

# Back to the Past in California: A Temporary Retreat to a *Tarasoff* Duty to Warn

Robert Weinstock, MD, Gabor Vari, MD, Gregory B. Leong, MD, and  
J. Arturo Silva, MD

The original *Tarasoff* decision created a duty for California psychotherapists to warn potential victims of their patients. After rehearing the matter two years later, the California Supreme Court, in the landmark second *Tarasoff* decision, changed the duty to warn to a duty to protect potential victims, with warning as only one of the options for discharging that duty. Despite this change, the *Tarasoff* duty frequently was referred to erroneously as a duty to warn. This misunderstanding and an ambiguous California immunity statute culminated in “simplified” jury instructions and two appellate court decisions in 2004 in which it was assumed without question that there was a duty to warn, with liability for not doing so regardless of rationale. As a result of persistent lobbying by the California Psychiatric Association and other mental health groups, a recent bill corrected the problem created by the courts, returning the *Tarasoff* duty to a duty to protect.

**J Am Acad Psychiatry Law 34:523–8, 2006**

As a result of an ambiguous “*Tarasoff* immunity statute,”<sup>1</sup> “simplified” jury instructions,<sup>2,3</sup> and the two recent *Ewing* decisions,<sup>4,5</sup> the *Tarasoff* duty,<sup>6</sup> often misinterpreted to be a duty to warn, has recently in fact reverted to being solely a duty to warn in California.

The *Tarasoff* duty originated in California and has had an oscillating history. The duty, which has spread to several other jurisdictions, began with the 1974 California Supreme Court decision in *Tarasoff v. Regents of the University of California*

(*Tarasoff I*<sup>7</sup>). Since that time, the original *Tarasoff* duty has mutated after further judicial and legislative actions. First, the California Supreme Court reheard the *Tarasoff v. Regents of the University of California* case and revised its decision in 1976 (*Tarasoff II*<sup>6</sup>); then, the California legislature enacted a “*Tarasoff* immunity statute,” entered into the California Civil Code effective January 1, 1986<sup>1</sup>; and, most recently, two Court of Appeal cases from 2004 revised the *Tarasoff* duty.<sup>4,5</sup> We provide a historical synopsis of the *Tarasoff* duty before the recent 2004 decisions. We then explore the 2004 Court of Appeal decisions and the recent successful effort by organized psychiatry and a consortium of mental health groups to remedy with legislation the problem created by the courts.

## Origins of the *Tarasoff* Duty in California

In the 1974 California Supreme Court decision in *Tarasoff I*, the court established that psychotherapists have a duty to warn potential victim(s) of the threat posed by the psychotherapist’s patient. The ruling stated:

Dr. Weinstock is Clinical Professor of Psychiatry, and Dr. Vari is Resident in Psychiatry, Department of Psychiatry and Biobehavioral Sciences, David Geffen School of Medicine, University of California, Los Angeles, CA. Dr. Weinstock is also Psychiatrist, Department of Veterans Affairs Greater Los Angeles Health Care System, Los Angeles, CA. Dr. Leong is Clinical Professor of Psychiatry, Department of Psychiatry and Behavioral Sciences, University of Washington School of Medicine, Seattle, and Psychiatrist, Center for Forensic Sciences, Western State Hospital, Tacoma, WA. Dr. Silva is in private practice in San Jose, CA. The views expressed in this paper are solely those of the authors and do not necessarily represent those of the University of California, Department of Veterans Affairs, University of Washington, or Washington State Department of Social and Health Services. Address correspondence to: Robert Weinstock, MD, UCLA-SPS, John Wooden Center West, 221 Westwood Plaza, Los Angeles, CA 90095-1556. E-mail: rweinstock@earthlink.net

When a doctor or a psychotherapist, in the exercise of his professional skill and knowledge, determines, or should determine, that a warning is essential to avert danger arising from the medical or psychological condition of his patient, he incurs a legal obligation to give that warning [Ref. 7, p 555].

