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# Tarasoff and the duty to warn third parties

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Issues of risk and dangerousness are receiving ever increasing attention in the psychiatric literature, particularly the forensic literature. No longer are these concerns viewed as subsidiary to those of diagnosis; rather, they are seen as essential considerations in the management of any psychiatric patient. Furthermore, although doctors have traditionally offered treatment under strict conditions of confidentiality, the climate is changing. There is an increasing awareness among, and indeed pressure on, professionals, especially those dealing with dangerous patients, to take into account issues of public safety when implementing any management plan.

This alteration in the balance of professional concerns, which has affected practice in both the UK and the USA, was encouraged by the much-cited Tarasoff decision (*Tarasoff v. Regents of the University of California*, 1976), which had both immediate and long-lasting legal ramifications in the USA and other common-law jurisdictions. Although courts in the UK have resisted setting a similar precedent, the debate created by the Tarasoff case and the recent violent incidents in the community, with subsequent quasi-judicial responses in the form of inquiries (Ritchie *et al*, 1994), has had an important and lasting influence on psychiatric practice and led to ongoing criticisms of the law in this area.

The details of the Tarasoff case are by now familiar to most psychiatrists, but none the less are worth reiterating here. A young man became infatuated with a female student named Tatania Tarasoff at the University of California. The latter rejected the former's attention and he subsequently went on to receive psychiatric treatment in the form of psychotherapy. During treatment he announced to his therapist his intent to kill Tarasoff and revealed his plans to purchase a gun. Although the therapist, obviously alarmed by these disclosures, attempted to have the patient compulsorily detained, and indeed breached confidentiality to inform the police, he did not inform Tarasoff or her family of the risks posed to her by the patient. Two months later the patient killed Tarasoff. The victim's parents subsequently sued the University of California, of which the therapist was an employee, on the grounds that failure to warn their daughter of the

risk posed to her was a breach of a duty, which at that point was not yet a duty recognised in law.

The subsequent ruling by the California Supreme Court set a precedent in that state, which was later reinforced by legislation in other states, to the effect that mental health professionals involved in the care of dangerous patients incurred a duty to warn identifiable third parties if, in the course of the treatment of their patients, it became apparent that the said third parties were at risk from the patient. The consequence of this case and the subsequent legislation passed in other states was that a breach of this duty rendered professionals liable to civil action from the victim, or in the case of homicide, the victim's estate. This was a radical shift from the pre-Tarasoff position where therapists' actions could only be called into question at least legally by the patient or his/her representatives.

It is worth noting in passing that the entailments of the 'duty to warn' are themselves the subject of considerable controversy. In California, for example, the duty may be met (in the first instance at least) by treatment designed to improve mental health and reduce dangerousness. Failure of such treatment would of course require the therapist to warn any potential victim (Leong *et al*, 1992). In Michigan in the case of *Davis v. LHIM* (1983) the Supreme Court of Michigan gave a wider interpretation of the duty to warn, which was later further expanded to include warning even non-identifiable potential victims, that is issuing a general warning to the effect that an individual was dangerous.

As intimated above, in the UK the position is essentially pre-Tarasoff. That is to say that, even if in the course of treatment of a dangerous patient the therapist becomes aware of a risk posed to an identifiable individual, the former has no legal duty to warn the latter. In the absence of a duty to warn it is clear that, as far as the UK is concerned, third parties cannot make claims against psychiatrists as no duty has been breached. The fact that there is no duty to warn in law is, however, of little comfort to the psychiatrist faced with managing a dangerous patient. The balancing of confidentiality with the inclination to breach this creates difficult ethical and practical problems on which central government offers little guidance.

The dilemma associated with breaching confidentiality in the course of managing dangerous patients has been the focus of some, albeit limited, legal attention, but this has added little in the way of clarification.

In the case of *W. v. Egdell* (1989) the plaintiff W. was detained compulsorily in a special hospital and under Home Office restrictions without limit of time, having previously killed five people and wounded two. Egdell, a psychiatrist, submitted a report to W.'s solicitors in connection with a forthcoming mental health review tribunal. The report recommended that W. not be discharged or transferred to a medium secure unit on the grounds of his continuing dangerousness. W.'s solicitors did not rely on the report and so Egdell, aware of this, took it upon himself to send a copy to the hospital managers, who later forwarded a copy to the Home Office. As a result, W. brought an action against Egdell for a breach of confidentiality. The case failed on the grounds that public interest was felt to outweigh W.'s right to confidentiality, but the court in reaching its decision identified several circumstances which it felt must obtain if confidentiality was to be breached. First, disclosure must be necessary to protect the public interest; second, the risk must be real rather than fanciful; and third, the risk must involve danger of physical harm. The area is a difficult one, but it should be clear that these three elements provide little help to a psychiatrist attempting to arrive at a considered judgement regarding breaching confidentiality. Indeed he must rely largely on his own intuitions, with perhaps some additional support from professional bodies.

Despite the lack of official guidance and legal clarification it is now openly recognised among the psychiatric fraternity that good practice often dictates that professionals should warn victims, a course of action tacitly endorsed by findings of recent inquiries (Ritchie *et al.*, 1994). Furthermore, there is a growing sense within the profession that warning third parties, after weighing up the possible negative consequences to the patients of taking such a step, is in fact more a requirement than simply appropriate professional behaviour. Indeed, most psychiatrists would regard themselves as potentially liable for failing to do so. This sense of potential liability, a feeling that the courts may well in an appropriate case regard a psychiatrist as in breach of a duty which has not yet been established in English law, may, at least in part, be a consequence of the considerable weight given to the Tarasoff case in discussions in this area.

The situation is made more complicated by an increasing awareness that the current legal position with regard to psychiatrists' liability is somewhat anomalous. Currently in the UK

patients can, and are, suing psychiatrists for the consequences of negligent care. Those consequences may include a patient harming himself or a third party. The case of Christopher Clunis (*Sunday Times*, 1994), a schizophrenic who murdered a stranger, Jonathan Zito, in 1992, is a case in point. It illustrates how the position at present is unusual, and somewhat inequitable, in that whereas patients such as Clunis can obtain compensation for harming third parties, the third party, or their estates, are left without a course of action. This is the situation Jayne Zito, the wife of Christopher Clunis's victim, has found herself in, and as a consequence of the legal restrictions imposed upon her, her only option is to pursue a claim against Clunis himself, the success of which is dependent on the outcome of his negligence claim against the health authority (*The Times*, 1996b).

This anomalous situation may in due course prompt a judicial response. Recently the European Commission of Human Rights (*The Times*, 1996a) held that third parties can sue for damage suffered consequent upon failure of a public body (in this case the police) to warn an identifiable potential victim. This ruling may create a climate in which a third party duty to warn will be imposed on psychiatrists in similar circumstances.

We conclude, therefore, that although the feeling within psychiatry regarding a duty to warn does not at present have any grounding in law, the situation may soon change. Therefore, the shift in psychiatric decision-making which puts more emphasis on third parties pre-empts, but none the less reflects, current legal trends.

## References

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## Cases

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