with whom he had not yet spoken, and explained why Colello should remain hospitalized. Levinson told Goldstein that Colello was not suicidal and would be discharged. [***5] Goldstein urged Levinson to reevaluate Colello and keep him hospitalized through the weekend. He did not do so.

Colello was discharged on June 22. Goldstein had no further contact with his patient. On June 23, Colello

murdered Williams's new boyfriend, Keith Ewing, and then committed suicide.

Keith's parents, Cal and Janet Ewing, sued Goldstein for wrongful death based on professional negligence. The Ewings alleged Colello posed a foreseeable danger to their son, and had directly or indirectly through third persons communicated to Goldstein his intention to kill or cause serious physical harm to him. They alleged Goldstein failed to discharge his duty to warn their son or a law enforcement agency of the risk of harm his patient posed to their son's safety.

Goldstein moved for summary judgment. He argued the Ewings' action was barred by *section 43.92*, which immunizes a psychotherapist for failing to warn of, protect against or predict a patient's violent behavior except in cases where "the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." [4] (*§ 43.92, subd. (a)*.) Goldstein argued he could not [***6] be liable for failing to alert the police and the Ewings' son to the danger posed by Colello because Colello had never directly disclosed to him an intention to seriously harm the Ewings' son, whose surname Colello never revealed.

> 4 As a licensed marriage and family therapist, Goldstein is considered a "psychotherapist," as that term is statutorily defined. (See *Evid. Code, § 1010, subd. (e)*, and *Civ. Code, § 43.92, subd. (a)*.)

The Ewings opposed the motion. They argued the evidence showed that, by virtue of Colello's statements to Goldstein, his interactions with him and [*813] the information his father conveyed to Goldstein, the therapist [**868] was aware of the threat of harm Colello posed to the Ewings' son, who was readily identifiable. They argued summary judgment was inappropriate, because there were material factual disputes regarding the extent to which Goldstein was aware of the danger his patient posed to the Ewings' son, and whether the information given or made [***7] available to Goldstein constituted a "communication" to him of Colello's intent to kill or injure their son.

The trial court found the Ewings had failed to satisfy the statutory requirements necessary to defeat the psychotherapist's immunity, because "the patient himself" had not communicated the threat to the therapist. The court also found the information in Goldstein's possession did not rise to the level of the "serious threat of physical violence" required to trigger psychotherapist liability. The motion was granted and judgment entered. The Ewings appeal. [5]

> 5 The Ewings prematurely filed a notice of appeal after the court issued its minute order, but before the signed order was entered. Under *California Rules of Court, rule 2(d)(1)*, we exercise our discretion to treat the appeal as taken from the November 27, 2002, judgment and order granting summary judgment.

DISCUSSION

The Ewings make two primary contentions on appeal. First, they assert the trial court misinterpreted [***8] *section 43.92*, when it found that the serious threat of violence which triggers a therapist's duty to warn may only come directly from "the patient himself." Second, they insist disputed factual issues preclude summary judgment. We agree.

1. *The trial court's construction of Civil Code section 43.92 was unduly narrow.*

Section 43.92, subdivision (a) provides: "There shall be no monetary liability on the part of, and no cause of action shall arise against, any ... psychotherapist ... in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." [6] The Ewings insist *§ 43.92* is hopelessly ambiguous and must be invalidated. We disagree.

> 6 If a psychotherapist has a duty to warn, the duty is discharged once he or she makes a reasonable effort to communicate the threat to the intended victim and a law enforcement agency. (*§ 43.92, subd. (b)*.)

[***9] [*814] *Section 43.92* does contain certain facial ambiguities. However, once the statute's legislative history and the evils it sought to remedy are considered, we conclude the ambiguities are not fatal and the statute can easily be read to effect its purpose.

a. *A communication from a patient's family member to the patient's therapist, made for the purpose of advancing the patient's therapy, is a "patient communication" within the meaning of section 43.92.*

The rules of statutory construction are well established. The primary objective in construing a statute is to ascertain and effectuate the underlying legislative intent. "We begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. [Citation.] We give the language its usual and ordinary meaning, and '[i]f there is no ambiguity, then

we presume the lawmakers meant what they said, and the plain meaning of the language governs.' [Citation.]" (*Allen v. Sully-Miller Contracting Co. (2002) 28 Cal.4th 222, 227* [**869] *[120 Cal. Rptr. 2d 795, 47 P.3d 639].*) However, if the statutory language is reasonably susceptible to more than one meaning, we look to extrinsic sources in an effort to discern the [***10] intended meaning. (*Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 775 [72 Cal. Rptr. 2d 624, 952 P.2d 641].*) "Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute." (*Allen, supra, 28 Cal.4th at p. 227.*) [7]

7 Goldstein refers to portions of the legislative history of *section 43.92*, but has not formally requested judicial notice of material outside the record. As required, the parties have been afforded an opportunity to present information relevant to the tenor and propriety of taking judicial notice of the legislative history of *section 43.92*. (*Evid. Code, §§ 455, subd. (a), 459, subds. (a), (c).*) On our own accord, judicial notice is taken of portions of the legislative history of *section 43.92* specified in the text. (See *Evid. Code, §§ 452, subd. (h), 459, subd. (a)*; *Schmidt v. Southern Cal. Rapid Transit Dist. (1993) 14 Cal.App.4th 23, 30, fn. 10 [17 Cal. Rptr. 2d 340]* ["In a search to discern legislative intent, an appellate court is entitled to take judicial notice of the various legislative materials, including committee reports, underlying the enactment of a statute."].)

[***11] (1) *Historical context of enactment of Section 43.92.*

Section 43.92 refers only to a patient's communication to his or her psychotherapist. A "patient" is defined as "a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition ... ." (*Evid. Code, § 1011.*) Read literally, *section 43.92* would preclude the imposition of liability if information about the patient's violent intentions, regardless of the credibility of the information, were received by a therapist from any source other than the patient. The [*815] trial court construed the statute in that manner. However, the rule of reason and a review of the circumstances which lead to the enactment of *section 43.92* militate strongly against such a restrictive interpretation.

Section 43.92 was enacted in response to the Supreme Court's decisions in *Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425 [131 Cal. Rptr. 14, 551 P.2d 334]* (*Tarasoff*), and *Hedlund v. Superior Court (1983) 34 Cal.3d 695 [194 Cal. Rptr. 805, 669 P.2d 41]* (*Hedlund*).