*Tarasoff I* assumed therapists could forecast future harm and imposed professional liability on psychotherapists if it could be determined that they should have known that a patient was dangerous, did not recognize the danger, and did not warn the intended victim. Under *Tarasoff I*, the required way to attempt to reduce harm to a potential victim was by warning.

The *Tarasoff I* decision evoked serious concern among mental health professionals. The American Psychiatric Association filed an *amicus curiae* brief requesting a rehearing by the California Supreme Court. The brief argued that psychotherapists are poor prognosticators of future violence and that there is no standard for psychotherapists to predict violence accurately and practically. In addition, the brief argued that the *Tarasoff I* ruling jeopardized the sanctity of the psychotherapist-patient relationship, which is based primarily on confidentiality. The brief cited previous court decisions that found that doctor-patient communications were protected under the constitutional right to freedom of speech. The police also were concerned, since they too were potentially liable under *Tarasoff I*.

In a rare judicial occurrence, the California Supreme Court decided to rehear the *Tarasoff* case. In its 1976 ruling in *Tarasoff II*, the California Supreme Court established a “duty to protect.” The *Tarasoff II* decision led to the current *Tarasoff* duty. Warning was one way, but not the only way, to discharge the duty to protect, as enunciated by the following:

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 [Ref. 6, p 340].

The *Tarasoff II* decision still required therapists to forecast future harm. However, it removed liability from the police in the belief that only therapists had special expertise.

## The Birth of a *Tarasoff* Immunity Statute

Although the duty to warn had disappeared with *Tarasoff II* with the establishment of a duty to protect, many remained fixated on the duty to warn and, in the experience of the authors, many erroneously continued to refer to the *Tarasoff* duty as a duty to warn. As will be shown later in this article, this incorrect characterization recently had resulted in the recodification of the duty to warn in California in a poorly worded immunity statute<sup>1</sup> that was used to justify that interpretation.

The confusion surrounding the vague “duty to protect,” as explicated in *Tarasoff II*, and the requirement to forecast future harm resulted in some unreasonable findings of liability against psychiatrists and others (e.g., finding therapists liable for not predicting a driving accident a significant period after the assessment using an almost strict liability standard<sup>8</sup>). At that time, as has happened again recently in California, mental health professionals sought legislative remedy via a so-called *Tarasoff* immunity statute.<sup>1,9</sup> The California immunity statute attempted to provide some protection from liability for failure to predict future harm as codified by *Tarasoff II*. It made clear that victims had to be readily identifiable and was intended to establish warning as one way, but not the exclusive way, to get immunity and discharge the duty to warn or protect. As California Civil Code 43.92 until very recently stated:

(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) 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.<sup>1</sup>

The purpose of California Civil Code 43.92 was to allow warning the victim and notifying police as a way to satisfy fully the duty to protect. It clarified that the victim had to be reasonably identifiable. However, the statute contained shortcomings. The word “shall” in “shall be discharged” was clearly intended, by reading the history of this statute, to mean a warning was sufficient, but not necessary, to discharge the duty. The problem is that “shall” is an

ambiguous word, and in recent years it was interpreted as “must” by the courts; this ambiguity was the source of the recent trouble.

The California *Tarasoff* immunity statute did not render *Tarasoff II* obsolete, but rather specified steps for a therapist to obtain freedom from liability when a patient posed a serious danger to a third party. While California Civil Code 43.92 adequately eliminated liability to adherents if harm did occur and the therapist elected to warn the potential victim and the police, the code, then as now, did not immunize therapists from potential liability for breach of confidentiality.

