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Bitter Medicine: A Critical Look at the Mental Health Care Provider's Duty to Warn in Texas

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BITTER MEDICINE: A CRITICAL LOOK AT THE MENTAL HEALTH CARE PROVIDER'S DUTY TO WARN IN TEXAS

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I. Introduction	361
II. Background: The Mental Health Care Provider's Duty to Protect Third Parties from Dangerous Patients	364
A. Recognition of a Duty to Warn Third Parties	364
1. <i>Tarasoff v. Regents of the University of California: Tarasoff I and Tarasoff II</i>	365
2. <i>Thompson v. County of Alameda</i>	366
B. Evolution of the Duty and Underlying Sources ...	367
1. The Common Law Rule	367
2. Public Policy	369
III. The <i>Tarasoff</i> Legacy—Adaptation of the Duty to Warn: The State of the Law in Other Jurisdictions ...	369
A. Negligence Standard	372
B. Duty to the General Public	373
C. Duty to Foreseeable Victims	374
D. Duty Only If Control Over Patient Exists	375
E. Readily Identifiable Victim	377
F. No Duty	378
IV. Development of the Duty to Warn in Texas	379

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A.	The Duty to Warn in Texas Statutory Law	379
B.	The Duty to Warn in Texas Case Law	380
1.	<i>Gooden v. Tips</i>	381
2.	<i>Otis Engineering Corporation v. Clark</i>	382
3.	<i>Williams v. Sun Valley Hospital</i>	385
4.	<i>Bird v. W.C.W.</i>	387
5.	<i>Kerrville State Hospital v. Clark</i>	389
6.	<i>Zezulka v. Thapar (Zezulka I)</i>	392
7.	<i>Limon v. Gonzaba</i>	394
8.	<i>Van Horn v. Chambers</i>	395
9.	<i>Zezulka v. Thapar (Zezulka II)</i>	397
V.	Argument for the Recognition of a <i>Tarasoff</i> / <i>Thompson</i> Duty in Texas	399
A.	Major Factors Favoring the Recognition of a Duty in Texas	399
1.	The Special Relationship	400
2.	Predictability of Harm	401
3.	Foreseeability of the Victim	401
B.	Major Considerations for Imposing a Statutory Recognition of a Duty	402
1.	Specifically Communicated Threat Requirement	402
2.	Requirement of Intent and Ability to Carry out the Threat Against a Reasonably Identifiable Person	402
3.	Alternatives to Disclosure and Exoneration ..	403
C.	A Statutory Model	403
VI.	Conclusion	405

“We can hardly live in our modern, crowded and violent society when professionals deliberately disregard the opportunity to save a life from a violent end, and do so when there is no risk or cost to themselves.”¹

1. Peter Lake, *Virginia Is Not Safe for “Lovers”: The Virginia Supreme Court Rejects Tarasoff in Nasser v. Parker*, 61 BROOK. L. REV. 1285, 1297 (1995) (criticizing the *Nasser* court’s formalistic interpretation of the Restatement (Second) of Torts). Professor Lake provides an enlightening criticism of the Supreme Court of Virginia’s decision in *Nasser v. Parker*, 455 S.E.2d 502, 506 (Va. 1995), which held that to meet the special-relationship exception and subsequently establish a duty, the mental health care provider must have a higher degree of control over the patient than a typical doctor-patient relationship. See *id.* at 1289-94 (referring to section 319 of the Restatement (Second) of Torts as the basis for

I. INTRODUCTION

The common law tenet that one is under no obligation to prevent harm to a third party² would seem to support the notion that a mental health care provider is not required to warn individuals who have been threatened by a patient during a counseling session. Imagine the following hypothetical situation involving a divorced couple: the ex-husband is attending counseling sessions to resolve his feelings of loss following the divorce, and during the sessions, the therapist learns that his patient's feelings range from obsessive love to obsessive hatred.

Additionally, the patient admits that he has been following his ex-wife and is very disturbed that she has started dating. During his sessions, the patient states that he does not think he can live without his ex-wife and has even considered suicide. Each time the therapist and patient discuss these feelings, concluding that these emotions are normal and felt by many during such a profound time of loss.

During the most recent session, however, the patient informs his therapist that his ex-wife has become engaged to the man she has been dating. The ex-husband is deeply troubled and is determined to prevent the wedding. He tells his therapist that he has bought a gun and that he plans to kill his ex-wife, her fiancée, and himself.

Under what circumstances is the therapist required to warn the ex-wife, alert the fiancée, or notify law enforcement? In *Jaffee v. Redmond*,³ the United States Supreme Court proclaimed that "reason tells us that psychotherapists, and patients share a unique relationship, in which the ability to communicate freely without the

requiring the additional factor of the physician taking charge of the patient). Lake particularly emphasizes difficulties with the *Nasser* court's interpretation of Section 319 of the Restatement (Second) of Torts. *See id.* (suggesting that it might be possible to take charge of someone without having control or custody of that individual). He argues that the court unjustifiably collapses the meanings of "[taking] charge," "[taking] control," and "[taking] custody" in analyzing whether an exception to the general rule of no duty is applicable. *Id.* (inferring that in *Nasser*, Dr. Parker "may well have had the power to exert control over Edwards, or to have others exert control over or take custody of him"). Lake further suggests that the Restatement maintains a distinction. *See id.* at 1290 (intimating that the Restatement uses the wording "takes charge of" as opposed to "takes control of").

2. *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965) (relating that there is no common law duty to come to the aid of a third party absent a special relationship).

3. 518 U.S. 1 (1996).

fear of public disclosure is the key to successful treatment."⁴ Further, the Court reasoned that the therapist privilege is vital to facilitating treatment of individuals suffering from mental or emotional problems.⁵ The Court concluded that ensuring the good mental health of the citizenry best serves the public's interest.⁶ Although the U.S. Supreme Court refused to require the mental health care provider to disclose confidential communications covered by the physician-patient privilege, the Court did not prohibit the mental health care provider from voluntarily disclosing the confidential communications of a patient.⁷

A quarter of a century has passed since *Tarasoff v. Regents of the University of California*⁸ first imposed a duty upon mental health care providers to warn third parties of their patient's threats of harm.⁹ In *Tarasoff*, the California Supreme Court held that once a therapist determines, or reasonably should have determined under applicable professional standards, a patient poses a significant danger of violence to others, the therapist bears a duty to exercise reasonable care to protect the foreseeable victim from that danger.¹⁰ *Tarasoff* has been widely accepted by both legislatures and courts as the basis for imposing the duty of reasonable care upon mental health care professionals to provide a warning to likely victims of

4. *Jaffee v. Redmond*, 518 U.S. 1, 6 (1996) (suggesting that the ability to communicate freely with the therapist is the foundation upon which successful treatment is based).

5. *See id.* at 11 (providing that the public has an interest in facilitating treatment).

6. *See id.* (relating that the mental health of the citizenry is as important as its physical health).

7. *See id.* (maintaining the confidentiality of the physician-patient relationship).

8. 529 P.2d 553 (Cal. 1974). The 1974 decision, referred to as *Tarasoff I*, was later modified in what is now known as *Tarasoff II*.

9. *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 353 (Cal. 1976) (holding that a mental health care provider owes a duty to protect third parties from dangerous patients); *see also* John M. Burman, *Disclosing Privileged Communications: A Lawyer's Duty to Warn*, 19 WYO. LAW., Aug. 1996, at 17 (declaring that *Tarasoff's* implications are far reaching, affecting not only mental health care providers, but physicians in general, as well as attorneys). Because attorneys are among those professionals who might receive information from a client suggesting a threat of harm to a third party, the ethical and legal issues raised by an attorney's breach of confidentiality in warning a third party merit consideration. *See id.* at 18. Though beyond the scope of this Article, such a discussion is provided by Professor Burman. *See id.*

10. *See Tarasoff*, 551 P.2d at 340 (imposing a duty upon mental health care providers to warn third parties of threats made against them).

their dangerous patients.¹¹ While most states have adopted some variation of the *Tarasoff* duty to warn,¹² the Texas Supreme Court recently has declined to impose such a duty.¹³

The purpose of this Article is to analyze the *Tarasoff* duty and advocate for the imposition of such a duty to warn in Texas. Part II outlines the background of the mental health care provider's duty to protect third parties from dangerous patients, including the evolution and rationale of such a duty. Part III presents the *Tarasoff* legacy and the variations that other jurisdictions have adopted in recognizing the mental health care provider's duty to warn. Part IV discusses the development of the law in Texas. Finally, Part V presents a legislative proposal that would statutorily impose a duty upon mental health care providers to warn third parties.

11. See Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 98 (1994) (acknowledging the wide acceptance of the *Tarasoff* duty). Professor Lake argues that beyond the duty for which *Tarasoff* is widely known is the broader implication of its use by "courts in reconceptualizing the nature and source of duty and of tort liability." *Id.* (seeing *Tarasoff*'s significance as more than just the "epiphenomenon" of liability expansion). Professor Lake analogizes *Tarasoff* to *Palsgraf*, stating that "*Tarasoff* is the *Palsgraf* of its generation, a case with meta-significance which endures beyond its jurisdiction, time, place, and perhaps its particular holding." *Id.* (suggesting that it is more than just a "policy" case); John C. Williams, Annotation, *Liability of One Treating Mentally Afflicted Patient for Failure to Warn or Protect Third Persons Threatened by the Patient*, 83 A.L.R.3d 1201 (Supp. 1999) (providing a collection, current as of 1999, of various jurisdictions and their treatments of the *Tarasoff* duty).

12. See, e.g., *Bradley v. Ray*, 904 S.W.2d 302, 308 (Mo. Ct. App. 1995) (outlining *Tarasoff* duties in the United States); Peter Lake, *Virginia Is Not Safe for "Lovers": The Virginia Supreme Court Rejects Tarasoff in Nasser v. Parker*, 61 BROOK. L. REV. 1285, 1285 n.3 (1995) (providing that half of the states have adopted a duty to warn, judicially, legislatively, or both); Allison L. Almason, Comment, *Personal Liability Implications of the Duty to Warn Are Hard Pills to Swallow: From Tarasoff to Hutchinson v. Patel and Beyond*, 13 J. CONTEMP. HEALTH L. & POL'Y 471, 471 (1997) (stating that most jurisdictions in the United States have established a duty of reasonable care for mental health care providers to protect third parties against their dangerous patients).

13. See *Thapar v. Zezulka*, 994 S.W.2d 635, 640 (Tex. 1999) (refusing to impose a *Tarasoff* duty upon health care providers to third parties because of its inconsistency with the State's confidentiality statute). Prior to this decision, the Texas Supreme Court had refused to decide the issue of imposing a *Tarasoff* duty. See *Limon v. Gonzaba*, 940 S.W.2d 236, 237 (Tex. App.—San Antonio 1997, writ denied) (acknowledging that the Texas Supreme Court has not addressed the *Tarasoff* duty).

II. BACKGROUND: THE MENTAL HEALTH CARE PROVIDER'S DUTY TO PROTECT THIRD PARTIES FROM DANGEROUS PATIENTS

The mental health care provider's duty to warn third parties has evolved from one of no duty¹⁴ to a duty currently recognized in many states.¹⁵ This duty was first established by *Tarasoff v. Regents of the University of California*¹⁶ and *Thompson v. County of Alameda*.¹⁷ Since its establishment, common law and public policy have refined this duty.

A. Recognition of a Duty to Warn Third Parties

To understand the magnitude of the duty imposed by *Tarasoff*, it is necessary to understand the general common law rule of no duty. Under the Anglo-American system of jurisprudence, there is neither a duty to prevent one party from harming another¹⁸ nor is there a duty to warn third persons who are likely to be harmed.¹⁹ Enter *Tarasoff*. Set against the no duty common law background, it is easy to appreciate why this case, with its imposition of an affirmative duty upon therapists to warn third parties of their pa-

14. See RESTATEMENT (SECOND) OF TORTS § 315 (1965) (providing no duty to warn third parties).

15. See *Thompson v. County of Alameda*, 614 P.2d 728, 730 (Cal. 1980) (providing a duty to warn when there is a threat to third parties); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 353 (Cal. 1976) (establishing a duty to warn third parties).