In *Tarasoff* [***12] , a patient confided to his psychotherapist his intent to kill an unnamed but readily identifiable girl. The therapist notified campus police and requested the patient's involuntary commitment for observation in a mental hospital. Due to his rational appearance and promise to stay away from the girl, the police released the patient. Despite his promise, the patient killed the girl. The girl's parents sued the patient's therapist for wrongful death for failure to warn them or their daughter about the danger his patient presented. (*Tarasoff, supra, 17 Cal.3d at pp. 432-433.*) The trial court sustained the therapist's demurrer without leave to amend. The Supreme Court reversed, rejecting the therapist's contention that he owed no duty to the girl because she was not his patient. It held that "once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger." (*Id. at pp. 431, 439.*) Depending on the nature of the case, the therapist's duty [**870] may include [***13] notifying the police, or warning the intended victim or others likely to apprise the victim of the danger. (*Id. at p. 431.*)

In *Hedlund,* the child of a woman shot by a psychologist's patient sued for emotional injuries suffered after a therapist failed to warn him of a known threat against his mother. The child, who was seated next to his mother when she was shot, asserted the therapist owed him a duty on the theory it was foreseeable he would be injured if the patient's threats materialized. (*Hedlund, supra, 34 Cal.3d at p. 705.*) The Supreme Court agreed. It held that a therapist's duty to warn potential victims of a patient's threatened violence extends "to persons in close relationship to the object of a patient's threat ... ." (*Id. at p. 706.*)

Assembly Bill No. 1133 was introduced in response to these decisions and in recognition of the problems posed to the mental health profession if therapists were required to predict a patient's violence. [8] The resulting statutory provision, *section 43.92*, was not intended to overrule *Tarasoff* or [*816] *Hedlund*, "but rather to limit the psychotherapists' liability for failure to warn to [***14] those circumstances where the patient has communicated an 'actual threat of violence against an identified victim', and to 'abolish the expansive rulings of *Tarasoff* and *Hedlund* ... that a therapist can be held liable for the mere failure to predict and warn of potential violence by his patient.' " (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1133 (1985-1986 Reg. Sess.), May 14, 1985.) [9]

* 8 In his concurring and dissenting opinion in *Tarasoff*, Justice Mosk pointed to what one scholar has characterized as "[t]he hardship[O>s<O] for [O>a<O] therapists of trying to negotiate a safe passage between the Scylla of unjustified disclosure and the Charybdis of failure to warn" created by the majority's broad rule. (Merton, *Confidentiality and the 'Dangerous' Patient: Implications of Tarasoff* for Psychiatrists and Lawyers, (1982) *31 Emory L.J. 263, 295.*) By creating a duty to warn not just where a psychotherapist had actually predicted a patient's violence, but also where other practitioners, adhering to the standard of the mental health profession, would have done so, Justice Mosk feared the court had taken the profession "from the world of reality into the wonderland of clairvoyance." (*Tarasoff, supra, 17 Cal.3d at p. 452* (conc. & dis. opn. of Mosk, J.).)

* Justice Mosk addressed the issue again in a dissenting opinion in *Hedlund*, where he pointed to a substantial body of literature demonstrating the inherent unreliability of psychiatric predictions of violence. (*Hedlund, supra, 34 Cal.3d at pp. 707-710.*) He noted another significant hazard of the *Tarasoff* standard was that it encouraged the breach of a necessarily confidential relationship and placed subtle pressure on mental health practitioners to play it safe and resolve doubts in favor of predictions of dangerousness. It further encouraged practitioners to lock up their patients and warn others of the danger that a patient may, but in reality probably did not, present, even at the risk of effective therapy. (*Id. at pp. 709-710, fn. 1*, citation omitted.)

[***15]

9 One court has found that *section 43.92* codified, rather than limited, the rule in *Tarasoff*. (See *Tilley v. Schulte (1999) 70 Cal.App.4th 79, 85 [82 Cal. Rptr. 2d 497].*) We respectfully disagree. Although both *Tarasoff* and *Hedlund* involved factual situations in which the therapists had actual knowledge of the patient's harmful intentions, the Supreme Court went further and held that liability may attach in a case in which a therapist should have determined his patient presented a grave risk to another. (*Tarasoff, supra, 17 Cal.3d at p. 431*; *Hedlund, supra, 34 Cal.3d at pp. 705-707.*) *Section 43.92*, on the other hand, eliminates the "should have determined" component and provides immunity to therapists for failure to warn, except where the plaintiff can show that the patient actually communicated to his therapist a serious threat of physical violence against an identifiable victim. (*§ 43.92, subd. (a)*; see also *Barry v. Turek (1990) 218 Cal. App. 3d 1241, 1244 [267 Cal. Rptr. 553]*, fn. omitted. ["*Section 43.92, subdivision (a)* was enacted to limit the liability of psychotherapists under *Tarasoff*..."].)

[***16] [**871] *Section 43.92* represents a legislative effort to strike an appropriate balance between conflicting policy interests. On the one hand, the need to preserve a patient confidence recognizes that effective diagnosis and treatment of a mental illness or an emotional problem is severely undermined when a patient cannot be assured that a statement made in the privacy of his therapist's office will not be revealed. On the other hand is the recognition that, under limited circumstances, preserving a confidence is less important than protecting the safety of someone whom the patient intends to harm.

The preservation of a patient confidence--even when that confidence includes an expression of violent intentions--is a fundamental tenet of psychotherapy. As the Supreme Court cautioned in *Tarasoff*, "the open and confidential character of psychotherapeutic dialogue encourages patients to [*817] express threats of violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his [or her] therapist and with the persons threatened. To the contrary, the therapist's [***17] obligations to his [or her] patient require that he [or she] not disclose a confidence unless such disclosure is necessary to avert danger to others ... ." (*Tarasoff, supra, 17 Cal.3d at p. 441.*)

(2) Balanced against the interest in preserving a patient confidence is the Legislature's recognition that privacy interests must yield when, in the therapist's professional opinion, the disclosure of a patient confidence is necessary to avert serious physical harm to another. *Section 43.92* strikes a reasonable balance in that it does not compel the therapist to predict the dangerousness of a patient. Instead, it requires the therapist to attempt to protect a victim under limited circumstances, even though the therapist's disclosure of a patient confidence will potentially disrupt or destroy the patient's trust in the therapist. However, the requirement is imposed upon the therapist only after he or she determines that the patient has made a credible threat of serious physical violence against a person. Stated differently, otherwise confidential information conveyed to a therapist loses its "protected" status once it provides the reasonable cause for the therapist to believe [***18] the patient presents a significant danger to himself, herself or others. (Cf. *Evid. Code, § 1024* ["There is no privilege ... if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be danger-

ous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger."].)

(2) *Application to statements by family members.*

Against this backdrop, we turn to the question presented. If information about the serious threat of grave bodily injury is brought to the therapist's attention through a member of the patient's family rather than the patient, may the therapist be relieved of an obligation to act on the information, no matter how credible, simply because it has not come directly from the "patient"? We do not believe so. When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering [**872] the patient's treatment, the fact that the family member is not technically a "patient" is not crucial to [***19] the statute's purpose.

[*818] Our construction harmonizes the competing principles discussed above and is consistent with the interpretation placed on the psychotherapist-patient evidentiary privilege (*Evid. Code, § 1010 et seq.*). Because *section 43.92* was prompted by *Tarasoff* and *Hedlund*, and because *Tarasoff* itself is rooted in the psychotherapist-patient privilege (see *Tarasoff, supra, 17 Cal.3d 425, 441)*, the two statutory schemes should be accorded complementary interpretations, if at all possible.