Many other states soon joined California in passing statutory law regarding psychotherapists’ duty to protect third parties from harm by their patients.<sup>10</sup> Twenty-seven states have legislated a *Tarasoff*-type duty. Most states other than California that have such legislation allow for options instead of warning to protect a potential victim. However, any statutes that can be read to mandate warning as the required option can lead to problems similar to those in California. Nine states and the District of Columbia allow therapists to warn but do not require it.<sup>10</sup> Thirteen states have no definitive law, while Virginia law clearly rejects a *Tarasoff* duty.<sup>10</sup> Of the states that have legislated a *Tarasoff*-type duty, Minnesota<sup>11</sup> and Ohio<sup>12</sup> do not require that the threat be communicated directly by the patient. These states allow for the imposition of the duty if the therapist is informed of the threat by another party who knows the patient well. Minnesota has the one statute that creates all the problems in *Ewing*, as described below, in that it additionally creates a duty to warn. In contrast, Ohio’s statute, like most states, recognizes that warning sometimes can inflame the problem and allows for alternative options. Some states (e.g., Texas) have not found a *Tarasoff*-type duty.<sup>13</sup>

In some instances, prosecutors have manipulated *Tarasoff* statutes to mandate therapists to testify as prosecution witnesses against their patients, and the California Supreme Court has allowed this coercion. In a recent case, a psychotherapist used sessions with his patient primarily for surreptitious evidence-gathering, resulting ultimately in the patient’s arrest and conviction for threatening to murder federal law enforcement officers.<sup>14</sup> In addition, there were two recent cases in which police, after receiving *Tarasoff*

warnings, elected to arrest and prosecute the patients, who were already in locked psychiatric settings, for “criminal threats.”<sup>15</sup> Many have argued against this perversion of the *Tarasoff* civil duty, termed by some as the “criminalization of *Tarasoff*.”<sup>16</sup>

In part because of the vague wording of the California Civil Code 43.92 as well as confusion between *Tarasoff I* mandating the duty to warn and the duty to protect in *Tarasoff II*, the California Civil Code recently was interpreted in legal settings as a duty to warn, contrary to the intent of those who proposed the statute. This is demonstrated in BAJI (*Book of Jury Approved Instructions*) 6.00.2, a plain-English instruction to civil case jurors:

A psychotherapist has no duty to warn third persons of a patient’s threatened violent behavior, nor any duty to predict such behavior or to protect third persons from such behavior, unless the patient has communicated to the psychotherapist a serious threat of physical violence against [a] reasonably identifiable potential victim[s].

If a patient has communicated such a threat to a psychotherapist, the psychotherapist then has a duty to warn and protect the reasonably identifiable potential victim[s].

If you find that a psychotherapist had this duty, it is satisfied and there is no liability if the psychotherapist made reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency [Ref. 2, p 186].

Similarly, in Judicial Council Instruction 503:

[Name of plaintiff] claims that [name of defendant] was negligent because [he/she] did not warn plaintiff or a law enforcement agency about [name of third party]’s threat of violent behavior. To establish this claim, plaintiff must prove all of the following:

1. The defendant was a psychotherapist
2. That third party was defendant’s patient
3. That third party communicated a serious threat of physical violence to defendant
4. That defendant knew or should have known that plaintiff was third party’s intended victim, and
5. That defendant did not make reasonable efforts to warn plaintiff and a law enforcement agency about the threat [Ref. 3, p 348].

The misinterpretation of California Civil Code 43.92 ironically resulted in part from interpreting the immunity statute to have created a new duty to warn that could be satisfied only by warning. The recently revised jury instructions were intended to simplify current law and not to change it. However, they “simplified” Civil Code 43.92 by interpreting the code’s ambiguity to mean that this duty could be fulfilled only by warning.