16. 551 P.2d 334 (Cal. 1976).

17. 614 P.2d 728 (Cal. 1980).

18. See RESTATEMENT (SECOND) OF TORTS § 315 (1965). Section 315 provides that:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id.

19. See *id.* § 314 (promulgating that no duty is imposed for the protection of others). An exception exists where the defendant has a special relationship with either the dangerous party (for our purposes, the patient) or the plaintiff (for our purposes, the patient's victim). See *id.* §§ 315-20 (relating that the special relationships that give rise to the exception to the common law rule of no duty are as between doctor and patient, parent and child, and parole officer and parolee). In addition, comment (a) to section 319 specifically provides an illustration wherein the special relationship exception applies: "A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac, is permitted to escape. B attacks and causes harm to C. A is subject to liability to C." *Id.* § 319 cmt. 2.

tients' threats of danger, is "one of the single most celebrated cases in the recent history of American tort law."²⁰

1. *Tarasoff v. Regents of the University of California: Tarasoff I and Tarasoff II*

Tarasoff is the first case to hold that mental health care providers have a duty to warn third parties of harmful threats made by their patients.²¹ In 1969, Prosenjit Poddar murdered his girlfriend Tatiana Tarasoff two months after revealing this intention to a University of California psychologist.²² At the time of the threat, the therapist notified the campus police and requested that they apprehend Poddar.²³ The police did apprehend Poddar, only to release him after determining that he did not pose a current threat to himself or others.²⁴ Though they cautioned Poddar to stay away from Tatiana, neither the psychologist nor the campus police warned Tatiana or her family of Poddar's threats.²⁵

Upon first hearing the case, the California Supreme Court held that the victim's family had a cause of action against the psycholo-

20. Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 97 (1994) (noting that "[v]irtually every lawyer who has taken a basic course in torts since the late 1970s knows . . . how important the case has become in the development of American common law tort jurisprudence").

21. See Dianne S. Salter, Note, *The Duty to Warn Third Parties: A Retrospective on Tarasoff*, 18 RUTGERS L.J. 145, 146 (1986) (discussing the landmark nature of the *Tarasoff* case). While *Tarasoff* was the first to hold that mental health care providers owe a duty to third parties who are the subjects of a patient's threats, past cases have imposed a similar duty upon physicians to third parties in situations involving injury due to the spread of contagious diseases. See generally *Davis v. Rodman*, 227 S.W. 612, 614 (Ark. 1921) (recognizing that physicians have a duty to exercise ordinary care in preventing the spread of contagious disease); *Hofmann v. Blackmon*, 241 So. 2d 752, 753 (Fla. Dist. Ct. App. 1970) (restating the rule that a physician owes a duty of reasonable care to warn members of a patient's immediate family when that patient has a contagious diseases); *Jones v. Stanko*, 160 N.E. 456, 457 (Ohio 1928) (holding that a physician has a duty to exercise ordinary care in reporting notice of a contagious disease to health officials in patient's jurisdiction).

22. See *Tarasoff v. Regents of Univ. of Cal.*, 529 P.2d 553, 554-55 (Cal. 1974) (presenting the facts underlying the *Tarasoff I* decision).

23. See *id.* (discussing the protective measures taken by the therapist following Poddar's threats). In addition, the therapist expressed to the campus police by letter and telephone that he felt Poddar should be committed to an institution. See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 341 (Cal. 1976) (chronicling the therapist's actions stemming from Poddar's threats).

24. See *Tarasoff*, 529 P.2d at 554.

25. See *id.* at 554-55.

gist for breaching his duty to warn Tatiana.²⁶ The court held that a duty to warn exists when, "in the exercise of his professional skill and knowledge, [the therapist] determines, or should determine, that a warning is essential to avert danger arising from the medical or psychological condition of [the] patient."²⁷

On rehearing, the California Supreme Court vacated its prior *Tarasoff I* decision, holding that "[w]hen 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."²⁸ Expanding on its earlier holding, the court explained that the duty to protect could be carried out in a number of ways, including "warn[ing] 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."²⁹ As such, the much broader duty to protect imposed by *Tarasoff II* replaced the *Tarasoff I* duty to warn.³⁰

2. *Thompson v. County of Alameda*

Several years after its decision in *Tarasoff*, the California Supreme Court revisited this issue and redefined the health care provider's duty to warn third parties in *Thompson v. County of Alameda*.³¹ In *Thompson*, a juvenile released from a county facility murdered a child.³² Though the juvenile had made murderous threats prior to his release, the threats were generalized and not

26. *See id.* at 565.

27. *Id.* at 555 (explaining the circumstances giving rise to the duty).

28. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976) (vacating *Tarasoff I* and imposing an even greater duty upon mental health providers in what would become known as *Tarasoff II*).

29. *Id.* (providing examples of methods that the professional might exercise to protect potential victims).

30. *Compare Tarasoff II*, 551 P.2d at 345 (placing an objective obligation on the therapist based on what professional standards are appropriate in similar instances, as well as, the individual's skill and knowledge), *with Tarasoff I*, 529 P.2d at 555 (limiting the therapist's obligation to a subjective standard centered on the individual's professional experience).

31. 614 P.2d 728, 738 (Cal. 1980) (holding that a mental health care provider's duty to third parties arises only in situations involving a threat to a specific victim or victims).

32. *See Thompson v. County of Alameda*, 614 P.2d 728, 730 (Cal. 1980).

directed toward any particular victim.³³ In holding that the “duty to warn depends upon and arises from the existence of a prior threat to a specific identifiable victim,”³⁴ the court refused to create an affirmative duty to warn a “large amorphous public group of potential targets.”³⁵ Such a duty, reasoned the court, would require therapists to spend unreasonable amounts of time and already limited resources in an effort yielding only marginal benefits.³⁶

B. *Evolution of the Duty and Underlying Sources*

Tarasoff I established the mental health care provider’s duty to warn third parties. *Tarasoff II* and *Thompson* created exceptions and refined the duty. In *Tarasoff II*, the California Supreme Court created an additional exception to the general common law rule that a person has no affirmative duty to take action to protect others from harm.³⁷

1. The Common Law Rule

Prior to the *Tarasoff* holdings, California did not impose a duty unless a prior special relationship existed between the parties in question.³⁸ Under the special relationship exception to the common law general rule of no duty, one has an obligation to control the acts of “a third person [so] as to prevent him from causing physical harm to another [if] . . . a special relation[ship] exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct.”³⁹ Examples of this

33. *See id.* (stating that the juvenile threatened that he “would, if released, take the life of a young child . . . in the neighborhood”).

34. *Id.* at 738 (asserting that the victim must be readily identifiable).

35. *Id.* (finding that the therapist would be unduly burdened).

36. *See id.* at 737 (weighing the costs and benefits of a broad affirmative duty to warn by examining the limited resources available to parole and probation agencies against the potential harm of stigmatizing the offender and thus jeopardizing rehabilitation efforts).

37. *See Tarasoff*, 551 P.2d at 340 (establishing an exception for therapists whose patients present a threat of violence towards a third party); *see also* RESTATEMENT (SECOND) OF TORTS § 314 (1965) (outlining the general rule of no duty).

38. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 359 (5th ed. 1984) (explaining that courts will find a duty when there is a relationship that makes the recognition of such a duty reasonable).

39. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

exception include relationships between a parent and child, a physician and patient, and a parole officer and parolee.⁴⁰

In addition, the common law exception to the general rule of no duty requires first that the actor be able, or have the right to control the third person's conduct,⁴¹ and second that the harm be foreseeable.⁴² Under *Tarasoff*, the court will additionally declare such a duty after

balancing a number of considerations . . . [including] . . . foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant, and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.⁴³

Of the above considerations, the *Tarasoff II* court identified foreseeability of harm as the greatest factor in imposing a duty to warn.⁴⁴ Acknowledging that therapists may have difficulty in foreseeing danger posed by their patients, the court determined that therapists need only exercise the "reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances."⁴⁵ In *Tarasoff II*, the therapist's concerns over Poddar's threats given to police proved the foreseeability of harm to Tatiana.⁴⁶

40. See *id.* §§ 316-19 (listing examples of special relationships that give rise to the duty to protect).

41. See *id.* § 319 (discussing the control of dangerous third persons, namely in-patients in psychiatric hospitals).

42. See *Tarasoff*, 551 P.2d at 342 (emphasizing the importance of foreseeability of harm in the imposition of a duty to warn); see also RESTATEMENT (SECOND) OF TORTS § 319 (1965) (requiring foreseeability as a factor in the imposition of a duty). Section 319 speaks of foreseeability in terms of imposing a duty when an individual "knows or should know" that harm is likely to result. *Id.*

43. *Tarasoff*, 551 P.2d at 342 (describing the balancing test that courts must perform).

44. See *id.*

45. *Id.* at 345 (outlining that a therapist should use his "best judgment" in foreseeing the risk of harm).

46. See *id.* (recognizing that the therapist must have foreseen the harm to Tatiana, in as much as he spoke of the same to the campus police). The court noted that, while Poddar did not identify Tatiana specifically, a moment's reflection on the part of the therapist

2. Public Policy

According to the *Tarasoff II* court, the duty to warn of potential harm arising from a patient's threat is based not only in the common law special relationship exception, but in public policy as well.⁴⁷ While recognizing Poddar's privacy interest arising from the doctor-patient privilege, the court reasoned that the public safety interest was of greater importance.⁴⁸ Regarding doctor-patient privilege, the court emphasized that when evidence of public peril exists as a result of a patient's disclosure, such peril outweighs the protective privilege.⁴⁹ Our modern world, reasoned the court, requires societal protection,⁵⁰ and the possibility of unnecessary warnings "is a reasonable price to pay for the lives of possible victims that may be saved."⁵¹

III. THE *TARASOFF* LEGACY—ADAPTATION OF THE DUTY TO WARN: THE STATE OF THE LAW IN OTHER JURISDICTIONS

Almost all jurisdictions have adopted some form of the *Tarasoff*⁵² and *Thompson*⁵³ duty, either through case law⁵⁴ or by

would have revealed the victim's identity. *See id.* at 345 n.11 (acknowledging that therapists are not required to interrogate patients or conduct investigations to discover the victim's identity).

47. *See id.* at 346 (reasoning that the public interest in safety underscores the therapist's duty to warn).

48. *See Tarasoff*, 551 P.2d at 347 (concluding that the public's safety interest outweighs the patient's privacy interest where disclosure to the public will avert danger to others).

49. *See id.* (demanding that the public's safety be placed before the "confidential character" of the physician-patient privilege).

50. *See id.* (justifying breach of the physician-patient privilege).

51. *Id.* at 346 (concluding that the potential to save lives outweighs the harm caused by breaking the physician-patient privilege). *But see id.* at 354-55 (Clark, J., dissenting) (emphasizing that the legislature has already decided that doctor-patient confidentiality has preference over a duty to warn). Justice Clark argued that the majority failed to adequately consider the impact of imposing the duty warn on the treatment of the mentally ill. *See id.* (arguing that public policy mandates the preservation of doctor-patient confidentiality because it facilitates treatment of the mentally ill). In addition, Justice Clark concluded that neither of the exceptions to the confidentiality requirement applied in *Tarasoff*. *See id.* at 357.

52. *See id.* at 342 (Cal. 1976) (relating that *Tarasoff* imposes a duty on the mental health care provider).

53. *See Thompson v. County of Alameda*, 614 P.2d 728, 730 (Cal. 1980) (explaining that *Thompson* narrows the *Tarasoff* duty).