(3) A statement between a therapist and third persons may be a confidential patient communication, and hence privileged, if it assists the therapist in the diagnosis, treatment or cure of a patient's mental or emotional illness. (*Evid. Code, § 1012.*) Thus, a communication between a patient and his or her therapist's staff or professional associates is presumed to be privileged if the communication occurs in order to further the therapeutic relationship. (*Evid. Code, §§ 917, subd. (a), 1014, subd (c).*) Similarly, information is considered a "confidential communication [***20] between patient and psychotherapist," even if it is shared in the presence of third persons--such as participants in group or joint counseling, or marriage and family counseling--so long as the information is disclosed in confidence and in an effort to accomplish the purpose of the patient's therapy. (*Evid. Code, § 1012.*)

(4) More to the point, a communication between a patient's family members and the patient's therapist, made in the course of or functionally related to the diagnosis and treatment of the patient, also is protected by the psychotherapist-patient privilege. (See *Evid. Code, § 1014*; *Grosslight v. Superior Court (1977) 72 Cal. App. 3d 502, 508 [140 Cal. Rptr. 278]*, fns. omitted [Holding that the "privilege established by [*Evidence Code section 1014*] includes all relevant communications to psychotherapists ... by intimate family members of the patient"].) The reasons for according protection to the patient's treatment are clear. A mental illness or an emotional problem does not exist in a vacuum. In order to effectively treat a patient, a therapist must often explore [***21] the contextual aspects of a patient's mental illness or emotional problem associated with or impacted by his or her life history, current circumstances, and personal or familial relationships. Protecting these communications from disclosure, as if they are the patient's own, furthers the patient's therapy by giving the therapist a fuller understanding of the problem or illness for which his or her expertise is needed by encouraging the patient and his or her family members to fully disclose information they might otherwise be embarrassed or reluctant to reveal.

(5) The Legislature has long recognized that information conveyed to a therapist by a patient's parent or other family member is relevant and sufficiently important to be considered and incorporated into developing the best treatment for a patient, and is worthy of protection from disclosure. [*819] Despite its privileged nature, the Legislature also has recognized that the therapist's duty to protect that information must yield once the therapist comes to believe the information must be revealed to prevent danger to his or her patient or another. (Evid Code, *§ 1024.*) We discern no principled reason why equally [***22] important information in the form of an actual threat that a parent shares with his or her son's therapist about the risk of grave bodily injury the patient poses to another also should not be considered a "patient [**873] communication" in determining whether the therapist's duty to warn is triggered under *section 43.92.* [10]

[10] We are not faced with and do not address the situation in which a third party who is not a member of the patient's immediate family, but who may be involved in his therapy in some manner (e.g., an intimate or close friend), conveys the information of the patient's potential dangerousness to the therapist.

The point is illustrated by the facts of this case. On June 21, Goldstein spoke with Colello. Even though Colello admitted thinking about suicide, the therapist did no more than encourage him to consider checking into a hospital. Later that day, however, after speaking with Colello's father, who told him Colello was indeed suicidal and had threatened Ewing, Goldstein made arrangements to [***23] immediately admit Colello to a hospital psychiatric ward. If Colello's father's information was credible and important to Goldstein's determination that immediate hospitalization was necessary to prevent

Colello's suicide, the information also could be germane to Goldstein's determination as to whether Colello posed a risk of serious physical harm to Williams's new boyfriend, so that Goldstein was required to warn the boyfriend and law enforcement agency.

The danger inherent in the trial court's literal reading of the statute is illustrated by the following hypothetical. Imagine that Colello's father called Goldstein on June 21 and told him that Colello said he intended to shoot Keith Ewing at 3:00 the following afternoon. Goldstein spoke with Colello himself, found Colello's father's representations credible even though the actual threat was not repeated, and convinced Colello to immediately check himself into a psychiatric hospital. Goldstein also spoke with the hospital's staff psychiatrist to stress the importance of keeping Colello for observation, but did not notify Ewing or a law enforcement agency of the danger. Colello then was discharged from the hospital on June 22 and [***24] killed Ewing, as planned. Under the trial court's reading of *section 43.92*, Goldstein had no duty to warn and was immune from liability, simply because the information which he found credible and on which he acted came from Colello's father, rather than from Colello himself. The statute cannot fairly be read to sanction such a result.

[*820] By this decision, we do not conclude the information shared with Goldstein was necessarily sufficient to trigger his duty to warn. It is plausible, based on his years of treating Colello, his knowledge of his patient's mental illness, emotional problems and behavioral characteristics, and the information he learned from both Colello and Colello's father, that Goldstein believed Colello presented a danger to himself but had not made a serious threat of physical violence against Keith Ewing. [11] Our conclusion is limited. We hold that the trial court erroneously refused, as a matter of law, to consider the information a patient's family member shared with the therapist in determining the existence of a material factual dispute as to whether the patient had communicated to the therapist a serious threat of physical violence to another, simply because the [***25] information did not flow directly from the patient to the therapist. [12]

11 The parties do not dispute that Ewing was a reasonably identifiable victim.

12 Not every statement made by a family member falls under *section 43.92*. The statute applies only to threats. Thus, a statement of mere belief by the family member that the patient poses a danger, unaccompanied by a statement of a threat, would not by itself give rise to potential liability.

[**874] b. *A therapist's duty to warn a victim arises if the information communicated to the therapist leads the therapist to believe his or her patient poses a serious risk of grave bodily injury to another.*

The Ewings also insist *section 43.92* is fatally ambiguous because it is not clear whether the term "serious," as used in the phrase "serious threat of physical violence," refers solely to the patient's state of mind, or whether it must instead be read as a part of the phrase "serious threat," referring to the probability of harm or its magnitude. They also [***26] claim the statutory phrase "physical violence against" is unclear because it fails to specify whether a threat of physical injury to an actual person is required as opposed to an item of the target individual's property, or whether the therapist's duty to warn is triggered if a patient's expresses his intention to "gently slap or pinch a victim." These claims have no merit.

Divorced from reality and viewed in isolation, *section 43.92*'s use of the phrase "serious threat of physical violence" might be read to refer to the credibility of the patient's stated intentions, the harm likely to be suffered irrespective of his or her intent, or the gravity of the threatened injury. However, in view of the policies that the statute seeks to balance, and the purpose for which it was enacted, the phrase cannot be viewed in the abstract and is not unclear. "[S]entences are not to be viewed in isolation but in light of the statutory scheme." (*Torres v. Automobile Club of So. California (1997)* [*821] *15 Cal.4th 771, 777 [63 Cal. Rptr. 2d 859, 937 P.2d 290]*.) A statute must be read to effectuate its purpose, and a construction that is unreasonable is a sound basis for its rejection. (See *Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1159 [278 Cal. Rptr. 614, 805 P.2d 873]*.) [***27]

Section 43.92 was intended to eliminate immunity and to sanction an invasion into the psychotherapist-patient privilege only in the very narrow circumstance in which actual knowledge of potentially grave bodily injury is presented. With that purpose in mind, we are not able to seriously credit the Ewings' contention that a psychotherapist might be expected effectively to destroy his or her professional relationship with a patient and reveal sensitive, confidential information if he or she believes the patient is "jesting," intends only to damage someone's physical property, or plans to "gently slap or pinch a victim."