## Creation of a New Psychotherapist's Duty to Warn in California

Two recent cases heard by the Court of Appeal in California resulted in the further codification of the misinterpretation of the Civil Code as a "duty to warn." Gene Colello, a former police officer, received treatment from David Goldstein, PhD, for work-related problems and problems related to his relationship with his ex-girlfriend. Mr. Colello became increasingly depressed when he learned of his ex-girlfriend's romantic involvement with another man, Keith Ewing. In June 2001, Mr. Colello confided to his father that he could not handle his ex-girlfriend's involvement with Ewing and was considering causing harm to Mr. Ewing. Mr. Colello's father notified Dr. Goldstein of this exchange and, at Dr. Goldstein's urging, took his son to be voluntarily psychiatrically hospitalized at Northridge Hospital Medical Center. He was admitted on June 21, 2001, under the care of Gary Levinson, MD. Dr. Levinson notified Mr. Colello's father on June 22 of his intent to discharge the patient. Mr. Colello's father notified Dr. Goldstein who in turn spoke with Dr. Levinson and explained why Mr. Colello should remain hospitalized. Dr. Levinson indicated that Mr. Colello was not suicidal and then discharged him. On the following day, Mr. Colello murdered Keith Ewing and then committed suicide. Dr. Levinson settled out of court and therefore was not part of the appeal. Mr. Ewing's parents sued Dr. Goldstein for wrongful death based on professional negligence. The negligence was based on Dr. Goldstein's failure to warn the potential victim or law enforcement of the patient's threat despite the psychotherapist's having hospitalized his patient and having attempted to keep the inpatient psychiatrist from discharging the patient.

In *Ewing v. Goldstein*, the California Court of Appeal overturned the decision to dismiss and found that Dr. Goldstein was potentially negligent.<sup>4</sup> In their decision, the court erroneously interpreted the California Civil Code 43.92 as though the code necessitated warning to discharge the duty to protect. Effectively, the court interpreted that the spurious "duty to warn" could be satisfied only by warning and not by other means (such as hospitalization in this case). The court apparently did not consider any other possible interpretations of the California Civil Code 43.92 or show any indication that this facet

was even in question. There is no evidence in the decision that the attorneys for the defendant therapists raised this issue. Apparently, they accepted that there is a duty to warn but argued that it arises only when a threat is communicated directly by a patient and not by a relative.

The decision in *Ewing v. Goldstein* was also significant because the court found that the communication of a threat via a close family member is equivalent to a threat communicated directly by the patient. The court found the duty contingent on the psychotherapist's believing the patient was dangerous as a result of being informed about the threat. There was no duty if the report from a family member lacked credibility. The decision did not require prediction of dangerousness. The therapist's actions including hospitalization and statements in this case showed that the therapist did consider the patient dangerous. The duty to warn, according to this decision, existed if at any time after a threat the therapist considered the patient dangerous. The duty apparently existed even if subsequent data led another treating clinician in the hospital to disagree and determine the patient not to be dangerous as in the *Ewing* case itself or most likely if the therapist changed his or her mind, because the duty to warn apparently was created at the time the therapist determined the patient to be dangerous.

In the second case, *Ewing v. Northridge*,<sup>5</sup> the parents of the victim sued the mental health facility in which Mr. Colello was hospitalized. They alleged that a "psychotherapist" (the admitting social worker) was aware that the patient had threatened to kill their son but failed to warn the victim or to notify law enforcement. Further establishing this misinterpretation as case law, the appellate court interpreted the ambiguous wording again of California Civil Code 43.92 as follows:

...when a patient has "communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim," the psychotherapist must take reasonable steps to warn the victim and a law enforcement agency of the threat [Ref. 5, p 592].

The appellate court also overturned two prior rulings by the trial court. The appellate court found that (1) an expert was not necessary to determine whether the psychotherapist considered the patient dangerous and whether the psychotherapist warned and (2) that the threat of risk conveyed by the patient's father, and not directly by the patient, was still a "pa-

tient communication.” The court opined that a layperson was capable of determining whether the therapist considered the patient dangerous and whether the therapist had warned.