54. *See Almonte v. New York Med. College*, 851 F. Supp. 34, 40-41 (D. Conn. 1994) (recognizing a duty to warn of a specific threat against a specific victim or group); *Hamman v. County of Maricopa*, 775 P.2d 1122, 1128 (Ariz. 1989) (holding that mental health care

statute.⁵⁵ Some courts have reasoned that this duty to warn third

providers owe a duty to third parties in "the zone of danger"); *Thompson*, 614 P.2d at 738 (imposing a duty to warn if there is "a predictable threat of harm to a named or readily identifiable victim or group of victims who can be effectively warned of the danger"); *Pereira v. State*, 768 P.2d 1198, 1210 n.8 (Colo. 1989) (citing a Colorado statute outlining the duty to warn); *Bradley Ctr., Inc. v. Wessner*, 296 S.E.2d 693, 695-96 (Ga. 1982) (involving a duty to warn and control a hospital patient who is likely to cause harm); *Evans v. Morehead Clinic*, 749 S.W.2d 696, 699 (Ky. Ct. App. 1988) (holding that a therapist has a duty of reasonable care to protect readily identifiable victims of danger from a patient's threats); *Swan v. Wedgewood Christian Youth and Family Serv., Inc.*, 583 N.W.2d 719, 723 (Mich. Ct. App. 1998) (citing a Michigan statute requiring a threat and a reasonably identifiable victim); *Lundgren v. Fultz*, 354 N.W.2d 25, 28 (Minn. 1984) (requiring both elements of control and foreseeability in imposing a mental health care provider's duty to third parties); *Bradley v. Ray*, 904 S.W.2d 302, 311 (Mo. Ct. App. 1995) (requiring a warning of a specific threat of physical harm against a readily identifiable person); *McIntosh v. Milano*, 403 A.2d 500, 511-12 (N.J. Super. Ct. Law Div. 1979) (imposing a duty to take steps that are reasonably necessary when a patient exhibits danger toward an intended victim); *Estates of Morgan v. Fairchild Family Counseling Ctr.*, 673 N.E.2d 1311, 1323 (Ohio 1997) (concluding that the imposition of a duty to protect or control arises from a special relationship between psychotherapist and patient); *Wofford v. Eastern State Hosp.*, 795 P.2d 516, 520 (Okla. 1990) (holding that a *Tarasoff* duty arises when a therapist knows or should know of a patient's dangerous propensities); *Bishop v. South Carolina Dep't of Mental Health*, 502 S.E.2d 78, 81-82 (S.C. 1998) (holding that legal guardian's knowledge of threats is a relevant issue in imposing the previously recognized duty to warn); *Turner v. Jordan*, 957 S.W.2d 815, 820-21 (Tenn. 1997) (finding a duty on the part of a physician to protect a nurse from the violent acts of a mental patient); *Peck v. Counseling Serv., Inc.*, 499 A.2d 422, 426 (Vt. 1985) (recognizing a duty to warn when a patient poses a danger to a readily identifiable person); *Peterson v. State*, 671 P.2d 230, 237 (Wash. 1983) (imposing a duty to protect third persons who might foreseeably be endangered by a patient's drug related problems); *Schuster v. Altenberg*, 424 N.W.2d 159, 165 (Wis. 1988) (applying a duty to warn when it is foreseeable that an act or omission may cause harm to someone, but not limiting the circumstance to that which includes a readily identifiable victim).

While some state courts have not decided the issue of a therapist's duty to third parties, some federal court decisions have addressed the issue and applied state law in imposing such a duty. *See, e.g., Brady v. Hopper*, 751 F.2d 329, 330-31 (10th Cir. 1984) (applying Colorado state law and holding that harm to third persons must be foreseeable for a *Tarasoff* duty to arise); *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 191 (D. Neb. 1980) (applying Nebraska state law and concluding that the relationship between a psychotherapist and his patient gives rise to a duty to warn for the benefit of third persons); *Naidu v. Laird*, 539 A.2d 1064, 1072-73 (Del. 1988) (applying Delaware state law and holding that the doctor-patient relationship functions as an exception to the common law rule of no duty and that a therapist owes a duty of reasonable care to third persons).

Finally, some states have refused to decide the issue of a mental health care provider's duty to third parties altogether. *See, e.g., Doyle v. United States*, 530 F. Supp. 1278, 1287 (C.D. Cal. 1982) (declaring that Louisiana has not decided a duty of therapists to warn third persons of patients' dangerous intentions); *Estate of Votteler, Heltsley v. Votteler*, 327 N.W.2d 759, 760 (Iowa 1982) (concluding that the duty to warn should not be imposed when the foreseeable victim already knows of the danger).

55. *See* ARIZ. REV. STAT. ANN. § 36-517.02 (West 1993 & Supp. 1998) (providing that a therapist must warn of an explicit threat by a patient of immediate, serious physical harm

parties should be imposed because of the therapist's control over the patient,⁵⁶ while others have taken a modified approach by broadening the therapist's duty to warn all foreseeable victims.⁵⁷ The minority of jurisdictions has declined to recognize the obligation altogether.⁵⁸

to a clearly identifiable victim); CAL. CIV. CODE § 43.92 (Deering 1990 & Supp. 1999) (stating that a therapist has a duty to warn if there is a serious threat of harm to a reasonably identifiable victim); COL. REV. STAT. ANN. § 13-21-117 (West 1999) (recognizing that there is no duty except when the patient states a threat against a specific person); DEL. CODE ANN. tit. 16, § 5402 (1995) (requiring a warning wherein there exists an explicit and imminent threat to kill or injure a clearly identifiable victim); FLA. STAT. ANN. § 455.671 (West Supp. 1999) (specifying that one must warn of an actual threat of physical harm against an identifiable victim); IDAHO CODE §§ 6-1902 (1998) (requiring warning of an explicit threat of immediate serious physical harm or death to an identifiable victim); IND. CODE ANN. § 34-30-16-1 (Lexis 1998) (stating that there must be a warning regarding an actual threat of physical violence or other means of harm against a reasonably identifiable victim); KY. REV. STAT. ANN. § 202A.400 (Michie 1999) (requiring a warning wherein there is an actual threat to a clearly identifiable or reasonably identifiable person); LA. REV. STAT. ANN. § 9:2800.2 (West 1997) (specifying that a threat of violence against an identified victim requires a warning); MINN. STAT. ANN. § 148.975(2) (West 1998) (requiring a specific threat of violence against a specific, clearly identified, or identifiable potential victim); MONT. CODE ANN. § 27-1-1102 (1998) (stating that an actual threat of physical violence by specific means against a clearly identified or reasonably identifiable victim requires a warning); NEB. REV. STAT. § 71-1, 336 (1996) (specifying a grave threat of physical violence against a logically identifiable victim); N.H. REV. STAT. ANN. §§ 329:31, 330-A:22 (1995) (requiring a warning against a serious threat of bodily harm against a readily identified or reasonably identifiable person or serious threat of damage to real property); UTAH CODE ANN. § 78-14a-102 (1996) (requiring a threat of physical violence directed toward a clearly identified or reasonably recognizable victim); WASH. REV. CODE ANN. § 71.05.120(2) (West 1992) (specifying an actual expression of intent to commit physical violence against a reasonably identifiable victim).

56. See *Lipari*, 497 F. Supp. at 191 (holding that relationship between psychotherapist and patient establishes a duty to third parties); *Lundgren*, 354 N.W.2d at 28 (holding that the therapist must have control over the patient for the duty to third parties to arise); *Estate of Morgan*, 673 N.E.2d at 1323 (concluding that the duty to third parties arises from the control arising from the doctor-patient relationship).

57. See *Thompson*, 614 P.2d at 738 (holding that the duty to third parties depends upon a threat of harm to a foreseeable victim); *Evans*, 749 S.W.2d at 699 (concluding that a therapist has a duty to protect foreseeable victims from the patient's threats); *Peterson*, 671 P.2d at 237 (establishing that a duty to protect third parties hinges upon the foreseeability of danger resulting from the patient's actions); *Schuster*, 424 N.W.2d at 165 (recognizing a duty to warn when harm to third parties is foreseeable).

58. See *King v. Smith*, 539 So. 2d 262, 264 (Ala. 1989) (concluding that a therapist-outpatient relationship does not give rise to mental health care provider's duty to third parties); *Boynton v. Burglass*, 590 So. 2d 446, 448-49 (Fla. App. 1991) (rejecting the enlightened *Tarasoff* approach and stating that a voluntary outpatient situation lacks the sufficient elements of control necessary to hold a psychiatrist liable for failing to warn a victim of their patient's dangerous propensities); *Santa Cruz v. Northwest Dade Community*

Though differing in their interpretations, those jurisdictions that have adopted the *Tarasoff* duty to warn begin their analyses at the same juncture. To recover, a plaintiff must establish that: (1) a special relationship exists between the plaintiff and the physician, or the physician and the party who caused the injury; (2) the physician acted contrary to the ordinary skill and diligence required by the situation; and (3) most jurisdictions also require an element of foreseeability regarding the injury. The “‘ordinary skill and diligence’” prong of the test constitutes the primary source of controversy among the courts.⁵⁹

A. *Negligence Standard*

Some courts have used simple negligence standards when determining whether a *health* care provider owes a duty to third parties.⁶⁰ For example, in *Schuster v. Altengerg*,⁶¹ a doctor failed to warn his patient that driving an automobile could be dangerous.⁶² While she was driving, the patient struck another vehicle killing herself and injuring others.⁶³ The Wisconsin Supreme Court declared that a doctor's negligent failure to properly treat a psychiatric condition may constitute harm-in-fact to the patient and to third

Health Ctr., Inc., 590 So. 2d 444, 445 (Fla. App. 1991) (holding that hospitals owe no duty to third parties who suffer injury at the hands of an outpatient).

59. See Christine E. Stenger, Note and Comment, *Taking Tarasoff Where No One Has Gone Before: Looking at “Duty to Warn” Under the AIDS Crisis*, 15 ST. LOUIS U. PUB. L. REV. 471, 475 (1996) (presenting a standard where therapists are judged by their “‘reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of that professional specialty under similar circumstances’”). The “‘ordinary skill and diligence’” prong was established primarily as a solution to the lack of certainty inherent in psychiatric diagnosis and prediction. See *id.* at 477 (establishing this prong because of the difficulty in predicting whether a patient will act violently toward another). One example of an alternative to this prong is Ohio's “‘good faith rule,’” wherein the mental health care provider's duty to third parties includes both the more objective *Tarasoff* standard, as well as, a more subjective requirement. See *id.* at 485 (stating that a doctor may be held liable for his patient's subsequent actions when he failed to act in good faith in terminating his patient's medication because he did not consider the consequences that related to the public from his actions).

60. See *Schuster*, 424 N.W.2d at 164 (imposing a regular negligence standard in determining whether a third party duty exists).

61. 424 N.W.2d 159 (Wis. 1988).

62. See *Schuster v. Altengerg*, 424 N.W.2d 159, 161-62 (Wis. 1988) (establishing the gravamen of the complaint against the treating physician).

63. See *id.* at 166 (discussing the harm caused by the mental patient while at the wheel).

parties, provided the plaintiff can establish that the patient's behavior could have been controlled or corrected with proper treatment.⁶⁴ The court further stressed that an injury resulting from a doctor's failure to warn a patient not to operate a motor vehicle was foreseeable.⁶⁵ The *Schuster* court expressly rejected the *Tarasoff* requirement, concluding that a duty to warn or protect is not limited to situations in which a threat has been made to a readily identifiable target.⁶⁶

B. *Duty to the General Public*

One court has taken an extremely broad approach to the duty owed by mental health care providers to third parties. In *Bradley Center, Inc. v. Wessner*,⁶⁷ a patient was voluntarily admitted to a mental hospital for the treatment of anger toward his wife for engaging in an extramarital affair.⁶⁸ Although aware of the potential danger to the patient's wife, the nursing staff issued an unrestricted weekend pass to the patient.⁶⁹ During that weekend, the patient killed his spouse.⁷⁰

The *Wessner* court rejected the notion that the duty to warn arises from the doctor-patient relationship, instead concluding that it stems from "the general duty one owes to all the world not to subject them to an unreasonable risk of harm."⁷¹ Specifically, the court held that:

Where the course of treatment of a mental patient involves an exercise of 'control' over him by a physician who knows or should know that the patient is likely to cause bodily harm to others, an independent duty arises from that relationship and falls upon the physician to

64. *See id.* (presenting the Wisconsin Supreme Court's outline of a simple negligence standard).

