

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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.

No. L.A. 31676
(Ct. App. No. 4-Civ.-27750)
(Super. Ct. No. 345277)

BRIEF OF AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF PETITIONERS' PETITION FOR REHEARING

On Appeal From the Judgment of the Superior Court
of the State of California, Orange County

Honorable Edwin J. Wallin, Judge

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To the Honorable Rose Bird, Chief Justice,
and to the Honorable Associate Justices of the
Supreme Court of the State of California:

This case presents a question of first impression in this State -- the extent to which therapists owe a duty of due care to bystanders who happen to be present when their patients injure third parties and the steps therapists must take to protect such bystanders. Because the Court's decision unwisely extends several of its prior decisions and subjects therapists to broader liability than have courts in other jurisdictions, because the Court left open the limits of its decision and therefore the extent of therapists' liability, and because the Court ignored a psychologist's obligation not to

disclose confidences communicated by patients, as well as other relevant policy considerations, amicus American Psychological Association urges the Court to grant petitioners' petition for rehearing.

I. The Court's Decision Unwisely Extends Its Prior Decisions and Subjects Therapists to Broader Liability than Have Courts in Other Jurisdictions.

Therapists' duty to exercise reasonable care in protecting third persons from violent acts by their patients can be traced to this Court's decision in Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). In that case the Court carefully balanced the public interest in maintaining the confidentiality of patients' communications to their therapists against the public interest in safety from violent assault. See id. at 440, 551 P.2d at 346, 131 Cal. Rptr. at 26. Accordingly, the Court refused to impose on therapists a general duty to warn potential victims of each threat by a patient, but limited the duty to cases where the 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" Id. at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.

Similarly, the Court later made clear in Thompson v. County of Alameda, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980), that Tarasoff is not applicable in cases where the patient "has made nonspecific threats of harm directed at nonspecific victims." Id. at 754, 614 P.2d at 735, 167 Cal. Rptr. at 77 (emphasis in original). There the Court held that the defendant County had no duty to warn the victim -- a young boy who lived a few doors away from the patient's mother -- even though the patient had expressly threatened "to take the life of a young child residing in the neighborhood." Id. at 746, 614

P.2d at 730, 167 Cal. Rptr. at 72. The duty of due care comes into play, the Court ruled, only when the patient "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" Id. at 758, 614 P.2d at 738, 167 Cal. Rptr. at 80.

In this case, by contrast, the Court has abandoned the delicate balance reached in Tarasoff and its progeny by substantially increasing a therapist's potential liability for the failure to warn to include liability for emotional injuries suffered by witnesses to a patient's violence. Such witnesses are not restricted to those who are readily identifiable, but include an amorphous category of bystanders the Court denominates as reasonably foreseeable. The result is inconsistent with this Court's prior rulings. For example, the same child who was owed no duty of care in Thompson when he was the actual victim of the patient's violence might, under the Court's decision in this case, recover damages if he was merely a witness to the patient's assault on another person. In Thompson, the patient's threat to kill a young child in the neighborhood was not specific enough to give rise to a duty to warn all children who met that description. But any such children who happened to witness a patient's violence toward another person and who suffered emotional harm as a result might prevail under the Court's rationale in this case: a court might reason that it was foreseeable that the children would be present when the victim, who resided in their neighborhood, was assaulted by the patient. Such a disparity is incongruous.

In addition to extending therapists' potential liability beyond that reached in this Court's previous opinions, the Court's decision in this case extends that liability beyond that imposed in any other jurisdiction. Courts

in other jurisdictions have followed this Court's lead in Tarasoff and imposed a duty to warn on therapists. See Leedy v. Hartnett, 510 F. Supp. 1125 (M.D. Penn. 1981), aff'd mem., 676 F.2d 686 (3d Cir. 1982); Merchants National Bank & Trust Co. of Fargo v. United States, 272 F. Supp. 409 (D.N.D. 1967); Davis v. Yong-Oh Lhim, No. 59284 (Mich Ct. App. March 21, 1983), application for leave to appeal filed, No. 71915 (Mich. S. Ct. June 13, 1983); McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (Law Div. 1979). But those cases, like this Court's prior decisions, carefully limit therapists' potential liability. None of these other jurisdictions has extended therapists' duty by imposing liability for emotional injuries suffered by bystanders.

The Court's decision in this case unwisely extends not only the Tarasoff line of cases but also Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), and Molien v. Kaiser Foundation Hospitals, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). In Dillon, the Court held that a tortfeasor is liable in negligence to "a mother who suffers emotional trauma and physical injury from witnessing the infliction of death or injury to her child" 68 Cal. 2d at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74 (emphasis added). In this case, by contrast, Darryl Wilson alleges no physical injury. See Hedlund v. Superior Court of Orange County, No. L.A. 31676, slip op. at 16 n. 8 (Cal. S. Ct. Sept. 29, 1983). Likewise, in Molien the Court held that a plaintiff who was himself "a direct victim of the assertedly negligent act" may recover damages for the negligent infliction of emotional or mental distress unaccompanied by physical injury. 27 Cal. 3d at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834. In this case, by contrast, Darryl Wilson was not a direct victim of petitioners' allegedly negligent failure to warn.

