DUTY TO WARN:
Tarasoff/Emerich versus Clinical Care
(where clinical care, risk management and ethics meet)

presenter

James H. Andrews, LCSW, BCD, ICCDP-Diplomate
Forensic Social Worker

Forensic Behavioral Associates
Greensburg, PA
www.forensicbehavioral.com
• What is Tarasoff?
  To fully understand the impact of Tarasoff, we should review the actual case facts that lead to the Tarasoff and other related duty to warn decisions.
  • Prosenjit Poddar 25 y/o student from Bengal, India
    – University of California at Berkely 09/1967 in Masters in Naval Engineering
    – Member of “untouchable” caste in India – Harijan caste, virtually outside acceptable society
    – Referred to by his countryman as “gabhir jaler mach” OR “a deep water fish” because he revealed so little of himself.
  • Tatiania Tarasoff, 19 y/o student.
    – Met Poddar at a folk dance class.
    – Exchanged a casual New Year’s Eve kiss
    – Poddar interpreted this as strong interest
    – Ms. Tarasoff was not interested in him and was already involved.
  • Poddar & Tarasoff still met occasionally.
    – Poddar would secretly tape these meetings
    – He would spend hours afterwards dissecting the conversations to determine Tarasoff’s feelings for him
  • Tarasoff traveled to Brazil in Spring of 1969
    – Poddar’s emotional condition seemed to improve
    – A friend persuaded him to seek counseling at student health services
  • Poddar saw Dr. Gold, a psychiatrist on the hospital inpatient’s staff
    – Dx: Paranoid Schizophrenia
    – Dr. Gold stated to Poddar he appeared quite disturbed
    – Prescribed medication and assigned to therapist for weekly sessions.
  • Dr. Lawrence Moore, 34 y/o clinical psychologist assigned to case.
    – Dr. Moore was recently traumatized:
      • His wife had attempted suicide and attempted to murder their child.
      – Met for eight sessions; Poddar distrusted Dr. Moore and feared betrayal
      – Dr. Moore determined that Poddar had a pathological attraction to a young woman whom had rejected him AND that he fantasized about harming her.
  • August 18, 1969
    – Dr. Moore concluded from remarks in session that Poddar planned to kill this woman upon her return from vacation
    – He determined her identity from the totality of the sessions.
    – Poddar’s friend had informed the doctor of Poddar’s plan to buy a gun.
    – Poddar himself told Dr. Moore he intended to buy a pellet gun.
    – Dr. Moore requested he turn the pellet gun over to him, Poddar refused.
  • August 20, 1969
    – Dr. Moore consults with Dr. Gold (initial eval psychiatrist) and Dr. Yandells (Asst Director of Psychiatry Dept).
      • Dr. Yandells covering for Dr. Moore’s regular Supervisor Dr. Harvey Powelson, Director of Psychiatry Dept.
      – These three professionals concurred that Poddar should be involuntarily committed.
  • Dr. Moore contacted the campus police by phone & letter for a 72-hr emergency psychiatric evaluation
    – Complied with existing commitment law that specified city police as agents to pick up individuals needing psychiatric evaluation.
    – Neither the city nor campus police had clear understanding of the law’s implementation.
• University Police interviewed Poddar
  – In presence of Tatiana’s brother Alex
  – Alex was Poddar’s friend and roommate
  – Poddar denied any intent to kill Tatiana
  – Tatiana was still in Brazil
  – Poddar promised to stay away from her
  – Poddar never returned to Dr. Moore for treatment

• Dr. Harvey Powelson, Director of Psychiatry Dept returned from vacation
  – He was outraged that Poddar had been interviewed by the campus police
  – He ordered Dr. Moore’s letter returned
  – He ordered Dr. Moore to destroy all his clinical notes pertaining to Poddar & take no further action to commit him

• Dr. Powelson’s overruling Dr. Moore ended the Psychiatry Department’s treatment and interventions with Poddar.

• No further efforts were made:
  – To deter his intention to kill her
  – To warn her or her family

• Tatiania Tarasoff returned to Berkeley in the Fall of 1969.
  – Poddar again approached her and she rebuffed him
  – He moved within a few blocks of her
  – He invited Alex to live with him
  – He went to her home with his pellet gun and demanded to see her (two months after campus police interviewed him)

• When Tatiania refused to see him he grew more insistent.
  – When she screamed, he shot her with the pellet gun.
  – She ran and he chased her, catching her and repeatedly stabbing her with a kitchen knife.
  – After she was dead, he returned to her home and phoned the police.