65. *See id.* (focusing on the foreseeability element of the court's decision to hold the physician liable under simple negligence).

66. *See id.* at 165 (re-emphasizing that a physician will not be found negligent for failing to correctly diagnose a patient so long as the physician conforms to the accepted standard of care and no threat has been made to a readily identifiable person).

67. 296 S.E.2d 693 (Ga. 1982).

68. *See Bradley Ctr., Inc. v. Wessner*, 296 S.E.2d 693, 694 (Ga. 1982).

69. *See id.* at 694.

70. *See id.*

71. *Id.* at 695 (reasoning that there is a duty owed by mental health care providers to warn others against their dangerous patients).

exercise that control with such reasonable care as to prevent harm to others at the hands of the patient.⁷²

Thus, although the court announced a duty to the general public, it undertook to limit that duty to situations in which the doctor exercises control over the patient.⁷³ Notwithstanding this limitation, the court concluded that this control exists even when a patient is voluntarily committed.⁷⁴

C. *Duty to Foreseeable Victims*

Many courts have limited the duty owed by a mental health care provider to only those third parties who are foreseeable victims.⁷⁵ For example, in *Wofford v. Eastern State Hospital*,⁷⁶ the Oklahoma Supreme Court held that when a therapist knows or should know that his patient's dangerous propensities present an unreasonable risk of harm to others, the therapist has a duty not to release the patient.⁷⁷ Because the plaintiffs in *Wofford* failed to establish that the hospital knew or should have known of the patient's violent propensities, the court held that there was no element of foresee-

72. *Id.* at 695-96 (defining the duty owed to third parties by those exercising control over the patient).

73. *See Bradley Ctr.*, 296 S.E.2d at 695 (emphasizing that the broad duty to warn all of the risk of harm from dangerous patients is limited to circumstances wherein the patient is within the doctor's control).

74. *See id.* at 692-95 (extending the duty of a doctor to warn even when the exercise of control is over patients who have been voluntarily committed).

75. *See Thompson v. County of Alameda*, 614 P.2d 728, 738 (Cal. 1980) (imposing a duty to warn if there is a "predictable threat of harm to a named or readily identifiable victim or group of victims who can be effectively warned of the danger"); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976) (imposing a duty to warn when a patient poses a risk of harm to a foreseeable victim); *Evans v. Morehead Clinic*, 749 S.W.2d 696, 699 (Ky. Ct. App. 1988) (holding that a therapist has a duty to protect readily identifiable victims of danger from a patient's threats); *Peterson v. State*, 671 P.2d 230, 237 (Wash. 1983) (imposing a duty to protect third persons who might foreseeably be endangered by a patient's drug related problems); *Schuster v. Altenberg*, 424 N.W.2d 159, 165 (Wis. 1988) (applying a duty to warn when "it [is] foreseeable that an act or omission . . . may cause harm to someone" without limiting the circumstance to that which includes a readily identifiable victim).

76. 795 P.2d 516 (Okla. 1990).

77. *See Wofford v. Eastern State Hosp.*, 795 P.2d 516, 520 (Okla. 1990) (holding that a therapist has a duty to retain a patient whom the therapist knows, or should know, presents a risk to foreseeable victims); *Peterson*, 671 P.2d at 239 (establishing that the State has an obligation to take reasonable precautions to protect others from a state hospital patient's dangerous propensities).

ability, and hence no duty on the part of the hospital.⁷⁸ Additionally, in *Rum River Lumber Co. v. State*,⁷⁹ the Minnesota Supreme Court coupled the two elements of foreseeability and control,⁸⁰ finding that when a hospital foresees or should foresee that a patient presents an unreasonable risk of harm and has control over that patient, the hospital must exercise reasonable care to prevent that patient from injuring a third party.⁸¹

D. *Duty Only If Control Over Patient Exists*

The State of Virginia bases a mental health care provider's duty to third parties on the degree of control the therapist or hospital exercises over the patient.⁸² For example, in *Nasser v. Parker*,⁸³ the victim, Angela Nasser Lemon, had a "relationship" with the patient, Edwards.⁸⁴ When Angela informed Edwards of her intention to end their affair, he held a gun to her head and threatened to kill her.⁸⁵ Because this was not the first time Edwards had exhibited such behavior against women,⁸⁶ Angela went into hiding for fear of losing her life.⁸⁷ Soon after, Edwards visited his psychiatrist of seventeen years, Charles Parker.⁸⁸

78. See *Wofford*, 795 P.2d at 520 (holding that because there was no foreseeability, no duty exists on the part of the hospital to warn third parties of the risk of danger posed by its patient).

79. 282 N.W.2d 882 (Minn. 1979).

80. See *Rum River Lumber Co. v. State*, 282 N.W.2d 882, 882 (Minn. 1979) (combining the two elements of control and foreseeability to establish the criteria necessary to impose a duty).

81. See *id.* (imposing a duty to prevent harm to third parties when a hospital can foresee such harm and has control over the patient); see also *Lundgren v. Fultz*, 354 N.W.2d 25, 28 (Minn. 1984) (requiring the elements of both control and foreseeability in imposing a mental health care provider's duty to prevent harm to third parties).

82. See *Nasser v. Parker*, 455 S.E.2d 502, 506 (Va. 1995) (holding that a therapist's duty to third parties does not arise unless the extent of control over the patient is greater than that of an ordinary doctor-patient relationship).

83. 455 S.E.2d 502 (Va. 1995).

84. See *Nasser v. Parker*, 455 S.E.2d 502, 502 (Va. 1995) (establishing the nature of the relationship between the murder victim and the patient).

85. See *id.* at 502-03 (recapping the patient's threat of violence against Angela).

86. See *id.* (discussing the recurring nature of the patient's violence toward women who rejected his advances).

87. See *id.* at 503.

88. See *id.* (establishing the long-term relationship between Edwards and his psychiatrist).

The court noted that Parker was not only aware of Edwards's general problem with women, but was also aware of his specific threat against Angela.⁸⁹ Parker concluded that "Edwards's mental condition was deteriorating and . . . [he] needed prolonged intensive therapy in a mental hospital."⁹⁰ For unexplained reasons, Edwards was admitted to an unsecure section of the hospital on a voluntary basis.⁹¹ Upon learning that Edwards had been hospitalized for what she believed to be a prolonged period, Angela came out of hiding.⁹² Within a week of his release from the hospital, Edwards made good on his threat and murdered Angela.⁹³ The court determined that neither the hospital nor the psychiatrist warned Angela of the potentially temporary nature of Edwards's admission.⁹⁴

On appeal, the Virginia Supreme Court concluded that a mental health care provider's duty to protect third parties is dependent upon the existence of a special relationship.⁹⁵ The court further explained that this special relationship depends on whether the defendant has taken control over the patient within the meaning expressed by section 319 of the Restatement (Second) of Torts,⁹⁶ which requires more than a mere doctor-patient relationship.⁹⁷ To impose a duty under this section, the doctor must assert control over the patient such that the patient is in the personal care and custody of the mental health care provider.⁹⁸ The court found that

89. *See Nasser*, 455 S.E.2d at 503 (establishing that the risk to Angela was foreseeable to the psychiatrist).

90. *Id.* (suggesting that despite the fact that Parker knew of Edwards's worsening condition, Parker did not inform Lemon of Edwards's release from the hospital the next day).

91. *See id.* (describing the circumstances of Edwards's admission to the mental hospital).

92. *See id.*

93. *See id.*

94. *See id.* (determining that despite the apparent threat to Lemon's life she was not informed of Edwards's release from the hospital).

95. *See Nasser*, 455 S.E.2d at 506 (outlining that no duty exists in the absence of a special relationship).

96. *See id.* at 505 (relying on proof by the plaintiff to show that the defendant had taken control of a third person).

97. *See id.* at 506 (explaining that a doctor is required to "assert custody" over the patient for a duty based on a special relationship to arise).

98. *See id.* (establishing that a doctor must import a minimal degree of control over the patient so that the doctor will be deemed to have a duty to third parties).

neither Parker nor the hospital had sufficient control over Edwards to render them liable for failing to warn Angela.⁹⁹

E. *Readily Identifiable Victim*

The majority of states that have addressed this issue follow the *Tarasoff/Thompson* rule, which states that when a mental health care provider foresees or should foresee that a patient poses a serious risk of violence to a readily identifiable third person, a duty arises to use reasonable care to protect that individual against the danger.¹⁰⁰ For example, in *Bardoni v. Kim*,¹⁰¹ a two-pronged test was established to determine whether a third party is readily identifiable.¹⁰² First, the plaintiff must show that the therapist knew or should have known that the patient posed a serious threat of harm to others.¹⁰³ Second, the plaintiff must establish that the therapist knew or should have known that the patient was dangerous to a specific third party.¹⁰⁴ According to the *Bardoni* court, proving that had the doctor asked more specific questions, the doctor would have been able to identify the potential victim is insufficient to establish this second prong.¹⁰⁵

Some courts draw a distinction between the duty to warn and the duty to confine.¹⁰⁶ The *Tarasoff* court avoided this distinction by taking the position that the therapist owes a duty to use reasonable care to *protect* the intended victim.¹⁰⁷ This duty may require warn-

99. *See id.* (stating the court's reasoning for failing to find a duty on behalf of the psychiatrist to the third party).

100. *See* *Estates of Morgan v. Fairfield Family Counseling*, 673 N.E.2d 1311, 1320-21 (Ohio 1997) (outlining the acceptance of some form of the *Tarasoff/Thompson* duty in the majority of courts that have addressed the issue).

101. 390 N.W.2d 218 (Mich. Ct. App. 1986).

102. *See* *Bardoni v. Kim*, 390 N.W.2d 218, 222 (Mich. Ct. App. 1986) (outlining the test for determining whether a third party victim is reasonably identifiable).

103. *See id.* (establishing the first prong of the test for the readily identifiable standard).

104. *See id.* (recounting the second prong of the readily identifiable standard for the imposition of a duty to third parties).

105. *See id.* at 222-23 n.6 (emphasizing that a duty will not necessarily be imposed simply because a doctor should have asked specific questions that would have led to a specific victim).

106. *See* *Kerrville State Hosp. v. Clark*, 900 S.W.2d 425, 436 n.13 (Tex. App.—Austin 1995), *rev'd on other grounds*, 923 S.W.2d 523 (Tex. 1996) (finding important differences between the duty to warn and the duty to confine).

107. *See* *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976) (indicating that the court took the position that the therapist must protect the victim).

ing the victim, notifying the police, or taking any other steps reasonably necessary under the circumstances.¹⁰⁸

F. *No Duty*

Not all states require a duty to warn the victim. At least two states have declined to find a *Tarasoff/Thompson* duty on the part of a therapist to protect third parties from dangerous patients.¹⁰⁹ In *Leonard v. State*,¹¹⁰ the plaintiff was severely injured when he was beaten by a recently released mental patient.¹¹¹ The patient had been involuntarily committed by his mother and required special assault and suicide precautions.¹¹² The precautions were suspended within three days of the patient's admission.¹¹³ After undergoing lithium therapy, the patient, Parrish, was released with the recommendation that he continue treatment on an outpatient basis.¹¹⁴ The victim, Leonard, claimed that the physicians failed to properly treat Parrish and discharged him knowing that he was a threat to others.¹¹⁵ In refusing to impose a duty upon mental health care providers to the general public, the court reasoned that doing so would not have the effect of decreasing the type of risk that led to the plaintiff's injury.¹¹⁶ The court distinguished the facts presented in *Leonard* from a situation in which a psychiatrist would have reason to believe that a particular individual would be endangered by the patient's release.¹¹⁷ In refusing to decide the duty owed in the latter situation,¹¹⁸ the court held that the possibility of

108. *See id.* (describing actions the therapist may be responsible to take).