(6) The intent of the statute is clear. A therapist has a duty to warn if, and only if, the threat which the therapist has learned--whether from the patient or a family member--actually leads him or her to believe the patient poses a risk of grave bodily injury to another person. [13] Regardless of the definition of "serious" applied to *section*

43.92, there can be no question that, as in this case, a threat to take another's life, if believed, is sufficient to trigger a therapist's duty to warn the intended victim and a law enforcement agency. Although every case must [***28] be decided on its own facts, we conclude a therapist's duty to breach a patient's confidence in favor of warning an intended victim could also arise if the therapist becomes aware [**875] the patient intends to commit an act or acts of grave bodily injury short of murder, but akin to "mayhem" or "serious bodily injury" as defined by statute. (See *Pen. Code, §§ 203* ["Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."], *243, subd. (f)(4)* [" 'Serious bodily injury' means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement."].)

13 As originally introduced, Assembly Bill No. 1133 referred to "actual" threats. That term was changed to "serious" after the Attorney General pointed out it might preclude liability if the patient made an entirely credible threat, but posed it in conditional terms (i.e., "I'm going to kill X if ... ," or "I might kill X.") (See Senate Com. on Judiciary, Analysis of Assem. Bill No. 1133 (1985-1986 Reg. Sess.), p. 4, ¶ 3.)

[***29] We reject the Ewings' invitation to "declare the provisions of *Civil Code section 43.92* unconstitutionally vague and therefore void."

[*822] 2. *Communication to the therapist by a member of the patient's family of the patient's threat to kill or cause grave bodily injury to the victim raised a triable issue concerning the therapist's duty to warn.*

The Ewings contend summary judgment was unwarranted because material factual issues remain as to whether Goldstein believed Colello intended to kill or cause serious physical harm to their son Keith. We agree.

The information known to Goldstein before the murder was that, in June 2001, Colello was depressed over his breakup with Williams, and Goldstein believed he was "feeling obsessed about what [Williams] was doing with her boyfriend." Colello told Goldstein he knew Keith Ewing's name and the address where he lived. He admitted driving past Ewing's house and becoming scared "thinking that he might get out of control and ruin everything," by which Colello meant "his job and possibly a future with [Williams]." Colello admitted intercepting several telephone messages from Ewing, and wondered "how [Williams] [***30] could be in love with this guy." Goldstein specifically asked Colello if he planned to follow or stalk Ewing. Colello denied any such intention, and said "he just wanted to know where [Williams] was going." Colello told Goldstein he had "driven past this guy's home," but said he "wasn't going to do anything," and "just wanted to see this guy." By June 21, Colello admitted thinking about suicide, and Goldstein arranged for him to be seen at a hospital emergency room. On June 22, after Colello's father told him the hospital planned to discharge Colello, Goldstein contacted the treating physician, explained to him why Colello should remain hospitalized, and asked him to reevaluate Colello and keep him in the hospital through the weekend. We agree with the trial court that this information, considered alone, is insufficient to establish that Goldstein was aware that Colello intended to gravely injure Keith.

(7) This information, however, cannot be viewed in isolation. The trial court also was required to consider the threat Colello shared with his father, which the father communicated to Goldstein. If a fact finder, viewing this evidence and Goldstein's conduct, believed Colello's father [***31] told the therapist about his son's stated intentions to do physical violence, it could conclude Goldstein had sufficient information to trigger his duty to warn. Because triable factual questions remain, Goldstein's motion for summary judgment should not have been granted. [*823]

[**876] **DISPOSITION**

The judgment is reversed. Costs are awarded to the Ewings.

Cooper, P. J., and Rubin, J., concurred.

Respondent's petition for review by the Supreme Court was denied November 10, 2004. Baxter, J., and Brown, J., were of the opinion that the petition should be granted.

LEXSEE 131 CAL APP 4TH 224 (2005)

MARIA DEL ROSARIO CALDERON et al., Plaintiffs and Appellants, v. HOWARD NORMAN GLICK et al. Defendants and Respondents.

B177040

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

131 Cal. App. 4th 224; 31 Cal. Rptr. 3d 707; 2005 Cal. App. LEXIS 1121; 2005 Cal. Daily Op. Service 6419; 2005 Daily Journal DAR 8816

July 21, 2005, Filed

PRIOR HISTORY: [***1] Superior Court of Ventura County, No. SC036162, Kent M. Kellegrew, Judge.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The former girlfriend of a deranged and suicidal gunman (and other members of her family) sued three psychotherapists, alleging causes of action for wrongful death and personal injuries based on failure to warn and professional malpractice. The gunman, who believed the former girlfriend had deliberately infected him with HTLV (human T-cell lymphotropic virus), shot and killed three of the former girlfriend's family members and wounded two more. The trial court granted the psychotherapists' motion for summary judgment. (Superior Court of Ventura County, No. SC036162, Kent M. Kellegrew, Judge.

The Court of Appeal affirmed the judgment, holding that the failure to warn causes of action were precluded as a matter of law, pursuant to *Civ. Code, § 43.92*. The gunman did not communicate to the psychotherapists any threats of physical violence against the former girlfriend or her family. Every time the gunman was asked if he intended to harm someone, he always said that he did not. The court also held that the psychotherapists did not owe a duty of care to plaintiffs. Although plaintiffs unquestionably suffered injury, the connection between the psychotherapists' conduct and the injury was not sufficiently close to impose on the psychotherapists a duty of care to plaintiffs. The gunman inflicted the injuries because of his mental illness and, in particular, his delusional belief that the former girlfriend had infected him with HTLV on purpose. The psychotherapists were in no way responsible for the gunman's mental illness or delusional belief, which existed before he entered therapy. (Opinion by Yegan, J., with Gilbert, P. J., and Perren, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Summary Judgment § 3--Propriety.--The purpose of the law of summary judgment is to provide courts with a mechanism to cut through [*225] the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. Under *Code Civ. Proc., § 437c, subd. (c)*, a motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A triable issue of material fact exists only if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the cause of action in question cannot be established, or that there is a complete defense thereto.

(2) Summary Judgment § 26--Appellate Review--Scope of Review.--On appeal of a decision granting summary judgment, the appellate court conducts a de novo review, applying the same standard as the trial court. The appellate court's obligation is to determine whether issues of fact exist, not to decide the merits of the issues themselves. The appellate court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the opposing party.