In this case, then, the Court takes three prior decisions -- Tarasoff, Dillon, and Molien -- which themselves extend tort liability to the outer limits, and which were each controversial for that very reason, and combines them to extend liability to an even more attenuated level. This unprecedented imposition of liability is especially unwise given the countervailing policies suggesting the need for limits on a therapist's liability in this context, see Point III, infra, and given the reluctance of courts in other jurisdictions to subject therapists to such broad liability.

II. The Court Leaves Open the Limits of Its Decision and Therefore The Extent of Therapists' Potential Liability.

As discussed above, the Court's decision necessarily broadens therapists' potential liability for failing to warn potential victims of their patients' violence. In addition, the Court leaves open the boundaries of that decision and therefore leaves open the possibility that lower courts will subject therapists to almost limitless liability.

For example, the Court does not specify how close the relationship between the bystander and the victim must be in order to permit the bystander to recover damages for emotional distress. Just as the Court found in this case that Darryl Wilson's presence could be foreseen, any member of the victim's family, any close friend, or even any neighbor might be expected to witness a patient's violence toward the victim and to suffer emotional distress as a result. It is entirely unclear which of these persons will be permitted to bring suit.

The Court also fails to specify how near the bystander must be to the scene of the violence in order to bring suit under the Court's decision in this case. In fact, it is not evident that actual presence will be

dispositive. Members of the victim's family or close friends who are not witnesses to the violence will likely be distressed as a result of the violence -- perhaps as much as those actually present during the attack. It is entirely unclear under what circumstances such persons will be permitted to recover against therapists who fail to warn.

Finally, the Court fails to clarify the nature of a therapist's duty to potential bystanders. Darryl Wilson does not allege that petitioners had a duty to warn or protect him; rather, he claims that petitioners' duty to warn his mother "'extended' to him" and "was breached . . . when petitioners failed to protect LaNita." Hedlund v. Superior Court of Orange County, slip op. at 14 n. 7. If petitioners had warned LaNita of the threats made by Stephen Wilson, however, it is not evident that Darryl's cause of action would necessarily be precluded. Suppose that petitioners had warned LaNita and therefore had fulfilled their duty of due care towards her. If she had not told Darryl of the danger -- a likely hypothesis given his age -- and if she had not taken adequate steps to protect herself from Stephen Wilson's violence, Darryl would have been equally distressed at the time of the assault on his mother. Petitioners might conceivably be liable to Darryl because they had taken no action to warn him or otherwise satisfy their duty of due care towards him. Although petitioners could argue that LaNita's actions were a superseding cause of the emotional distress suffered by Darryl, they might nevertheless be subjected to liability on the theory that LaNita's actions were foreseeable. See Bigbee v. Pacific Telephone & Telegraph Co., 34 Cal. 3d 49, 58, 665 P.2d 947, 952, 192 Cal. Rptr. 857, 862 (1983); Weirum v. RKO General, Inc., 15 Cal. 3d 40, 47, 539 P.2d 36, 40, 123 Cal. Rptr. 468, 472 (1975).

Thus, the Court's failure to clarify the limits of its opinion leaves open the possibility that therapists will be held liable to an infinite class of persons who are post hoc denominated as foreseeable bystanders and are not themselves victims of a patient's violence, and that those therapists will be required to take unspecified steps to satisfy their duty of due care to those persons.

III. The Court Ignores Relevant Policy Considerations and Existing Empirical Evidence.

In reaching its result, the Court not only extended the therapist's potential liability to an unprecedented degree, but also ignored relevant policy considerations suggesting the need for reasonable limits on the therapist's duty of due care. The Court has consistently recognized in prior cases that the extent of one's duty is primarily a question of law and that the concept of duty is 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.'" Weirum v. RKO General, Inc., 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975) (quoting Prosser, Law of Torts 325-26 (4th ed. 1971)). See also Bigbee v. Pacific Telephone & Telegraph Co., 34 Cal. 3d at 60 n. 14, 665 P.2d at 953 n. 14, 192 Cal. Rptr. at 863 n. 14; Dillon v. Legg, 68 Cal. 2d at 734, 661 P.2d at 916, 69 Cal. Rptr. at 76.