109. *See Boynton v. Burglass*, 590 So. 2d 446, 448 (Fla. Dist. Ct. App. 1991) (refusing to impose third party duty upon therapist because the relationship did not involve the requisite element of control); *Leonard v. State*, 491 N.W.2d 508, 512 (Iowa 1992) (refusing to impose third party duty on mental health care providers based upon the particular circumstances).

110. 491 N.W.2d 508 (Iowa 1992).

111. *See Leonard v. State*, 491 N.W.2d 508, 510 (Iowa 1992).

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

116. *See Leonard*, 491 N.W.2d at 512 (discussing public policy reasons underlying the court's refusal to impose civil liability on a therapist for failing to warn the general public of risks posed by dangerous patients).

117. *See id.* (suggesting that the presence of a different fact scenario might alter the court's holding).

118. *See id.* (maintaining that the facts needed to properly decide the issue of such a duty are not before the court).

limitless liability and the customary requirement that patients be treated in the least restrictive environment possible outweighed any benefits that could result from the imposition of a therapist's duty to an individual member of the general public.¹¹⁹

A Florida court of appeals also rejected the *Tarasoff/Thompson* duty by declining to hold a therapist liable for the acts of his patient.¹²⁰ In *Boynton v. Burglass*,¹²¹ the court implied that control over a patient could create a special relationship resulting in an affirmative duty.¹²² Notwithstanding the recognition of this duty, *Boynton* indicates that because the patient was admitted voluntarily, the requisite element of control was not present and no duty existed.¹²³

IV. DEVELOPMENT OF THE DUTY TO WARN IN TEXAS

The Texas Supreme Court has held that there is no duty to warn third parties.¹²⁴ Nevertheless, some lower courts in Texas have indicated a duty to third parties through a series of cases dating back to 1983.¹²⁵ Consistent with the Texas Supreme Court, however the Texas Legislature also has declined to establish a duty to warn.

A. *The Duty to Warn in Texas Statutory Law*

Texas, through its legislation, has sought to ensure the confidentiality of communications between a patient and his mental health

119. *See id.* (explaining that a plaintiff would always be able to produce an expert witness that would testify that the defendant physician was negligent).

120. *See Boynton v. Burglass*, 590 So. 2d 446, 448 (Fla. Dist. Ct. App. 1991) (finding that a review of case law in Florida revealed no support for imposing liability for third party actions, particularly in the field of psychiatry).

121. 590 So. 2d 446 (Fla. Dist. Ct. App. 1991).

122. *See Boynton v. Burglass*, 590 So. 2d 446, 449 (Fla. Dist. Ct. App. 1991) (indicating that some jurisdictions have found affirmative duties to third parties created by the doctor-patient relationship).

123. *See id.* (finding that psychiatrists do not have a relationship with their patients, due to the nature of the science, that would warrant a duty to warn); *accord* *Perreira v. State*, 768 P.2d 1198, 1211 (Colo. 1989) (explaining that the therapist's control over the patient and the duty therein are greater when the patient has been admitted to a facility involuntarily).

124. *See Thapar v. Zezulka*, 994 S.W.2d 635, 640 (Tex. 1999) (failing to impose a duty on health care providers to warn third parties).

125. *See id.* at 637 (failing to impose a duty on health care providers to warn third parties).

care professional.¹²⁶ The Texas Legislature provides an exception that allows disclosure to law enforcement if the professional determines that there is a probability of imminent physical harm.¹²⁷ However, the ability to disclose confidential information is permissive rather than mandatory.¹²⁸

The Texas Legislature has included a disincentive for disclosure by providing a civil cause of action against the mental health care provider for improper disclosure.¹²⁹ Thus, the mental health care professional who discloses threats made during a counseling session faces the possibility of a civil trial and payment of monetary damages for making the disclosure.¹³⁰ The mental health care professional must therefore balance the potential public good of violating the patient's confidentiality to protect the threatened individual with potentially devastating personal liability. Furthermore, breaking the patient's confidentiality may damage the mental health care provider's professional reputation, resulting in a loss of business because individuals will be less likely to trust them with confidential information.

B. *The Duty to Warn in Texas Case Law*

Currently, no explicit duty to warn third parties of potential harm by a physician's patient exists in Texas. However, since 1983, Texas's lower courts have been grappling with the apparent need to provide mental health care professionals with clear guidelines in this area of the law. Gradually, the courts have laid the foundation

126. See TEX. HEALTH & SAFETY CODE ANN. § 611.002 (Vernon 1992) (providing that confidential communications between a patient and a mental health care professional may not be disclosed); *Tumlinson v. State*, 757 S.W.2d 440, 442 (Tex. App.—Dallas 1988, writ ref'd) (arguing the policy reasons for psychotherapist-patient privilege).

127. See TEX. HEALTH & SAFETY CODE ANN. § 611.004 (Vernon 1992) (establishing several exceptions to the psychotherapist-patient privilege, including disclosure to medical or law enforcement personnel).

128. See *id.* (stating that the mental health professional may disclose confidential information to medical or law enforcement personnel).

129. Compare TEX. HEALTH & SAFETY CODE ANN. § 611.005 (Vernon & Supp. 1999) (authorizing a civil cause of action when disclosure of confidential information is made without the patient's permission), with TEX. HEALTH & SAFETY CODE ANN. § 611.004(a)(2) (Vernon & Supp. 1999) (authorizing the disclosure of confidential information to medical or law enforcement personnel if the professional determines there is a likelihood of imminent injury to the patient or others).

130. See TEX. HEALTH & SAFETY CODE ANN. § 611.005 (Vernon & Supp. 1999) (providing a civil cause of action for monetary damages).

for recognizing some types of *Tarasoff/Thompson* duties to reach the proper balance between the patient's right to confidentiality and the public's interest in safety.

1. *Gooden v. Tips*

In *Gooden v. Tips*,¹³¹ the District Court of Appeals in Tyler entertained, as a matter of first impression, the issue of whether a physician owes a duty to third parties in Texas.¹³² The plaintiffs were injured when the defendant struck their vehicle while under the influence of the drug Quaalude, which had been prescribed by her doctor.¹³³ The plaintiffs sued the driver and also her doctor for failing to warn her not to drive while under the drug's influence.¹³⁴

The court determined that when a physician prescribes a drug that the physician knows or should know has an intoxicating effect,¹³⁵ the physician owes a duty to the public to warn the patient not to drive while under the influence of the drug.¹³⁶ Because there was no Texas precedent addressing this issue,¹³⁷ the court looked to cases in other jurisdictions and concluded that the imposition of such a duty was reasonable.¹³⁸ The court was careful to note that its decision did not fall into the *Tarasoff* category because the case at bar lacked the critical element of control over the patient.¹³⁹ Emphasizing this point, the court stated:

[W]e point out that we do not hold that a duty arose on the part of Dr. Tips to *control* the conduct of his patient, as was imposed in cases

131. 651 S.W.2d 365 (Tex. App.—Tyler 1983, no writ).

132. *See Gooden v. Tips*, 651 S.W.2d 364, 366 (Tex. App.—Tyler 1983, no writ) (noting that the issue of a physician's third party duty has never been decided in Texas).

133. *See id.* at 365.

134. *See id.* (discussing the failure of the defendant physician to warn his patient not to drive or operate machinery while under the influence of her prescribed medication especially in light of the physician's knowledge of the defendant's history of drug abuse).

135. *See id.* (holding that a physician who prescribed an intoxicating drug to a patient has a duty to warn the patient of the drug's potential effects to reduce the likelihood of injury to third parties).

136. *See id.* at 370 (indicating also that Dr. Tips knew that Edith Goodpasture, his patient and the driver in this case, had a history of drug abuse and could not be trusted to take her medication as prescribed).

137. *See Gooden*, 651 S.W.2d at 366 (noting the lack of Texas cases on this issue).

138. *See id.* at 368-70 (relying on courts imposing such a duty in Washington, Iowa, and Tennessee).

139. *See id.* at 370 (distinguishing *Tarasoff*, which imposes the element of control over the patient before finding a duty to warn).

such as *Tarasoff* The holdings in those cases were grounded on the fact that the physician had "taken charge" of a third person whom he knew or should have known was likely to cause bodily harm to others if not controlled.¹⁴⁰

After imposing a third-party duty upon physicians, the court addressed the doctor's public policy argument that such a duty would discourage physicians from prescribing drugs with the incidental effect impairing driving.¹⁴¹ In dismissing this concern, the court reiterated that the duty was only to warn, not to be "an insurer of highway safety."¹⁴² Consequently, the court's decision was limited to the duty to warn patients not to drive while under the influence of certain drugs.¹⁴³

2. *Otis Engineering Corporation v. Clark*

Although the Texas Supreme Court has refused to impose a duty upon mental health care providers to warn third parties,¹⁴⁴ it has imposed a similar duty in other situations.¹⁴⁵ In 1983, the same year that *Gooden* was decided, the Texas Supreme Court in *Otis Engineering Corp. v. Clark*¹⁴⁶ extended a duty to employers to protect third parties from employees who are known to be intoxi-

140. *Id.* (rejecting the application of the *Tarasoff* line of cases that impose the burden on the physician to control a patient).

141. *See id.* at 371 (articulating the doctor's argument that such a duty would cause physicians to "adopt ultra-conservative treatment procedures").

142. *Gooden*, 651 S.W.2d at 371 (quoting *Wharton Transp. v. Bridges*, 606 S.W.2d 521, 521 (Tenn. 1980)) (emphasizing that the duty is not to control the behavior of the patient but rather to warn the patient how his ability to drive may be impaired).

143. *See id.* at 372. The *Gooden* court was careful to make clear that it was not adopting the *Tarasoff* standard, noting that the physician had not taken charge of the patient. *See id.* at 370. The court stated, "We hold only that, under the facts here alleged, Dr. Tips may have had a duty to warn his patient not to drive. We do not hold he had a duty to prevent her from driving, if she so desired." *Id.*

144. *See Thapar v. Zezulka*, 994 S.W.2d 635, 639 (Tex. 1999) (refusing to impose a *Tarasoff* duty to warn upon health care providers because of inconsistencies with a Texas confidentiality statute governing mental health professionals).

145. *See Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 311 (Tex. 1983) (imposing a duty upon an employer to use reasonable care when sending home an employee known to be intoxicated); *see also Bird v. W.C.W.*, 868 S.W.2d 767, 770 (Tex. 1994) (holding that a psychiatrist owes no duty to the father of a child-patient for an incorrect diagnosis of sexual abuse).

146. 668 S.W.2d 307 (Tex. 1983).

cated.¹⁴⁷ In *Otis Engineering*, a supervisor at the defendant corporation sent his employee home with knowledge of the worker's intoxication.¹⁴⁸ As a result of his inebriated condition, the employee struck another vehicle and fatally injured its passengers.¹⁴⁹ The surviving husbands of the passengers brought a wrongful death action against the employer corporation.¹⁵⁰

After the appellate court reversed the trial court's grant of summary judgment in favor of the corporation,¹⁵¹ the Texas Supreme Court held that a duty should be imposed on the employer under these circumstances.¹⁵² The court explained that the employer undertook the affirmative act of sending the employee home with knowledge that he was intoxicated, and in so doing affected the interests of others.¹⁵³ By undertaking this affirmative act, the employer assumed a duty to proceed with reasonable care.¹⁵⁴

In support of imposing this new duty, the court first acknowledged that, as a general rule, an individual is under no duty to control the conduct of another.¹⁵⁵ Additionally, while certain types of relationships impose this duty despite the general no-duty rule,¹⁵⁶

147. See *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 311 (Tex. 1983) (holding that a duty exists on the part of an employer to exercise reasonable care in taking control of an intoxicated employee).

148. See *id.* at 308.

149. See *id.* (noting that the injuries caused by the inebriated employee's driving home from work included fatalities).

150. See *id.* (stipulating that the cause of action brought by the decedents' husbands was a wrongful death action against the corporation for whom the inebriated employee worked).