• Poddar was prosecuted for first-degree murder
  – Convicted of second-degree murder
  – He attempted to have original murder charged reduced due to his mental illness
  – Jury agreed with court appointed psychiatrist
  – Court of appeals reduced charge to voluntary manslaughter and he was confined to the Vacaville Medical Facility.

• Poddar was released
  – California Supreme Court reversed his conviction February 1974 due to improper jury instructions by the judge in regards to “diminished capacity”
  – He was released with an agreement not to retry him on condition he leave the country
  – He did and returned to India, eventually marrying a lawyer

• Tatiania’s parents filed civil suit:
  – Defendants: University Regents, psychotherapists and campus police
  – Allegations:
    • The defendants failed to detain a dangerous patient;
    • Dr. Moore failed to comply with his duty to warn others about his dangerous patient;
    • Dr. Powelson abandoned a dangerous patient by failing to hospitalized Poddar; and
    • All the defendants breached their duty to safeguard their patient and the public
• When the civil suit was filed, there was no duty for psychotherapists to warn or to protect potential victims
  – It was therefore dismissed by the trial court
  – Appealed to the California Supreme Court
  – The crux of appeal was the duty to warn idea.
  – The case was actually heard TWICE by the California Supreme Court, settled out of court with undisclosed amount and no actual liability admitted to by the defendants. (Amount rumored to be $50,000)
    • The two decisions are known as Tarasoff I & Tarasoff II
  – The California Supreme Court established a duty to warn in California.
    – No other court at that time had recognized the legal duty to warn the potential victim of a patient.

• The Tarasoff II majority stated that:
  – “When a therapist determines 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.” emphasis added
• The Pyrrhic victory of Tarasoff II
  – Left unstated by the California court was the following:
    • How do you know when a patient is dangerous?
    • Who would issue the warning?
    • What steps would reasonably discharge the duty?
• The cases that followed Tarasoff

• McIntosh v. Milano in New Jersey (1979)
  • Lee Morgenstein, OP client of Dr. Milano.
    – Morgenstein had substance abuse issues. During two years of therapy with Dr. Milano he made the following statements:
      • He was experiencing fantasies about his neighbor, Kimberly McIntosh.
      • He told Dr. Milano he was stalking her.
      • He also made threats against her and her boyfriends.
      • He had fired BBs at the family home and vehicles
      • He carried a knife and eventually purchased a pistol
    – Dr. Milano denied direct knowledge of threats against Ms. McIntosh.
    – The court in summary judgment found that he could or should have found Morgenstein to be a danger to Ms. McIntosh. It left to the trial court to determine if a duty to warn existed.
    – The trial court found that Dr. Milano did not breach a duty to warn the victim.
    – The important element is the following:
      – The court in summary judgment established that the therapist “could or should have found the client to be a danger”.
      – This was a major issue.

• Davis v. Lhim (1987 - Michigan)
  – Known as the Patterson case, this case accepted the basic Tarasoff doctrine and expanded it.
  – Following discharge from inpatient care, Mr. Patterson shot and killed his mother.
  – No history of violence.
  – No threat had been made and the only evidence was from an entry in a ER record two year’s previously of an unverified oral report from the patient.
  – Duty to protect applied to situations where there was a readily identifiable victim and extended liability to include patients with NO history of violence and did not appear to represent an imminent risk to the victim at the time of discharge.