(3) Healing Arts and Institutions § 30--Physicians, Surgeons, and Other Medical Practitioners--Duties and Liabilities--Mental Health Practitioners--Patient's Dangerous Propensities--Duty to Warn.--As a general rule, a mental health practitioner has no duty to warn third persons about, nor any duty to predict, a patient's dangerous propensities. *Civ. Code, § 43.92*, creates an exception to this rule.

(4) Healing Arts and Institutions § 30--Physicians, Surgeons, and Other Medical Practitioners--Duties and Liabilities--Psychotherapists--Patient Communication.--A communication from a family member to a therapist, made for the purpose of advancing a patient's therapy, is a "patient communication" within the meaning of *Civ. Code, § 43.92*.

(5) Healing Arts and Institutions § 30--Physicians, Surgeons, and Other Medical Practitioners--Duties and Liabilities--Psychotherapists--Communication of Threat of Physical Violence--Duty to Warn--Actual Threat of Violence Against Identified Victim.--*Civ. Code, § 43.92*, is intended to limit psychotherapists' liability for failure to warn to those circumstances where the patient has communicated an actual threat of violence against an identified victim and to abolish the expansive rulings of the California Supreme Court that a therapist can be held liable for the mere failure to predict and warn of potential violence by [*226] his patient. Even if a threat of violence is communicated to a psychotherapist, a duty to warn arises only if the information communicated to the therapist leads the therapist to believe his or her patient poses a serious risk of grave bodily injury to another.

(6) Healing Arts and Institutions § 30--Physicians, Surgeons, and Other Medical Practitioners--Duties and Liabilities--Psychotherapists--Communication of Threat of Physical Violence--Duty to Warn.--*Civ. Code, § 43.92*, does not compel a therapist to predict the dangerousness of a patient. Instead, it requires the therapist to attempt to protect a victim under limited circumstances, even though the therapist's disclosure of a patient confidence will potentially disrupt or destroy the patient's trust in the therapist. However, the requirement is imposed upon the therapist only after the therapist determines that the patient has made a credible threat of serious physical violence against a person.

(7) Healing Arts and Institutions § 30--Physicians, Surgeons, and Other Medical Practitioners--Duties and Liabilities--Psychotherapists--Communication of Threat of Physical Violence--Duty to Warn--Failure to Warn Causes of Action.--In a case in which a former girlfriend of a deranged and suicidal gunman (and members of her family) sued three psychotherapists, alleging causes of action for wrongful death and personal injuries based on failure to warn after the gunman shot and killed three of the former girlfriend's family members and wounded two more, the failure to warn causes of action were precluded as a matter of law, pursuant to *Civ. Code, § 43.92*, where the gunman, who had been a patient of the psychotherapists, did not communicate to the psychotherapists any threats of physical violence against the former girlfriend or her family.

[6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 861.]

(8) Negligence § 9--Elements of Actionable Negligence--Duty of Care.--The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion.

(9) Negligence § 9--Elements of Actionable Negligence--Duty of Care--Factors.--Where there is no privity of contract between the parties, a checklist of factor is employed in assessing legal duty. The determination whether in a specific case a defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the [*227] 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.

(10) Negligence § 10--Elements of Actionable Negligence--Duty of Care--Standard of Care--Psychotherapists.--A psychotherapist or other mental health care provider has a duty to use a reasonable degree of skill, knowledge, and care in treating a patient, commensurate with that possessed and exercised by others practicing within that specialty in the professional community.

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Rushfeldt, Shelley & Drake Kenneth W. Drake and Erica A. Levitt for Defendant and Respondent Thomas Wright, Ph.D.

JUDGES: Yegan, J., with Gilbert, P. J., and Perren, J., concurring.

OPINION BY: YEGAN

OPINION

[**709] **YEGAN, J.**--A deranged and suicidal gunman shot and killed three members of his former girlfriend's family. He wounded two more. The gunman had been the patient of psychotherapists but he had not communicated any threats of physical violence against the former girlfriend or members of her family. We empathize with the remaining members of the family but the Legislature has expressly precluded monetary recovery from psychotherapists in this situation.

This is an appeal from the judgment entered following the grant of respondents' motion for summary judgment. Respondents are psychotherapists. [1] Their patient Reynoldo Rodriguez (Rodriguez) [***2] shot and killed three members of appellants' family and injured more relatives. [2] Appellants' [*228] complaint alleged causes of action for wrongful death and personal injuries based on failure to warn and professional malpractice. We affirm.

1 Respondents are Howard Norman Glick, M.D., Jerry R. Bruns-Garcia, M.D., and Thomas Wright, Ph.D.

2 Appellants are Maria del Rosario Calderon, Ana Maria Calderon, Rafael Calderon, Sr., Lucia E. Calderon Vargas, Rafael Calderon III, and Rigoberto Calderon.

Facts

Dr. Bruns-Garcia was the owner of La Mer Medical group (hereafter La Mer). On June 28 and 29, 2001, Rodriguez went to La Mer for mental health reasons. He was evaluated by a psychiatrist, Dr. Howard Glick, and a licensed marriage and family therapist, Dr. Thomas Wright. Dr. Wright had a master's degree and a Ph.D. in psychology.

Rodriguez said that his problems began in March 2001 when he donated blood to the American Red Cross. His blood tested positive for HTLV (human T-cell lymphotropic [***3] virus). The Red Cross sent him a fact sheet stating that "only a small number (less than 2%) of individuals having a positive supplemental test for HTLV will ever develop a health problem, and if they do, it may take 20-40 years for the disease to appear." Nevertheless, Rodriguez told Dr. Wright and Dr. Glick that he was afraid that the virus would kill him. He falsely believed that his former girlfriend, Maria del Rosario Calderon (Maria), had transmitted the disease to him. He "was upset" with her for having given him the disease. He thought that Maria knew she was infected and had "infected him on purpose." Rodriguez denied having suicidal thoughts or intentions. But because of the virus, he had recurrent thoughts of death.

Dr. Wright believed that Rodriguez might be suffering from an undifferentiated somatoform disorder, obsessive compulsive disorder, obsessive compulsive personality disorder, major depression, and a delusional disorder. Dr. Glick diagnosed appellant as suffering from a major depression.

On July 9, 2001, Rodriguez returned to La Mer and was examined by Dr. Glick. Rodriguez was still delusional but said that he was not suicidal.

On July 16, 2001, Rodriguez was examined [***4] by Dr. Wright. Dr. Wright's notes state that Rodriguez "continues to be delusional" about his illness. Dr. Wright testified: "I looked at [Rodriguez] straight in the face clearly and I said, 'Do you have any intention to hurt your former girlfriend, Maria [*229] Calderon,' and he looked at me straight and he said no. I looked at his body language and there was no fluctuation, [**710] there was no deviation. I addressed that very clearly with him and his answer was very clear to me. I looked at him and I lingered to make sure that there was no deviation in his behavior, because obviously I was concerned about this issue. ... I concluded that at that time he was not a risk."