151. See *id.* (tracing the procedural history of Otis's motion for summary judgment).

152. See *Otis Eng'g Corp.*, 668 S.W.2d at 311 (holding that genuine issues of material fact existed as to whether Otis acted as a reasonably prudent employer in exercising control over its employee).

153. See *id.* (concluding that once an employer has undertaken to act, he must exercise reasonable care in preventing an employee from causing harm to third parties).

154. See *id.* at 309 (reasoning that the employer, by taking action in sending the employee home, had assumed a duty to act with reasonable care). The court relied on the well-established notion that generally there is no duty to aid another, although there is a duty to avoid any act that may cause any further harm. See *id.* (citing WILLIAM PROSSER, *THE LAW OF TORTS* § 56, at 343 (4th ed. 1971)) (restating the principle that if a person does act to aid another, he assumes the duty to act and must act with reasonable care to avoid worsening the situation).

155. See *id.* (explaining that there is generally no duty to constrain another's behavior even when practicality suggests such domain could be undertaken).

156. See *id.* (citing Restatement (Second) of Torts § 316-20 for the prospect that some relationships result in the imposition of a duty).

the court stipulated that the employer-employee relationship results in a duty on the part of the employer only if the employee commits a tort on the employer's property or with the employer's possessions.¹⁵⁷ As such, this duty was not based on the employer-employee relationship, but on the principle that an individual "who voluntarily enters an affirmative course of action affecting the interests of another is regarded as assuming a duty to act and must do so with reasonable care."¹⁵⁸

After examining decisions from other states imposing similar duties,¹⁵⁹ the court concluded that an employer must exercise reasonable care when he takes control of an incapacitated employee.¹⁶⁰ The court further analogized this duty to situations in which a defendant exercised control over a dangerous person, as provided in the Restatement (Second) of Torts, section 319.¹⁶¹ In addition, the court further qualified the newly-created duty by emphasizing that it is not "an absolute duty to insure safety, but requires only reasonable care."¹⁶²

Much of the Texas Supreme Court's reasoning includes references to Dean Prosser's observations that the concept of duty is ambiguous and subject to change as public policy requires.¹⁶³ This approach is reflected in the way that the court framed the issue: "What we must decide is if changing social standards and increas-

157. See *Otis Eng'g Corp.*, 668 S.W.2d at 309 (classifying the duty arising from the employer-employee relationship as a narrow one).

158. *Id.* (dispelling the notion that the employer-employee relationship in itself results in the imposition of a duty).

159. See *id.* at 310-11 (reviewing the holdings of three cases in which the courts imposed a duty of reasonable care upon the employer after he undertook affirmative acts concerning an employee's behavior).

160. See *id.* at 311 (providing the conditions that give rise to an employer's duty to proceed with reasonable care in controlling an employee).

161. See *id.* (referring to a duty imposed in cases in which the defendant was able to exercise control over a person with dangerous propensities to avoid harm to a third person); see also RESTATEMENT (SECOND) OF TORTS § 319, at 129 (1965) (stating that "one who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm").

162. *Otis Eng'g Corp.*, 668 S.W.2d at 311 (stressing that the duty of the employer who exercises control over a dangerous employee extends only to reasonable care).

163. See *id.* at 310 (quoting WILLIAM PROSSER, THE LAW OF TORTS § 56, at 257 (4th ed. 1971)) (referring to Prosser's observation that "'there is nothing sacred about 'duty,' which is nothing more than a word, and a very indefinite one, with which we state our conclusion'").

ing complexities of human relationships in today's society justify imposing a duty upon an employer to act reasonably when he exercises control over his [employees]."¹⁶⁴ Notably, the court's focus on the employer's control over the employee reflects Virginia's rationale for imposing a duty upon mental health care providers to warn third parties of a patient's threats of harm.¹⁶⁵

3. *Williams v. Sun Valley Hospital*

Four years after the *Gooden* and *Otis* decisions, the court of appeals in El Paso reviewed the reasoning of *Tarasoff* and *Thompson*. In *Williams v. Sun Valley Hospital*,¹⁶⁶ a voluntary patient being treated for depression at Sun Valley Hospital jumped over the walls of the complex and ran in front of a car driven by the plaintiff.¹⁶⁷ As a result of the ensuing accident, the plaintiff was seriously injured and sued the hospital for negligent care of the patient.¹⁶⁸ After examining the *Tarasoff* duty and noting the qualified duty imposed in *Thompson*, the *Sun Valley* court refused to impose liability in this case, finding that the hospital owed no duty to warn the plaintiff.¹⁶⁹ "Where there is no allegation of a threat or danger to a readily identifiable person, we, like those courts whose logic we follow, are unwilling to impose a blanket liability upon all

164. *Id.* (noting the changing concept of duty). The court relied in part on Dean Prosser's observation that "[c]hanging social conditions lead constantly to the recognition of new duties. No better general statement can be made, than the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists." *Id.* (expressing that knowledge of the dangerous condition is no longer required to impose a duty).

165. *See Nasser v. Parker*, 455 S.E.2d 502, 506 (Va. 1995) (imposing a third-party duty upon a mental health care provider if he or she exercises control over the patient).

166. 723 S.W.2d 783 (Tex. App.—El Paso 1987, writ ref'd n.r.e.).

167. *See Williams v. Sun Valley Hosp.*, 723 S.W.2d 783, 784 (Tex. App.—El Paso 1987, writ ref'd n.r.e.). The patient, Herrera, was allowed participation in group activities and access to the hospital grounds. *See id.* At the time of the events leading up to the suit, Herrera scaled a seven to ten foot wall and proceeded to hurl himself in front of the plaintiff's vehicle. *See id.* (explaining that this behavior was caused by schizophrenia). This episode occurred despite the fact that Herrera was only missing for approximately ten minutes. *See id.* (leading up to the appellant's claims that the hospital was negligent in failing to construct a wall high enough to contain its patients).

168. *See id.* (discussing the plaintiff's claim of negligence against the hospital for injuries she sustained from the collision resulting in the patient's death).

169. *See id.* at 787 (relating that the court acknowledged the limiting effect of the *Thompson* requirement of a clearly identifiable victim on the *Tarasoff* third-party duty).

hospitals and therapists for the unpredictable conduct of their patients with a mental disorder."¹⁷⁰

Unlike, the *Wessner* court, which imposed a duty of control even when the patient is voluntarily committed,¹⁷¹ the *Sun Valley* court concluded that the hospital had no duty to confine the patient, as there was no valid civil commitment order.¹⁷² Further, the court concluded that *Otis Engineering* was not applicable to the facts of this case because the hospital had not taken affirmative steps to place the patient on the streets.¹⁷³ Although not explicitly recognizing a *Tarasoff/Thompson* duty in Texas, the *Sun Valley* court implied as much in its application of the "readily identifiable victim" standard.¹⁷⁴ The intended victim does not have to be specifically named but he must be "readily identifiable" for liability to attach.¹⁷⁵ There can be no blanket liability for failing to warn the general public of a threat; rather there must be a foreseeable or a readily identifiable victim.¹⁷⁶

170. *Id.* (denying the imposition of a duty when there is no reasonably identifiable person).

171. *See Bradley Ctr., Inc. v. Wessner*, 296 S.E.2d 693, 695 (Ga. 1982) (imposing a duty of control over a "neutral" patient by a doctor who knows or should know that the patient is likely to cause harm to another).

172. *See Williams*, 723 S.W.2d at 787 (unwilling to impose liability on therapists and hospitals for their patients' unpredictable conduct and refusing to impose a duty to involuntarily confine an individual without a valid civil commitment order).

173. *See id.* (distinguishing the instant case from *Otis Engineering*). "We do not view this as a case of employer nonfeasance. In our case, the hospital did not by its affirmative conduct place Herrera out on the street where the accident occurred." *Id.* (confirming that the patient was not a danger or threat to another, and the hospital and therapists should not be held liable for their patients' unpredictable behavior). In addition, the court noted that while the employee in *Otis Engineering* manifested physical signs of inebriation, Herrera had never manifested an intention to escape from the hospital prior to the day of the events in question. *See id.* (reaffirming that therapists and hospitals should not be liable for their patients' unforeseen and unpredictable conduct).

174. *See id.* (basing the decision not to impose a duty on the lack of "threat or danger to a readily identifiable person"). Implicitly, the court seems to suggest that the presence of such a threat might have resulted in a different holding. *See id.* (relying on the allegation of whether a patient presented a danger or threat to a readily identifiable victim in determining whether to impose liability on therapists and hospitals).

175. *See Thompson v. County of Alameda*, 614 P.2d 728, 734 (Cal. 1980) (relating that the victim must be foreseeable or readily identifiable as a precondition to liability).

176. *See id.* (denying liability for general threats and requiring an analysis of foreseeability on a case-by-case evaluation).

4. *Bird v. W.C.W.*

In 1994, the Texas Supreme Court decided *Bird v. W.C.W.*,¹⁷⁷ which dealt with the issue of a physician's duty to third parties. In *Bird*, a psychologist mistakenly determined that a child had suffered sexual abuse at the hands of the child's father.¹⁷⁸ The psychologist signed an affidavit and provided the affidavit to the child's mother.¹⁷⁹ The mother then used the affidavit against the father in a child custody and visitation hearing in an effort to modify the court order.¹⁸⁰ The charges were ultimately dropped and the psychologist was sued.¹⁸¹ The Texas Supreme Court found that a mental health care professional owes no duty to a parent when there is no doctor-patient relationship.¹⁸²

While the court acknowledged that harm to the father was foreseeable under these circumstances, foreseeability alone was not enough to establish a legal duty to the father on the part of the psychologist.¹⁸³ Citing courts of appeals' decisions, the Texas Supreme Court reasoned there was no duty because there was no physician-patient relationship between the father and the health care provider.¹⁸⁴ The court further distinguished the contrary holding in *Gooden v. Tips*¹⁸⁵ on two grounds.¹⁸⁶

177. 868 S.W.2d 767 (Tex. 1994).

178. See *Bird v. W.C.W.*, 868 S.W.2d 767, 768 (Tex. 1994).

179. See *id.*

180. See *id.*

181. See *id.* (discussing the father's suit against the psychologist for erroneously determining that his child had been sexually abused).

182. See *id.* at 770 (refusing to hold the psychologist liable for misdiagnosis of a child because there was no duty to the father regarding misdiagnosis).

183. See *Bird*, 868 S.W.2d at 769 (concluding that foreseeability in itself is not enough to establish a new duty even though foreseeability is one of the elements to be considered in determining whether to impose a duty).

184. See *id.* at 769-70 (indicating several cases where there was no physician-patient duty to a third party). It is important to note that while these cases failed to find a duty to third parties, the duty at issue was to not misdiagnose as opposed to a duty to warn or protect from a dangerous patient. See *id.* at 770 (pointing to another case where there was a duty to warn a patient not to drive while taking a drug, but refusing to apply that limited duty to this case).

185. 651 S.W.2d 364 (Tex. App.—Tyler 1983, no writ).

186. See *Bird*, 868 S.W.2d at 770 (demonstrating that while *Gooden* focused on foreseeability, these facts did not involve foreseeability or involve a situation where the plaintiff was harmed by the direct actions of the patient).

First, the court compared the social value of the physician's actions.¹⁸⁷ The doctor in *Gooden* failed to warn his patient not to drive under the influence of a particular drug,¹⁸⁸ while the psychologist in *Bird* attempted to help a child whom she believed was a victim of sexual abuse.¹⁸⁹ The court had no trouble finding greater social value in the psychologist's actions in *Bird* than in the physician's action in *Gooden*.¹⁹⁰

Second, the court examined the cause of harm to the plaintiffs.¹⁹¹ In *Gooden*, the plaintiff was injured by the patient's driving while under the influence of a drug, whereas in *Bird* the plaintiff was injured by the psychologist's diagnosis of the patient.¹⁹² In *Bird*, the patient did not actually injure the plaintiff.¹⁹³ In *Gooden*, the patient was the direct cause of harm to the plaintiff, further enhancing the *Bird* court's finding of no duty.¹⁹⁴

In finding no duty on the part of the psychologist, the court acknowledged the difficulty in assessing whether a child has been sexually abused, and emphasized its interest in eradicating sexual abuse.¹⁹⁵ The court noted the availability of criminal sanctions against a person who knowingly reports false information concerning child abuse. This fact supported the court's view that accused

187. *See id.* (explaining that greater social value exists in addressing the problems of the sexually abused than in failing to warn a patient concerning drug side-effects).