• Jablonski by Pahls v. US (1983)
  – Ms. Kimball and Mr. Jablonski are dating/common law marriage
  – There have been past threats including attempts to kill her mother (Ms. Pahls), and her.
  – 07/10/1978: Mr. Jablonski is admitted to the Loma Linda VA following threatening Ms. Pahls.
  – Staff advises Ms. Kimball to leave him, but state they feel that he is not dangerous, as Mr. Jablonski has not threatened her currently.
  – 07.16.1978: Mr. Jablonsky is released and then he kills Ms. Kimball.
  – Civil lawsuit alleges that there was a duty to protect Ms. Kimball.
  – Court ruling: Ms. Kimball was a foreseeable victim of Jablonski’s violence, and necessary steps were not taken in protecting her.
  – Federal court found that a duty to protect existed and liability existed even though the patient had not verbalized (current) threats against anyone, even a specific individual.
• **Lipari v. Sears & Roebuck (1980, Nebraska)**
  - Mr. Cribbs had a history of involuntary treatment at VA.
  - He buys a gun at Sears.
  - During treatment he made no threats against anyone nor displayed any indications of dangerousness or violence.
  - One month later, he leaves outpatient VA program AMA.
  - Thirty days later, he fires a shotgun in Omaha club during a Thanksgiving children’s show, killing Mr. Lipari and wounding Mrs. Lipari.
  - Mrs. Lipari sues Sears. Sears sues the VA. Mrs. Lipari sues VA.
  - District Court ruled that the therapist has a duty to detain dangerous people if they are a threat to the public, even when a specific victim is not known and the potential threat was to an undefined or unidentified class of people; e.g. general public.

• **Hedlund v Orange County (1983) CA**
  - A psychologist and a psychological assistant were seeing a man and woman in treatment.
  - The man threatened to harm the woman and the therapists warned her of the threats.
  - The man ran the woman, Ms. Wilson and her minor aged son Darryl off the road in her car and then shot her. This ultimately led to the loss of one of her legs.
  - The woman sued the therapists, claiming that they did not warn her of the danger to herself OR her son.
  - The Supreme Court of California ultimately held that the therapists owed a duty not only to the woman, but also to her son because the injury to the woman’s son was foreseeable because children are not usually far from their parents.
  - The extended the right of protection of the third-party (Ms. Wilson) to a fourth-party (her son) as an extension of her third-party right to protection.

**Pennsylvania’s Tarasoff Case**

  - Gad Joseph was a patient with a history positive for:
    - post-traumatic stress disorder (PTSD)
    - drug and alcohol problems
    - intermittent explosive episodes
    - schizo-affective personality disorders
  - He had received out-patient mental health treatment at the Philadelphia Center for Human Development.
  - Mr. Joseph told his counselor he wanted to kill Theresa Hausler, his ex-girlfriend.
  - Ms. Hausler was also a client at the same facility.
  - A therapy session was conducted to allow him to express his anger. He left the session indicating that he was under control and would not harm her.
  - The counselor received a call from Ms. Hausler who was en route to Joseph’s house to finish packing her things. The counselor warned her not to go to the home.
  - She did and was subsequently shot and killed by Mr. Joseph.
A civil suit was filed alleging the following:
  • negligence and carelessness
  • reckless, willful, and wanton conduct in failing to provide proper mental health care
  • failing to commit Mr. Joseph to a mental institution
  • failing to adequately to warn the girlfriend and others such as the police
  • failing to adequately train and supervise staff.

Trial court judgment on the pleadings:
  • “even if the allegations in the complaint were true, recovery would not be possible against any of the defendants”.

This decision was based upon Pennsylvania’s failure to adopt Tarasoff v. Regents of the University of California, (1976).

The court held that the counselor had met even a Tarasoff duty to warn by informing Hausler of the danger and instructing her as to how to avoid that danger.

The counselor had fully discharged any obligation he owed her as a result of Mr. Joseph's threats of violence.

The case was appealed by the plaintiff to the Superior Court which affirmed the lower court.

The Superior Court observed that Pennsylvania's mental health care providers generally have no duty to warn third parties of a patient's threat of violence toward that third party.

It agreed with the trial court that, even if such a duty existed, the counselor's warning the deceased not to go to Mr. Joseph's home had discharged it.

The plaintiff appealed to the PA Supreme Court which agreed to hear an appeal on the issue of "whether a mental health professional has a duty to warn a third party of a patient's threats to harm the third party and the scope of any such duty and whether a judgment on the pleadings was proper."

The Supreme Court of Pennsylvania followed Tarasoff in this case.
  • It held that "pursuant to the special relationship between a mental health professional and his [sic] patient, the mental health professional has a duty to warn a third party of potential harm by his [sic] patient."

In Pennsylvania, resulting from Emerich:
  • mental health professionals have a case law duty to warn third parties of a patient's threat to harm them.