On July 30, 2001, Dr. Glick saw Rodriguez at La Mer. Rodriguez said that he felt less anxious.

Between July 30 and August 13, 2001, a member of Rodriguez's family telephoned La Mer and said that Rodriguez "was still quite anxious and obsessive regarding having a disease." Rodriguez had been taking Celexa. "The Celexa dosage was increased and Risperdal was prescribed for the delusional thinking and to reduce anxiety."

Rodriguez's last visit to La Mer was on August 13, 2001. He was seen by Dr. Glick and Dr. Wright. Rodriguez [***5] said that he was feeling better and that he had no thoughts of hurting himself.

Every time Dr. Glick saw Rodriguez, Dr. Glick asked him if he intended to harm anyone. Rodriguez always said that he did not. Dr. Glick asked this question "[b]ecause [Rodriguez] had a belief system ... out of proportion to the severity of his condition and related to a specific human being, namely his [former] girlfriend." Dr. Glick testified that Rodriguez's family members never told him that Rodriguez had expressed an intention to harm anyone.

On September 5, 2001, Rodriguez entered the home of Maria's family. He shot and killed Esperanza Martinez, Ricardo Calderon, and Shantal Rios. He shot and wounded Lucia Calderon and Rigoberto Calderon. Rafael Calderon III jumped out of a second story window. He sprained his ankle and fractured his wrist. Two days later, Rodriguez committed suicide.

Summary Judgment Ruling

In granting respondents' motions for summary judgment, the trial court ruled: "1) [A]s to the traditional professional negligence causes of action, [appellants] do not have standing to sue as they were not patients of [respondents] and never established a physician-patient [***6] relationship with [them] (i.e. no duty was owed to them), and 2) as to the causes of action based on a failure to warn theory ... , essential elements of the cause of action were [*230] missing including the absence of any evidence to show that there was ever any type of 'communication' between [respondents] and Reynaldo Rodriguez that [Rodriguez] wanted to harm Maria Calderon or her family."

Standard of Review

(1) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843 [107 Cal.Rptr.2d 841, 24 P.3d 493]*.) A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Code Civ. Proc., § 437c, subd. (c)*.) A triable issue of material fact exists only if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in [***7] accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 850*, fn. omitted.) A defendant moving for summary [**711] judgment "bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. [Citation.]" (*Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 850*; see also *§ 437c, subd. (p)(2)*.)

(2) On appeal we conduct a de novo review, applying the same standard as the trial court. (*AARTS Productions, Inc. v. Crocker National Bank (1986) 179 Cal.App.3d 1061, 1064 [225 Cal.Rptr. 203]*.) Our obligation is " ' "to determine whether issues of fact exist, not to decide the merits of the issues themselves." ' " (*Wright v. Stang Manufacturing Co. (1997) 54 Cal.App.4th 1218, 1228 [63 Cal.Rptr.2d 422]*.) We "must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations] ... in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 843*.) [***8]

Failure to Warn

(3) "As a general rule, a mental health practitioner has no duty to warn third persons about, nor any duty to predict, a patient's dangerous propensities." (*Ewing v. Northridge Hospital Medical Center (2004) 120 Cal.App.4th 1289, 1292 [16 Cal.Rptr.3d 591]*.) *Civil Code section 43.92* creates an [*231] exception to this rule. [3] *Subdivision (a) of section 43.92* provides: "There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in *Section 1010 of the Evidence Code* in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior *except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.*" (Italics added.) **(4)** "[A] communication from a family member to a therapist, made for the purpose of advancing a patient's therapy, is a 'patient communication' within the meaning of *section 43.92*." (*Ewing v. Goldstein (2004) 120 Cal.App.4th 807, 811 [15 Cal.Rptr.3d 864]*.) [***9]

3 All statutory references are to the Civil Code unless otherwise stated.

(5) *Section 43.92* was intended " 'to limit the psychotherapists' liability for failure to warn to those circumstances where the patient has communicated an "actual threat of violence against an identified victim," and to "abolish the expansive rulings of [the California Supreme Court in *Hedlund v. Superior Court (1983) 34 Cal.3d 695 [194 Cal.Rptr. 805, 669 P.2d 41]*; *Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334]]* ... that a therapist can be held liable for the mere failure to predict and warn of potential violence by his patient." ' [Citation.]" (*Ewing v. Goldstein, supra, 120 Cal.App.4th at p. 816*, fn. omitted, quoting from Assem. Com. on Judiciary, Analysis of

Assem. Bill No. 1133 (1985-1986 Reg. Sess.) May 14, 1985.) Even if a threat of violence is communicated to a psychotherapist, a duty to warn arises only "if the information communicated to the therapist [***10] leads the therapist to believe his or her patient poses a serious risk of grave bodily injury to another." (*Ewing v. Goldstein, supra, at p. 820*, italics omitted.)

(6) "*Section 43.92* strikes a reasonable balance in that it does not compel the therapist to predict the dangerousness of a patient. Instead, it requires the therapist to attempt to protect a victim under limited circumstances, even though the therapist's disclosure of a patient confidence will potentially [**712] disrupt or destroy the patient's trust in the therapist. However, the requirement is imposed upon the therapist only after he or she determines that the patient has made a credible threat of serious physical violence against a person." (*Ewing v. Goldstein, supra, 120 Cal.App.4th at p. 817.*)

Appellants contend that the trial court erroneously granted summary judgment on the failure to warn causes of action because there are triable issues of material fact "whether Dr. Wright or Dr. Glick *actually believed or predicted* that Reynaldo Rodriguez posed a serious threat of physical harm to Maria Calderon or her family." Appellants argue that "[a] jury could find that the facts presented demonstrate that Dr. Wright and Dr. [***11] Glick perceived such [*232] a threat, and therefore a threat was effectively communicated." Appellants also argue that "a jury could reasonably *infer* that Rodriguez in fact *expressly* communicated to Dr. Wright and Dr. Glick that he intended to harm Maria ... ."

A triable issue of material fact exists only if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 850*, fn. omitted.) The evidence submitted at the summary judgment hearing would not allow a reasonable trier of fact to find that Rodriguez had "communicated" to Dr. Glick or Dr. Wright "a serious threat of physical violence" against Maria or her family. (*§ 43.92.*) Every time Dr. Glick saw Rodriguez, Dr. Glick asked him if he intended to harm anyone. Rodriguez always said that he did not. Dr. Glick testified that Rodriguez's family never told him that Rodriguez had expressed an intent to harm another person.