188. *See id.* (emphasizing the low social utility in failing to inform patients regarding the side-effects of a drug).

189. *See id.* (finding "great social utility" in protecting a psychologist in examining and diagnosing sexual abuse).

190. *See id.* (concluding that the therapist acted properly because she did not owe a professional duty to the father for failing to correctly diagnose the child).

191. *See Bird*, 868 S.W.2d at 770 (implying that had the cause of the plaintiff's injury been the result of the patient and not the misdiagnosis, the court's conclusion may have been different).

192. *See id.* (concluding that the direct cause of the father's injury resulted from the psychologist's diagnosis and not from the patient's actions).

193. *See id.* (suggesting that where a patient directly causes the injury to the plaintiff, as in *Gooden*, a physician may owe a duty to a third party if the physician's negligence contributed to the plaintiff's injuries).

194. *See id.* (explaining the court's ruling that because the father was not harmed by the misdiagnosis, unlike the plaintiff in *Gooden*, the physician owed no duty).

195. *See id.* at 770-71 (recognizing countervailing interests, although refusing to impose a duty to communicate the identity of the abuser to third parties).

individuals have adequate protection without “the judicial imposition of a countervailing duty to third parties.”¹⁹⁶

5. *Kerrville State Hospital v. Clark*

The following year, the Third Court of Appeals in Austin heard *Kerrville State Hospital v. Clark*.¹⁹⁷ In *Kerrville State Hospital* (“*Kerrville*”), Gary Ligon was taken to the hospital for treatment after he threatened his estranged wife, Rebecca.¹⁹⁸ After a month’s stay, the hospital determined that Ligon was no longer dangerous and recommended to the county that he be placed on outpatient commitment.¹⁹⁹ Pursuant to a court order, Ligon was released.²⁰⁰ Later, Ligon voluntarily checked himself back into the Kerrville State Hospital, but was re-released at his request after only two days.²⁰¹ A week later, Ligon brutally murdered and dismembered Rebecca.²⁰²

After determining that the victim’s parents could assert a claim under the Texas Torts Claims Act,²⁰³ the court concluded that the hospital had a duty to use reasonable care in its release of Ligon.²⁰⁴ The key factor for the court was the hospital’s control over Ligon.²⁰⁵ Although he initially entered the hospital under a court

196. *Bird*, 868 S.W.2d at 769 (emphasizing the uncertainty of psychology and the difficulty of children communicating sexual abuse).

197. 900 S.W.2d 425 (Tex. App.—Austin 1995), *rev’d on other grounds*, 923 S.W.2d 523 (Tex. 1996).

198. *See Kerrville State Hosp. v. Clark*, 900 S.W.2d 425, 429 (Tex. App.—Austin 1995), *rev’d on other grounds*, 923 S.W.2d 523 (Tex. 1996) (discussing the hospitalization of Ligon following the threats against his wife).

199. *See id.* (explaining how Ligon came to be treated as an outpatient). Ligon, who had been arrested for his threats and resisting arrest, was committed by the County. *See id.* The Kerrville Institutional Review Board determined that he was not dangerous. *See id.* A Kerrville psychiatrist recommended to the County that Ligon be treated as an outpatient. *See id.*

200. *See id.*

201. *See id.*

202. *See id.* (describing Ligon’s brutal murder of Rebecca). As the court notes, “The record indicates that Gary decapitated, dismembered, and burned Rebecca’s body, and then attempted to hide the remains.” *Id.* at 429 n.1.

203. *See Kerrville State Hosp.*, 900 S.W.2d at 434 (allowing a cause of action for tort liability in the use of medical discretion).

204. *See id.* at 436 (limiting the duty to one of reasonable care and not to a burden of prescribing medication orally or by injection).

205. *See id.* (clarifying the factors that resulted in their decision).

order, Ligon's last visit was as a voluntary patient.²⁰⁶ Contrary to the *Boynton* court,²⁰⁷ however, the *Kerrville* decision does not appear to rest on the voluntariness of the patient's commitment.²⁰⁸ Rather, the court determined that the hospital assumed a duty of reasonable care when it permitted Ligon's voluntary re-entry.²⁰⁹

Because the court concluded that Kerrville State Hospital owed a duty to the general public to use reasonable care in its release of Ligon,²¹⁰ it did not reach the issue of the hospital's duty to warn. The court noted, however, that under the *Tarasoff/Thompson* line of cases, a psychiatrist has a duty to exercise reasonable care to protect identifiable victims from dangerous patients.²¹¹ According to the court, "[t]he foreseeable victim is the one who is said to be within the zone of danger, that is, subject to the probable risk of the patient's violent conduct."²¹² Therefore, because Rebecca was a foreseeable victim, as the person he initially threatened and motivated his hospitalization, the hospital may have had a duty to warn her.

Although the court's discussion of a duty to warn is pure dicta, it suggests the imposition of a duty broader than that of *Tarasoff/Thompson*, perhaps closer to that suggested by the *Wofford*

206. See *id.* at 429 (explaining that following his initial stay under court order, Ligon voluntarily checked into Kerrville State Hospital on May 22, 1990, only to be released at his own request on May 24, 1990).

207. See *Boynton v. Burglass*, 590 So. 2d 446, 449 (Fla. Dist. Ct. App. 1991) (refusing to recognize a third party duty because the patient was admitted voluntarily, and therefore the element of control was not sufficiently met).

208. See *Kerrville State Hosp.*, 900 S.W.2d at 433 (highlighting as dispositive the postcommitment actions of the hospital relating to its decision on whether to constrain or confine Ligon).

209. See *Boynton*, 590 So. 2d at 448 (suggesting that the hospital accepted the duty).

210. See *Kerrville State Hosp.*, 900 S.W.2d at 436 n.13 (deciding not to discuss the issue of Kerrville State Hospital's duty to warn). "Although we do not decide the issue of duty based on a failure to warn Rebecca of Gary's imminent release and his deteriorating mental condition, we note that a threat need not be made against a *specific victim* in order for the duty to warn to be imposed." *Id.* at 436-37 n.13 (categorizing the duty of reasonable care as a duty owed to the general public).

211. See *id.* (finding no burden on hospital staff in medicating by injection and no social utility in failing to do so). "When a psychiatrist determines, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, the psychiatrist has a duty to exercise reasonable care to protect the *foreseeable victim* of that danger." *Hamman v. County of Maricopa*, 775 P.2d 1122, 1127-28 (Ariz. 1989).

212. *Kerrville State Hosp.*, 900 S.W.2d at 437 n.13 (quoting *Hamman v. County of Maricopa*, 775 P.2d 1122, 1127-28 (Ariz. 1989)) (defining a foreseeable victim).

court.²¹³ The *Wofford* court held that a psychiatrist has the duty to exercise reasonable care in discharging mental patients.²¹⁴ Further, the duty arises when the psychiatrist knows or should know that the patient presents an unreasonable risk to foreseeable victims.²¹⁵

The Texas Supreme Court reversed the lower court's decision in *Kerrville* on a sovereign immunity issue,²¹⁶ thereby avoiding the issue of a hospital's duty to third parties. The dissent, in concluding that the hospital had waived sovereign immunity under the Texas Tort Claims Act,²¹⁷ squarely addressed the issue of third-party duty.²¹⁸ Justice Abbott, however, writing for the dissent, analyzed the third-party duty under the rationale of *Otis Engineering*²¹⁹ and determined that "[s]uch a duty may be analogized to cases in which a defendant can exercise some measure of reasonable control over a dangerous person when there is a recognizable great danger of harm to third persons."²²⁰

The dissent seems to follow the rule presented in the *Tarasoff/Thompson* line of cases. Although Justice Abbott agrees that mental health care providers owe no blanket duty to the public, he

213. See *Wofford v. Eastern State Hosp.*, 795 P.2d 516, 520 (Okla. 1990) (holding that a therapist has a duty to retain a patient whom the therapist knows, or should know, presents a risk to foreseeable victims). This duty would be potentially broader, as it does not require the *Thompson* court's specific threat to a readily identifiable victim. See *Thompson v. County of Alameda*, 614 P.2d 728, 738 (Cal. 1980).

214. See *Wofford*, 759 P.2d at 520 (finding that the psychiatrist has a duty of reasonable care in the discharge of his patients).

215. See *id.* (adding that the duty arises if the psychiatrist knows that there is a danger to foreseeable others).

216. See *Kerrville State Hosp.*, 923 S.W.2d at 585-86 (reversing the judgment of the court of appeals because the Kerrville State Hospital did not waive its sovereign immunity).

217. See *id.* at 586-87 (Abbott, J., dissenting) (suggesting that sovereign immunity would not preclude the liability of the hospital); see also TEX. CIV. PRAC. & REM. CODE § 101.021(2) (Vernon 1997) (providing that a state entity waives sovereign immunity for personal injury and death).

218. See *Kerrville State Hosp.*, 923 S.W.2d at 587-89 (Abbott, J., dissenting) (discussing whether the hospital owed a duty of care to third parties once it waived sovereign immunity).

219. See *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 311 (Tex. 1984) (holding that an employer assumes a duty of reasonable care over an incapacitated employee who is known to be inebriated).

220. *Kerrville State Hosp.*, 923 S.W.2d at 588 (Abbott, J., dissenting) (quoting *Otis Eng'g*, 668 S.W.2d at 311) (suggesting that the hospital owed a duty of care to third parties when and if the hospital has some right of control).

concludes that a hospital owes a duty to a nonpatient.²²¹ This duty is owed when a patient makes a specific threat against an identifiable nonpatient and the hospital has control over the threatening patient.²²²

Similar to the *Nasser* court, Justice Abbott focused on the element of control as required under section 319 of the Restatement (Second) of Torts,²²³ noting that Ligon was under a court-ordered outpatient commitment.²²⁴ This outpatient treatment program acknowledged Ligon's potentially dangerous behavior and required him to return to the hospital for periodic examinations to monitor his compliance with prescribed medication.²²⁵ Additionally, the social worker overseeing the treatment was required by statute to inform the court if Ligon failed to comply with the program.²²⁶ According to the dissent, these circumstances were sufficient to show that Kerrville State Hospital had control over Ligon as required by Section 319.²²⁷ Instead of distinguishing between a duty to warn and a duty to detain, Justice Abbott reasoned that the hospital owed a duty to Rebecca to exercise reasonable care in treating Ligon for his psychotic behavior.²²⁸

6. *Zezulka v. Thapar (Zezulka I)*

In *Zezulka v. Thapar*,²²⁹ the First District Court of Appeals in Houston affirmed a liability judgment against a therapist for failing to warn a stepfather of specific threats made against him by his

221. *See id.* (supporting a finding of a duty because the hospital undertook the responsibility of caring for a particular patient).

222. *See id.*

223. *Compare Nasser v. Parker*, 455 S.E.2d 502, 506 (Va. 1995) (suggesting that to establish a duty, the relationship requires a greater degree of control than an ordinary doctor-patient relationship), *with Kerrville State Hosp.*, 923 S.W.2d at 588 (Abbott, J., dissenting) (citing RESTATEMENT (SECOND) OF TORTS § 319 (1965)) (providing that "one who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm").

224. *See Kerrville State Hosp.*, 923 S.W.2d at 588 (noting Ligon's court-ordered treatment).

225. *See id.* at 588-89.

226. *See id.* at 588.

227. *See id.* (stating that "[u]nder these circumstances, KSH [Kerrville State Hospital] was in 'charge' of Ligon for purposes of Section 319").