The Supreme Court of Pennsylvania followed Tarasoff in this case.
  • The ruling does not mean that mental health professionals can be expected to predict future behavior; the duty arises when there is a specific threat of serious injury against a specific victim.
  • The court adopted the professional judgment rule as the standard of care stating that "a mental health professional who determines, or under the standards of the mental health profession should have determined, that his [sic] patient presents a serious danger of violence to another, bears a duty to exercise reasonable care to protect by warning the intended victim against such danger."
Type of Threats that Trigger the Duty to Warn

• **Threat to Specific Victim Required for Duty to Warn**
  - Alaska, Arizona, California, Colorado, Delaware, Idaho, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire (includes threat to real property)
  - New Jersey, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Washington and Wyoming

• **Duty to Warn May be Based on Threat to the Public**
  - DC (substantial risk of injury)
  - Florida, Indiana, Texas (probability of imminent harm to self or others)
  - WV (imminent danger to self or others),

• **Permission to Warn of Contemplation of Crime or Harmful Act**
  - Arkansas, Hawaii (act likely to result in death or substantial bodily harm)
  - Iowa, Missouri, New Mexico, New York, Oklahoma (includes violations of any law), South Carolina, Virgin Islands

• **Mandatory Duty to Warn**
  - Twenty-two states have statutes applicable to social workers that establish a mandatory duty to warn.
    - These are: Arizona, California, Colorado, Delaware, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, Ohio, Tennessee, Utah, Virginia, and Washington.
  - A number of these states also have court decisions that have interpreted the duty to warn laws

• **“Permissive” Standard**
  - A second group of states give permission in state statutes for social workers to warn of serious threats.
    - These states are: Alaska, Arkansas, District of Columbia, Florida, Hawaii, Iowa, Mississippi, Missouri, New Mexico, New York, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Virgin Islands, West Virginia, and Wyoming.

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• **No Statutory Standard**
  - A third set of states does not provide any statutory language for social workers addressing the duty to warn, but some of these have implemented the duty to warn through court decisions.
    - These are: Connecticut, Pennsylvania, Vermont and Wisconsin do not have statutory provisions, but have established a duty to warn through court decisions.
  - States that are silent as to the social worker’s duty to warn are Georgia, Kansas, Maine, Nevada, North Dakota, and Puerto Rico.

**Questions to Consider in Duty to Warn**

- Is the individual who represents a threat to self or others a client?
- Has disclosed the threat and under what circumstances?
- How much time has passed since the threat was made?
- Does the client possess the means and capacity to carry out the threat?
- Is the threat of harm to a specific individual or a general threat to the public at large?
- Does the criteria for involuntary commitment apply?
- Who needs to be warned to effectively discharge the duty to warn? (e.g. law enforcement, the intended target, the Department of Motor Vehicles, a treating physician, a responsible family member).
- Does the state permit disclosure of a threat even if it is not mandatory?
- Is the duty to

**Key Concepts in Duty to Warn Situations**

- Fiduciary Relationship
- Prediction of Dangerousness
- Foreseeability
- Identifiable Victim
- Reasonable Care
- Duty to Protect

- The law asks the following questions to determine professional negligence:
  - Was a duty of care owed?
    - If so, what was the duty of care?
  - Was the duty of care breached?
  - Did damages result?
  - Were the damages proximately caused?
- Once a duty of care has been determined to exist between parties, the court asks the following questions:
  - “But for the actions of the defendant, would the plaintiff had been injured?”
  - “Was this type of injury foreseeable?”
• **One Suggested Formula**
  
  – Has a clear threat been made?
  – Is the victim identifiable?
  – Does the client have the means to carry out the threat.
  – Is the threat imminent?

  – **Additional considerations**
    – Does the client have a history positive for violence?
    – How long of a history?
    – What type of violence?
    – What is the client’s diagnosis?
    – What is the relationship to the identified victim?

• **Four guidelines to balance the professional obligation of confidentiality with the duties to warn (and protect):**

  • The social worker should have evidence that the client poses a threat of violence to a third party.
  • The social worker should have evidence that the violent act is foreseeable.
  • The social worker should have evidence that the violent act is imminent.
  • The social worker must be able to identify the probable victim.

The disclosure of confidential information against a client’s wishes should not occur unless the social worker has specific information about the client’s apparent intent. It is clear that work with a dangerous client poses many therapeutic and ethical challenges.

Reamer (2003 ), pp. 38-39