(7) On July 16, 2001, Dr. Wright "looked at [Rodriguez] straight in the face clearly and ... said, [***12] ' Do you have any intention to hurt your former girlfriend, Maria Calderon,' ... ?" Rodriguez "looked at [Dr. Wright] straight and he said no." Dr Wright "looked at [Rodriguez's] body language and there was no fluctuation, there was no deviation." He "concluded that at that time [Rodriguez] was not a risk." Accordingly, the trial court properly ruled that the failure to warn causes of action were precluded as a matter of law. [4]

4 In the reply brief, appellants argue that "the limitations set forth under *Section 43.92* should not even apply in this case since Dr. Wright rendered services beyond the scope of his license." However, Dr. Wright is a licensed psychotherapist within the meaning of *Evidence Code section 1010, subdivision (e)* and is protected by *section 43.92* as long as he is providing mental health treatment to a patient.

Professional Malpractice

Appellants contend that the trial court also erred by precluding the professional malpractice causes of action because: [***13] "First, [they] have demonstrated that [respondents] failed to properly and adequately treat Rodriguez, and that the services provided fell below the applicable standard of care. Second, [they] have demonstrated that Maria Calderon and her family were foreseeable victims of [respondents'] negligence." Appellants argue that *section 43.92* does not bar a third party from bringing "a traditional medical malpractice action against a psychiatrist or psychologist" for negligent treatment "if it was foreseeable that the ... negligence could result in the type of harm or injury that occurs."

[*233] In effect, appellants are claiming that a psychotherapist owes a duty of care to [**713] third parties who suffer reasonably foreseeable harm as a result of the therapist's negligent treatment of his or her patient. Appellants maintain that, if this duty of care is breached, *section 43.92* does not shield the psychotherapist from liability even if the patient did not communicate a serious threat of physical violence against a reasonably identifiable victim.

We conclude that the trial court correctly determined that respondents did not owe a duty of care to appellants. Therefore, we need not consider [***14] whether *section 43.92* shields respondents from liability for their alleged professional malpractice.

(8) "The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.] Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court. [Citation.]" (*Bily v. Arthur Young & Co. (1992) 3 Cal.4th 370, 397 [11 Cal.Rptr.2d 51, 834 P.2d 745].*)

(9) Where, as here, there is no privity of contract between the parties, our Supreme Court has "employed a

checklist of factors to consider in assessing legal duty ... ." (*Bily v. Arthur Young & Co., supra, 3 Cal.4th at p. 397.*) In *Biakanja v. Irving (1958) 49 Cal.2d 647 [320 P.2d 16]*, the court "outlined the factors to be considered in making such a decision: 'The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to [***15] him, 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.' " (*Bily v. Arthur Young & Co., supra, 3 Cal.4th at p. 397*, quoting from *Biakanja v. Irving, supra, 49 Cal.2d at p. 650.*)

Application of the *Biakanja* factors convinces us that respondents did not owe a duty of care to appellants. The transaction between respondents and Rodriguez was not intended to affect or benefit appellants in any way. The transaction was intended to benefit Rodriguez by providing him with therapy for his mental problems. It was not reasonably foreseeable that Rodriguez would harm members of Maria's family. They had nothing to do with the [*234] blood virus in Rodriguez. Respondents had no information indicating that Rodriguez had been violent in the past. Lacking clairvoyant powers, they could not predict future dangerousness. Rodriguez always insisted that he did not intend to harm Maria or anyone else. Rodriguez's family never indicated to respondents that he might harm another person.

[***16] Appellants unquestionably suffered injury, but the connection between respondents' conduct and the injury is not sufficiently close to impose on respondents a duty of care to appellants. Rodriguez inflicted the injuries because of his mental illness and, in particular, his delusional belief that Maria had deliberately infected him with HTLV. Respondents were in no way responsible for Rodriguez's mental illness or delusional belief, which existed before he entered therapy.

There is no moral blame attached to respondents' conduct even if they were negligent. The evidence shows that they acted in good faith in treating Rodriguez.

(10) Finally, we believe that imposing on respondents a duty of care to appellants [**714] would not prevent harm in future cases by encouraging greater care by psychotherapists. The duty of care that psychotherapists owe to their patients is sufficient to deter them from committing acts of professional malpractice. "Existing case law provides that a psychotherapist or other mental health care provider has a duty to use a reasonable degree of skill, knowledge and care in treating a patient, commensurate with that possessed and exercised by others practicing within that [***17] specialty in the professional community. [Citations.]" (*Kockelman v. Segal (1998) 61 Cal.App.4th 491, 505 [71 Cal.Rptr.2d 552].*)

Appellants' Objections

Appellants filed written objections to the motions for summary judgment. Appellants argued that respondents' statements of undisputed facts were not supported by competent, admissible evidence. However, the record does not show that the trial court ruled on the objections or that appellants made an effort to secure rulings. "Because counsel failed to obtain rulings, the objections are waived and are not preserved for appeal. [Citations.]" (*Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 670, fn. 1 [25 Cal.Rptr.2d 137, 863 P.2d 207].*)

[*235] *Disposition*

The judgment is affirmed. Respondents shall recover their costs on appeal.

Gilbert, P. J., and Perren, J., concurred.

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*** THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED ***
*** THROUGH 2007 CH. 86, APPROVED 7/17/07 ***

CIVIL CODE
Division 1. Persons
Part 2. Personal Rights

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Civ Code § 43.92 (2007)

§ 43.92. Psychotherapist's duty to warn of patient's violent behavior; Immunity from liability

(a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in *Section 1010 of the Evidence Code* in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.

(b) There shall be no monetary liability on the part of, and no cause of action shall arise against, a psychotherapist who, under the limited circumstances specified above, discharges his or her duty to warn and protect by making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.

HISTORY:

Added Stats 1985 ch 737 § 1. Amended Stats 2006 ch 136 § 1 (AB 733), effective January 1, 2007.

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(b) If there is a duty to warn and protect under the limited circumstances specified above, the duty shall be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.

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California Evidence Code: Sections 1010-1027: Psychotherapist-Patient privilege

1010. As used in this article, "psychotherapist" means a person who is, or is reasonably believed by the patient to be:

(a) A person authorized to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry.

(b) A person licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.

(c) A person licensed as a clinical social worker under Article 4 (commencing with Section 4996) of Chapter 14 of Division 2 of the Business and Professions Code, when he or she is engaged in applied psychotherapy of a nonmedical nature.

(d) A person who is serving as a school psychologist and holds a credential authorizing that service issued by the state.

(e) A person licensed as a marriage and family therapist under Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code.

(f) A person registered as a psychological assistant who is under the supervision of a licensed psychologist or board certified psychiatrist as required by Section 2913 of the Business and Professions Code, or a person registered as a marriage and family therapist intern who is under the supervision of a licensed marriage and family therapist, a licensed clinical social worker, a licensed psychologist, or a licensed physician certified in psychiatry, as specified in Section 4980.44 of the Business and Professions Code.

(g) A person registered as an associate clinical social worker who is under the supervision of a licensed clinical social worker, a licensed psychologist, or a board certified psychiatrist as required by Section 4996.20 or 4996.21 of the Business and Professions Code.