The implications for psychotherapists in California were serious. The conscientious therapist who decided, after hearing a threat, that warning was counterproductive and potentially inflammatory and could increase the danger to the victim and then chose a carefully considered better alternative intervention was automatically liable if something dangerous happened. On the one hand, pursuant to *Ewing v. Northridge*, expert testimony was not even needed to find such action negligent. On the other hand, a truly negligent therapist who dismissed a communicated threat as not credible, despite performing no risk assessment or any meaningful assessment of the threat, apparently was not liable, because the duty to warn was contingent on the therapist’s belief, regardless of the basis or lack of basis for that belief, unless another theory of liability was found.

If a therapist considered a patient dangerous or was the admitting psychiatrist and did not warn but left that to the inpatient psychiatrist who could assess the threat more fully, that therapist was liable if the inpatient psychiatrist did not consider the patient dangerous and released the patient and something violent happened. That was the actual fact pattern of the *Ewing* case that resulted in both decisions. Psychotherapists in California who heard a threat and considered the patient dangerous but then left the warning to others were setting themselves up for liability if something happened. This is despite the fact that this is common clinical practice in California, as elsewhere, and otherwise considered appropriate practice. Waiting reserves violating confidentiality until after the inpatient staff has a better opportunity to assess the threat and the danger and determine the most protective action.

### Successful Legislative Remedy

The California Supreme Court refused to hear the *Ewing* case despite a filing by the California Psychiatric Association asking them to do so. A consortium of stakeholders, with the especially helpful leadership of the California Association of Marriage and Family Therapists was receptive to our concerns and proposed legislation recently passed into law and signed by the Governor, that removed the problem phrase “shall be discharged by warning,” in an attempt to

clarify that warning is a sufficient option (a safe harbor) but not the only way to satisfy the duty to protect. Because so many people had misinterpreted the *Tarasoff* duty as a duty to warn, this was not an easy accomplishment.

The California Psychiatric Association, the Association of Marriage and Family Therapists, and other stakeholders achieved a great deal but not everything we wanted. To avoid opposition, we needed to drop our effort to get immunity from liability in a suit by a patient for violating confidentiality when warning potential victims and the police. We did obtain a clarification that the *Tarasoff* duty is a duty to protect that can be discharged fully by warning. If a psychotherapist for good reason chooses instead what he or she believes to be a better way to protect the potential victim, there should be no liability if it can be shown that this alternative course of action is not negligent.

The first author representing the California Psychiatric Association in concert with other stakeholders did not work to change the *Ewing* interpretations that the duty to protect should apply if a patient threat is communicated by a close relative. We accepted the interpretation considering that equivalent to a threat communicated directly by the patient if the therapist considers the threat credible. We made the choice not to undermine our proposed legislation by adding in other facets likely to engender controversy. We also thought so long as there is no longer a rigid duty to warn, a responsible therapist should try to protect a potential victim after hearing a credible patient threat, regardless of who communicates the threat to the therapist.

The amendment to California Civil Code 43.92 enacted as AB 733 was signed into law by the governor on August 22, 2006 and goes into effect January 1, 2007. Section 43.92 of the Civil Code<sup>17</sup> now is amended to read:

(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.

## California Aberration?

The series of misinterpretations that led the courts to return the *Tarasoff* duty to a duty to warn was based on a poorly written, ambiguous immunity statute that to our knowledge is not written with the same ambiguity elsewhere. In Minnesota, however, their statute explicitly creates without ambiguity all the *Ewing* problems.<sup>11</sup> Subsequent to the passage of the original ambiguously worded California Civil Code 43.92, the American Psychiatric Association promulgated a model immunity statute that does not have this ambiguity for which the actions that satisfy the duty clearly are specified:

Any duty owed by a [physician] to take reasonable precautions to prevent harm threatened by a patient is discharged as a matter of law, if the [physician] either a) communicates the threat to any identified victim or victims; or b) notifies a law enforcement agency in the vicinity where the patient or any potential victim resides; or c) arranges for the patient to be hospitalized voluntarily; or d) takes legally appropriate steps to initiate proceedings for involuntary hospitalization [Ref. 9, p 828].

