



Psychiatry & Behavioral Sciences

Section – 20??

12 Using Legislation to Change *Tarasoff* Problems in California

Robert Weinstock, MD, 10966 Rochester Avenue, #4C, Los Angeles, CA 90024; Gabor Vari, MD, Department of Psychiatry, University of California at Los Angeles, CA 90024; Gregory B. Leong, MD, Center for Forensic Services, Western State Hospital, 9601 Steilacoom Boulevard, South West, Tacoma, WA 98498-7213; and J. Arturo Silva, MD, PO Box 20928, San Jose, CA 95160*

After attending this presentation, attendees will become familiar with the new *Tarasoff* developments in California and how problematic court decisions can be remedied by legislation.

This presentation will impact the forensic community by presenting changes in the law achieved through legislation.

There are significant developments regarding *Tarasoff* situations. California courts had interpreted the original immunity statute to have created a new duty to warn that could be satisfied only by warning. The former Judicial Council jury instructions and the Ewing vs. Northridge Hospital Medical Center 16 Cal Rptr. 3d 591 (Cal. Ct. App. 2004) decision had led to a finding of automatic liability if a serious threat by a patient to an identifiable victim was communicated to the therapist by the patient or a close family member, the therapist did not warn, and something untoward occurred. Expert testimony was not necessary. The California Association of Marriage and Family Therapists along with the California Psychiatric Association (CPA) were instrumental in getting new legislation passed with the support of a consortium of stakeholders. California Civil Code Section 43.92 now reads:

- 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.

The earlier ambiguous phrase "shall be discharged by warning" is eliminated from the statute. Those words were interpreted to require warning and not as intended that warning was sufficient. The revised statute was meant to clarify that immunity is provided by warning, but not that it was the only way to discharge the duty. The legislation was intended as a remedy for the problematic judicial decisions.

Generally, therapists will still want to warn. If not harmful, it is a way to get immunity from liability. There could be liability if it is argued successfully that warning would have protected the victim and it was negligent to choose an alternative means of protection. However, there are some situations in which warning will exacerbate the danger, and a responsible therapist may want to choose an alternative protective action such as hospitalization to enable further assessment and intervention. Such examples will be presented. The new legislation was intended to allow therapists to choose such an option without automatic liability if something happens for such a reasonable choice. Also, it requires only probable cause to hospitalize a patient. A therapist may want to leave it to the inpatient psychiatrist to assess the threat better and make a determination about whether to warn and/or take other measures to protect a potential victim.

Although warning the potential victim and the police provides immunity from *Tarasoff* liability, the situation is not like child abuse reporting. In child abuse reporting there is immunity from liability for false harmful reports. However, in *Tarasoff* situations there remains possible liability for the consequences of an irresponsible warning such as causing a patient to lose his/her job for a mere expression of anger about a boss that could readily have been determined not to be a serious threat. Thoughtless warnings may not necessarily be the best way to escape all liability. For political reasons the proponents of the bill were forced to allow some ambiguity into the statute. Dr. Weinstock went to the California Judicial Council to develop jury instructions consistent with the intent of the legislation so that therapists can choose the most appropriate protective action.

New proposed Judicial Council *Tarasoff* Jury Instructions: Consistent with the intent of the revised statute to provide both flexibility and (if warnings are made) immunity, the Judicial Council recently adopted jury instructions that would accomplish what the proponents of the bill wanted. CACI 503 B states warning is an affirmative defense that can result in immunity from liability and is read first if claimed by a therapist. It would state that the therapist is not responsible for the plaintiff's injury or the death of the deceased if the therapist proves that he/she made reasonable efforts to communicate the threat to the plaintiff/decedent and to a law enforcement agency.

If it is not claimed or found that such warnings were made, the therapist can be liable under *Tarasoff* for failure to make reasonable efforts to protect the intended victim from the patient's threat as described in jury instruction CACI 503A. If a therapist forgoes the safe harbor immunity by not warning, the therapist can be found



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liable if reasonable actions are not taken to protect the potential victim.

The marriage and family therapists and the CPA asked the Judicial Council to develop jury instructions such as these. If they are finalized, they will allow flexibility to do the most responsible protective thing without automatic liability if that does not include warning both the victim and the police. It is gratifying that the legislature, the Governor, and now the Judicial Council have understood and have been receptive to our concerns.

The new legislation did not change the finding in *Ewing vs. Goldstein* 15 Cal Rptr. 3d 864 (Cal. Ct. App. 2004) that if a serious threat of physical violence is received by the therapist from a member of the patient's immediate family and shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a patient is not crucial to the statute's purpose. If the threat in the therapist's opinion was not credible and communicated for an ulterior purpose (like in a divorce or custody dispute), it would not be to further treatment and should not lead to a duty. If an immediate family member does communicate a credible serious threat, therapists reasonably should take protective measures, including the possible option of immunity by warning both the potential victim and the police.

Proper documentation of your thinking that clarifies the reasons for your choices can be essential. It is important for practitioners to know what liability risks they are taking in these situations, in order to make an informed choice. This successful effort demonstrates the ability to correct court decisions through legislation when misguided decisions actually increase the danger to the public.

Tarasoff, Legislation, California