(h) A person exempt from the Psychology Licensing Law pursuant to subdivision (d) of Section 2909 of the Business and Professions Code who is under the supervision of a licensed psychologist or board certified psychiatrist.

(i) A psychological intern as defined in Section 2911 of the Business and Professions Code who is under the supervision of a licensed psychologist or board certified psychiatrist.

(j) A trainee, as defined in subdivision (c) of Section 4980.03 of the Business and Professions Code, who is fulfilling his or her supervised practicum required by subdivision (b) of Section 4980.40 of the Business and Professions Code and is supervised by a licensed psychologist, board certified psychiatrist, a licensed clinical social worker, or a licensed marriage and family therapist.

(k) A person licensed as a registered nurse pursuant to Chapter 6 (commencing with Section 2700) of Division 2 of the Business and Professions Code, who possesses a master's degree in psychiatric-mental health nursing and is listed as a psychiatric-mental health nurse by the Board of Registered Nursing.

(l) An advanced practice registered nurse who is certified as a clinical nurse specialist pursuant to Article 9 (commencing with Section 2838) of Chapter 6 of Division 2 of the Business and Professions Code and who participates in expert clinical practice in the specialty of psychiatric-mental health nursing.

(m) A person rendering mental health treatment or counseling services as authorized pursuant to Section 6924 of the Family Code.

1010.5. A communication between a patient and an educational psychologist, licensed under Article 5 (commencing with Section 4986) of Chapter 13 of Division 2 of the Business and Professions Code, shall be privileged to the same extent, and subject to the same limitations, as a communication between a patient and a psychotherapist described in subdivisions (c), (d), and (e) of Section 1010.

1011. As used in this article, "patient" means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems.

1012. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

1013. As used in this article, "holder of the privilege" means:

(a) The patient when he has no guardian or conservator.

(b) A guardian or conservator of the patient when the patient has a guardian or conservator.

(c) The personal representative of the patient if the patient is dead.

1014. Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

(a) The holder of the privilege.

(b) A person who is authorized to claim the privilege by the holder of the privilege.

(c) The person who was the psychotherapist at the time of the confidential communication, but the person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

The relationship of a psychotherapist and patient shall exist between a psychological corporation as defined in Article 9 (commencing with Section 2995) of Chapter 6.6 of Division 2 of the Business and Professions Code, a marriage and family therapy corporation as defined in Article 6 (commencing with Section 4987.5) of Chapter 13 of

Division 2 of the Business and Professions Code, or a licensed clinical social workers corporation as defined in Article 5 (commencing with Section 4998) of Chapter 14 of Division 2 of the Business and Professions Code, and the patient to whom it renders professional services, as well as between those patients and psychotherapists employed by those corporations to render services to those patients. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities.

1015. The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014.

1016. There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

1017. (a) There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea

based on insanity or to present a defense based on his or her mental or emotional condition.

(b) There is no privilege under this article if the psychotherapist is appointed by the Board of Prison Terms to examine a patient pursuant to the provisions of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

1018. There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

1019. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

1020. There is no privilege under this article as to a communication relevant to an issue of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship.

1021. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

1022. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

1023. There is no privilege under this article in a proceeding under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code initiated at the request of the defendant in a criminal action to determine his sanity.

1024. There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

1025. There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

1026. There is no privilege under this article as to information that the psychotherapist or the patient is required to report to a public employee or as to information required to be recorded in a public office, if such report or record is open to public inspection.

1027. There is no privilege under this article if all of the following circumstances exist:

(a) The patient is a child under the age of 16.

(b) The psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child.

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C.J.S. Physicians, Surgeons, and other Health-Care Providers §§ 19-20.

491.0147. Confidentiality and privileged communications

Any communication between any person licensed or certified under this chapter and her or his patient or client shall be confidential. This secrecy may be waived under the following conditions:

(1) When the person licensed or certified under this chapter is a party defendant to a civil, criminal, or disciplinary action arising from a complaint filed by the patient or client, in which case the waiver shall be limited to that action.

(2) When the patient or client agrees to the waiver, in writing, or, when more than one person in a family is receiving therapy, when each family member agrees to the waiver, in writing.

(3) When there is a clear and immediate probability of physical harm to the patient or client, to other individuals, or to society and the person licensed or certified under this chapter communicates the information only to the potential victim, appropriate family member, or law enforcement or other appropriate authorities.

Amended by Laws 1997, c. 97-103, § 515, eff. July 1, 1997.

§ 5-609.

Courts and Judicial Proceedings

(a) (1) In this section the following words have the meanings indicated.

(2) "Mental health care provider" means:

(i) A mental health care provider licensed under the Health Occupations Article; and

(ii) Any facility, corporation, partnership, association, or other entity that provides treatment or services to individuals who have mental disorders.

(3) "Administrator" means an administrator of a facility as defined in § 10-101 of the Health - General Article.

(b) A cause of action or disciplinary action may not arise against any mental health care provider or administrator for failing to predict, warn of, or take precautions to provide protection from a patient's violent behavior unless the mental health care provider or administrator knew of the patient's propensity for violence and the patient indicated to the mental health care provider or administrator, by speech, conduct, or writing, of the patient's intention to inflict imminent physical injury upon a specified victim or group of victims.

(c) (1) The duty to take the actions under paragraph (2) of this subsection arises only under the limited circumstances described under subsection (b) of this section.

(2) The duty described under this section is deemed to have been discharged if the mental health care provider or administrator makes reasonable and timely efforts to:

(i) Seek civil commitment of the patient;

(ii) Formulate a diagnostic impression and establish and undertake a documented treatment plan calculated to eliminate the possibility that the patient will carry out the threat; or

(iii) Inform the appropriate law enforcement agency and, if feasible, the specified victim or victims of:

1. The nature of the threat;

2. The identity of the patient making the threat; and

3. The identity of the specified victim or victims.

(d) No cause of action or disciplinary action may arise under any patient confidentiality act against a mental health care provider or administrator for confidences disclosed or not disclosed in good faith to third parties in an effort to discharge a duty arising under this section according to the provisions of subsection (c) of this section.

Duty to Warn of Violent Acts of Clients

330-A:35 Civil Liability; Duty to Warn.

I. Any person licensed under this chapter has a duty to warn of, or to take reasonable precautions to provide protection from, a client's violent behavior when the client has communicated to such licensee a serious threat of physical violence against a clearly identified or reasonably identifiable victim or victims, or a serious threat of substantial damage to real property.

II. The duty may be discharged by, and no monetary liability or cause of action shall arise against, any person licensed under this chapter if the licensee makes reasonable efforts to communicate the threat to the victim or victims, notifies the police department closest to the client's or potential victim's residence, or obtains civil commitment of the client to the state mental health system.

III. No monetary liability and no cause of action may arise concerning client privacy or confidentiality against any person licensed under this chapter for information disclosed to third parties in an effort to discharge a duty under paragraph II.

New Hampshire