## Conclusion

Courts do not always give reasonable or consistent interpretations to *Tarasoff*-type statutes.<sup>18</sup> Warning a potential victim is a complex issue and not always required legally or in the victim's interest.<sup>19</sup> After being warned, there generally is little a victim can do unless the threat is imminent. Warning sometimes can inflame the situation and increase the danger.

Our efforts in California show that legislative action on some occasions can rectify problems when courts do not understand the exigencies of psychiatric practice or what truly is most protective. A similar effort was made when the original *Tarasoff* immunity statutes were passed in California and elsewhere. At that time, courts had become unreasonable to the extent that they expected psychotherapists to be able to predict dangerous actions by patients and protect potential victims.

Because of the new legislation in California,<sup>17</sup> a conscientious psychotherapist again starting in 2007 will not automatically be liable if violence occurs if the therapist takes carefully considered alternative

measures thought to be more protective, such as hospitalizing or treating a patient instead of warning. The *Tarasoff* duty returns to its more pragmatic duty to protect. Warning is but one option, albeit one that by statute is in a unique position. Warning is itself a sufficient option to discharge the duty to protect, regardless of other actions taken or not taken. However, warning is not a necessary choice if there is no negligence in determining alternative ways to protect a potential victim. As in most other jurisdictions with a *Tarasoff*-type duty, warning in California again will revert to its former position as a "safe harbor." These changes are consistent with the intent of the original immunity statute<sup>1</sup> and *Tarasoff II*.<sup>6</sup>

## References

1. Cal. Civ. Code § 43.92 (1986)
2. BAJI California Jury Instruction Civil 6.00.2. St. Paul, MN: Thompson/West Publishing Co., April 2006
3. CACI 503: Judicial Council of California, Civil Jury Instructions. St. Paul, MN: Thompson/West Publishing Co., January 2006
4. *Ewing v. Goldstein*, 15 Cal Rptr. 3d 864 (Cal. Ct. App. 2004)
5. *Ewing v. Northridge Hospital Medical Center*, 16 Cal Rptr. 3d 591 (Cal. Ct. App. 2004)
6. *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976)
7. *Tarasoff v. Regents of University of California*, 529 P.2d 553 (Cal. 1974)
8. Pettis RW, Gutheil TG: Misapplication of the *Tarasoff* duty to driving cases: a call for a reframing of theory. *Bull Am Acad Psychiatry Law* 21:263-75, 1993
9. Appelbaum PS, Zonana H, Bonnie R, et al: Statutory approaches to limiting psychiatrists' liability for their patients' violent acts. *Am J Psychiatry* 146:821-8, 1989
10. Herbert PB, Young KA: *Tarasoff* at twenty-five. *J Am Acad Psychiatry Law* 30:275-81, 2002
11. Minn. Stat. § 148.975 (2005)
12. Ohio Rev. Code Ann. § 2305.51(B) (2006, Anderson's)
13. *Thapar v. Zezulka*, 994 S.W.2d 635 (Tex. 1999)
14. Herbert PB: Psychotherapy as law enforcement. *J Am Acad Psychiatry Law* 32:91-5, 2004
15. Weiner JR: *Tarasoff* warnings resulting in criminal charges: two case reports. *J Am Acad Psychiatry Law* 31:239-41, 2003
16. Weinstock R, Leong GB, Silva JA: Potential erosion of psychotherapist-patient privilege beyond California: dangers of "criminalizing" *Tarasoff*. *Behav Sci Law* 19:437-49, 2001
17. Cal. Civ. Code § 43.92 (2007)
18. Kachigian C, Felthous AR: Court responses to "*Tarasoff*" statutes. *J Am Acad Psychiatry Law* 32:263-73, 2004
19. Felthous AR: Warning a potential victim of a person's dangerousness: clinician's duty or victim's right? *J Am Acad Psychiatry Law* 34:338-48, 2006