The Court recognized and weighed the relevant policies in both Tarasoff v. Regents of University of California, supra, and in Thompson v. County of Alameda, supra. But it fails even to mention those policies in its decision in this case. By substantially increasing therapists' potential liability,

without considering the countervailing policies, the Court ensures that therapists will issue unnecessary warnings in order to minimize their liability and that those policies will thereby be sacrificed.

Furthermore, the court completely ignored the existing and consistent research demonstrating the difficulty of predicting dangerousness and the inherent unreliability of such predictions.^{1/} By imposing the duty it did, therapists, who can be subjected to liability on the attenuated basis that existed here, will be forced to resolve doubts in favor of protecting themselves and therefore to needlessly and often harmfully overpredict dangerousness. See Tarasoff, 17 Cal. 3d at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25; see generally Barefoot v. Estelle, 103 S. Ct. 3383, 3398 n. 7 (1983). As a result, they may issue unnecessary warnings, thereby stigmatizing the patient and disrupting his relationship with the person who has been warned. See Thompson, 27 Cal. 3d at 755, 614 P.2d at 736, 167 Cal. Rptr. at 78. Alternatively, therapists may hastily hospitalize patients who exhibit any signs of violence, thereby unnecessarily depriving them of their freedom. Some therapists may even decline to treat patients who they believe are potentially dangerous.

Moreover, confidentiality is a necessary aspect of a therapeutic relationship. As the Court recognized in In re Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970), "[u]nless a patient . . . is assured that . . . information [revealed by him] can and will be held in utmost

^{1/} Although the dissenting opinion cites one outdated study regarding the difficulty psychiatrists have predicting dangerousness, neither opinion discusses the recent literature on the subject. See, e.g., the references collected in the opinions in Barefoot v. Estelle, 103 S. Ct. 3383 (1983).

confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment . . . depend[]." See also Tarasoff, 17 Cal. 3d at 440, 551 P.2d at 346, 131 Cal. Rptr. at 26. Encouraging a therapist to disclose a patient's confidential communications in order to avoid liability in cases like this one will discourage the patient from confiding completely in the therapist and will undermine the patient's trust in the therapist that is essential for successful treatment. Some patients may even be deterred from seeking therapy altogether. See generally Caesar v. Mountanos, 542 F.2d 1064, 1067 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977); Lora v. Board of Education, 74 F.R.D. 565, 571 (E.D.N.Y. 1977); Allred v. State, 554 P.2d 411, 417-18 (Alaska 1976). Therapists who issue warnings to potential victims will surely find their relationship with their patients disrupted, see Tarasoff, 17 Cal. 3d at 441, 551 P.2d at 347, 131 Cal. Rptr. at 27, and may also find themselves subjected to liability for breaching their duty not to disclose confidential communications. See generally Doe v. Roe, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (1977); Rainer v. Grossman, 31 Cal. App. 3d 539, 107 Cal. Rptr. 409 (1973).

Finally, as the Court recognized in Thompson v. County of Alameda, encouraging unnecessary warnings will "produce a cacophony of warnings that by reason of their sheer volume would add little to the effective protection of the public." 27 Cal. 3d at 754-55, 614 P.2d at 735, 167 Cal. Rptr. at 77. As a result, the only rationale for the Court's decision in this case -- protecting the public -- will be substantially undermined.

These policy considerations, coupled with the Court's failure to impose reasonable limits on a therapist's duty to warn like those imposed by this Court's previous decisions and by courts in other jurisdictions, demonstrate

that the Court's decision was clearly erroneous and materially unjust. Under circumstances similar to those involved here, the Court agreed to rehear its first decision in the Tarasoff case, 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129, in order to reconsider the extent of a therapist's duty to warn and to weigh additional evidence. Similarly, amicus urges the Court to grant petitioners' petition for rehearing so that the Court can weigh social science evidence not discussed in either the majority or dissenting opinions and can render a decision that more evenly balances the duties of mental health professionals toward their patients and the public.

CONCLUSION

For the foregoing reasons, amicus American Psychological Association urges the Court to grant petitioners' petition for rehearing.

Respectfully submitted,

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Dated: October 26, 1983
Washington, D.C.

Certificate of Service

I hereby certify that on this 26th day of October, 1983, I served the foregoing Application of American Psychological Association for Permission to File Brief as Amicus Curiae, proposed Order, and Brief of Amicus Curiae American Psychological Association in Support of Petitioners' Petition for Rehearing by mailing copies, first-class postage prepaid, to Mary A. O'Gara, Turner and Sullivan, 1000 G Street, Suite 450, Sacramento, California 95814, counsel for petitioners, to S. James Colloran, Horton, Barraro & Reilly, 1020 North Broadway, 4th Floor, Santa Ana, California 92701, and to Richard E. Madory, Moore, Graves & Madory, 17882 East 17th Street, No. 205, Tustin, California 92680, counsel for real parties in interest.

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