228. *See id.* (acknowledging the court's adoption of the duty of reasonable care as expressed in section 319 of Restatement (Second) of Torts).

229. 961 S.W.2d 506 (Tex. App.—Houston [1st Dist.] 1996, no writ).

stepson, a Vietnam veteran suffering from post-traumatic stress syndrome.²³⁰ The patient, Lilly, had been in and out of psychiatric hospitals for years,²³¹ and during that time he had indicated both to the hospital and to his therapist, Thapar, that he wanted to kill his stepfather.²³² During Lilly's last stay, hospital records indicate that he was homicidal, withdrawn, and very confused.²³³ Despite his poor condition and dangerous diagnosis, Lilly was released.²³⁴ Defendant Thapar failed to notify Lilly's stepfather or any other family member of these violent threats.²³⁵ Approximately one month after his discharge, Lilly shot his stepfather at point blank range with a shotgun.²³⁶

Thapar argued that he owed no duty to the stepfather because there was no doctor-patient relationship between them.²³⁷ The *Zezulka* court concluded that no such relationship is necessary to bring a cause of action for wrongful death.²³⁸ The court further held that, although a physician owes no general duty to the public at large, Thapar "allegedly knew of a specific threat to a specific person, [therefore] she may have had a duty to warn that person."²³⁹ The court cited both *Tarasoff* and *Thompson* for the proposition that a mental health care provider owes a duty to warn an identifiable third party of a patient's specific threats.²⁴⁰

230. See *Zezulka v. Thapar*, 961 S.W.2d 506, 507-08 (Tex. App.—Houston [1st Dist.] 1996, no writ) (describing that Lilly, who served two tours of duty in Vietnam as an army intelligence officer, suffered from alcoholism as well as post-traumatic stress syndrome).

231. See *id.* (recounting the patient's many hospital visits).

232. See *id.* at 508 (portraying Lilly as paranoid and delusional, not only with regard to his stepfather, but toward those of Vietnamese and African-American descent as well).

233. See *id.* (indicating the records note that Lilly was unkempt, failed to take his medication, and avoided therapy).

234. See *id.*

235. See *Zezulka*, 961 S.W.2d at 509 (indicating that Thapar failed to issue such warnings even though the plaintiff had delivered clothes to Lilly during his hospital stay).

236. See *id.*

237. See *id.* at 510 (restating the therapist's argument that no doctor-patient relationship existed with the stepfather, thereby owing the stepfather no duty).

238. See *id.* at 511 (refuting the therapist's affirmative defense).

239. *Id.* (proposing that the assumptions of no duty may be rebutted).

240. See *Zezulka*, 961 S.W.2d at 511 n.2 (proclaiming that a duty may exist).

7. *Limon v. Gonzaba*

Later, in *Limon v. Gonzaba*,²⁴¹ the Fourth District Court of Appeals in San Antonio specifically recognized the existence of the *Tarasoff/Thompson* duty in Texas.²⁴² Although acknowledging the lack of Texas Supreme Court rulings on the issue, the court suggested that the four appellate decisions concerning the third-party duty indicated that such a duty would be imposed under the proper factual situation.²⁴³ As in prior decisions, the *Limon* court refused to recognize the duty under the circumstances it faced.²⁴⁴

In *Limon*, Lorenzo Limon's daughter took him to Gonzaba clinic where Will Munoz, a counselor, talked with him for twenty to twenty-five minutes.²⁴⁵ Limon's daughter told Munoz that her father was a danger to himself and others,²⁴⁶ but after talking with Limon, Munoz concluded that he had only "mild to moderate depression."²⁴⁷ Two days after the meeting with Munoz, Limon shot his former wife, rendering her a paraplegic.²⁴⁸

Mrs. Limon brought a negligence action against Munoz, various representatives of the clinic, and a corporate mental-chemical dependency provider.²⁴⁹ The *Limon* court began its opinion by tracing the Texas development of the *Tarasoff/Thompson* duty through *Williams*, *Kerrville*, and *Zezulka*, arriving at the conclusion that each holding allowed for the potential existence of the third-party duty under the proper circumstances.²⁵⁰ Those circumstances, according to the *Limon* court, included two types of foreseeability:

241. 940 S.W.2d 236 (Tex. App.—San Antonio 1997, writ denied).

242. See *Limon v. Gonzaba*, 940 S.W.2d 236, 236 (Tex. App.—San Antonio 1997, writ denied) (concluding that a *Tarasoff/Thompson* duty exists in Texas under the right circumstances).

243. See *id.* at 239-40 (summarizing the development of the *Tarasoff/Thompson* duty in Texas).

244. See *id.* at 241 (holding that nothing in the record indicates the presence of a third party duty because it was not foreseeable that Limon would shoot his ex-wife).

245. See *id.* at 237.

246. See *id.*

247. *Limon*, 940 S.W.2d at 237 (reviewing Munoz's conclusion that Limon did not present a threat to anyone).

248. See *id.*

249. See *id.* at 237-38 (explaining that Mrs. Limon's suit alleged the breach of a duty to warn her of a risk posed by Mr. Limon).

250. See *id.* at 239-40 (proposing that the Texas cases indicate the existence of a *Tarasoff/Thompson* duty in circumstances in which there is a foreseeable injury and a readily identifiable victim).

foreseeability of some injury²⁵¹ and foreseeability in the form of a readily identifiable victim.²⁵² Because in *Limon* there seemed to be no evidence that Munoz should have been aware of the threat posed by Limon, the court held that Munoz did not owe a duty to warn Mrs. Limon.²⁵³

After applying the facts of the case to the potential third-party duty, the *Limon* court reflected on the concept of foreseeability, conceding that there may be times in which the foreseeability of injury might be a question of fact.²⁵⁴ The court reasoned that foreseeability is based on logic, and mentally ill individuals, by virtue of their condition, are often illogical, rendering their actions unforeseeable.²⁵⁵ Nevertheless, the court concluded that some evidence is required to raise a foreseeable duty in the absence of a specific threat or a readily identifiable victim and that there was no such evidence in this case.²⁵⁶

8. *Van Horn v. Chambers*

In 1998, the Texas Supreme Court decided *Van Horn v. Chambers*.²⁵⁷ In *Van Horn*, a physician was sued when a hospital employee was killed and another injured in an attempt to subdue a violent patient.²⁵⁸ The individual, Johnny Long, had been admitted to Hermann Hospital after experiencing seizures and symptoms of alcohol withdrawal.²⁵⁹ Because Long was combative upon arrival, emergency room personnel administered sedatives and restrained him.²⁶⁰ Long was then transferred to the hospital's neurological critical care unit (NCCU) under the care of the defendant physi-

251. *See id.* at 240 (establishing the first element of the foreseeability test in a case involving a potential breach of the duty to warn).

252. *See Limon*, 940 S.W.2d at 240 (indicating the second element of the two-pronged foreseeability test requires the victim to be identifiable).

253. *See id.* at 241 (concluding that some logical connection is required to establish foreseeability in the case at bar).

254. *See id.* (admitting that there might be a situation in which reasonable minds could differ as to the foreseeability of future injury).

255. *See id.* (suggesting that "the actions of a tortured brain may not be foreseeable").

256. *See id.* (emphasizing that, although foreseeability might include "gray areas," there must still be evidence that would indicate its existence).

257. 970 S.W.2d 542 (Tex. 1998), *cert. denied*, 119 S. Ct. 546 (1998).

258. *See Van Horn v. Chambers*, 970 S.W.2d 542, 543 (Tex. 1998), *cert. denied*, 119 S. Ct. 546 (1998).

259. *See id.*

260. *See id.*

cian, Van Horn.²⁶¹ After two days in the NCCU, the physician determined that Long no longer required critical care and transferred him to a private room.²⁶²

The next day, when Long tried to leave the hospital, medical personnel attempted to prevent him from doing so and a struggle ensued.²⁶³ During the struggle, Long and several hospital staff crashed through a grill that covered an open air shaft, falling twenty-four feet to a concrete floor.²⁶⁴ A hospital employee and a medical student were killed, and another employee was seriously injured.²⁶⁵ Suit was brought against Van Horn alleging negligence and gross negligence for failing to properly diagnose Long's condition, failing to properly oversee his condition, failing to ensure that he was transferred to a facility equipped to manage his violent nature, and failing to order physical restraints.²⁶⁶

The trial court granted summary judgment for the physician,²⁶⁷ but the court of appeals reversed.²⁶⁸ The Texas Supreme Court reversed, citing its own precedent that health care professionals owe no legal duty to a third party stemming from their care of a patient.²⁶⁹ Though *Van Horn* did not involve threats of harm to readily identifiable victims, the decision is replete with references indicating the narrow interpretation the Texas Supreme Court gives to a physician's duty to third parties.²⁷⁰ Starting with *Bird*, the court traced the development of the law pertaining to the imposition of a physician's third party duty, repeatedly emphasizing the holding that no duty will be imposed without the establishment of a doctor-patient relationship.²⁷¹ In applying these holdings, the court acknowledged that Van Horn might have been negligent in

261. *See id.*

262. *See id.*

263. *See Van Horn*, 970 S.W.2d at 543.

264. *See id.* at 543-44.

265. *See id.* at 544.

266. *See id.*

267. *See id.* at 543.

268. *See Van Horn*, 970 S.W.2d at 544.

269. *See id.* at 545 (following previous Texas Supreme Court findings of no duty).

270. *See id.* at 545-46 (narrowing how the duty to third parties will be applied to the doctor-patient relationship).

271. *See id.* at 544-45 (examining *Bird*, *Trevino*, and *Krishnan* for their holdings that a physician does not owe a duty to the husband of a patient during the administration of prenatal care). In both cases, the court reiterated its refusal to impose a duty outside that created by the doctor-patient relationship. *See id.*

diagnosing Long.²⁷² However, the only person to whom Van Horn owed a duty of ordinary care as a physician was Long.²⁷³

Concluding that Van Horn had no duty to third parties to correctly diagnose Long,²⁷⁴ the court observed the generally limited scope of this responsibility.²⁷⁵ Additionally, the court criticized the use of sections 315 and 319 of the Restatement (Second) of Torts as a basis for a duty between physicians and third parties.²⁷⁶ The court explained that the application of these sections does not apply when there is no element of inherent control, such as in a master-servant or doctor-patient relationship.²⁷⁷ In summarizing its conclusion, the court stated that “[n]o Texas court has held that the physician-patient relationship”²⁷⁸ is sufficient to invoke the exception to the general common law rule of no duty to third parties.²⁷⁹

9. *Zezulka v. Thapar (Zezulka II)*

Recently, the Texas Supreme Court rendered the final decision in the case of *Thapar v. Zezulka*²⁸⁰ upon appeal in 1999. The court addressed the issue in a straightforward manner when it proclaimed that “[t]he primary issue in this case is whether a mental-health professional can be liable in negligence for failing to warn the appropriate third parties when a patient makes specific threats

272. *See id.* at 545 (asserting that Van Horn’s failure to continue physical restraints or critical care for Long might have been medical negligence).

273. *See Van Horn*, 970 S.W.2d at 545 (providing that the negligence pondered would be “only against the one to whom a duty is owed”).

274. *See id.* (stating that the “gravamen of the plaintiff’s complaint is that Van Horn should have known that Long posed a threat to others and should have treated him accordingly”).

275. *See id.* at 547 (stressing that the duty to third parties must be narrowly applied).

276. *See id.* (reiterating that the context in which the court applied § 319 in *Otis Engineering* involved the “inherent control of a master over its servant”). The Texas Supreme Court also indicated that section 315 applies only when a special relationship exists between a doctor and a patient. *See id.*

277. *See id.* (concluding that section 319 does not apply where there is no inherent right to control another).

278. *Van Horn*, 970 S.W.2d. at 546 (finding no precedent that requires the physician to control the conduct of the patient).

279. *See id.* at 546-47 (indicating that the relationship between a physician and patient does not invoke a duty to control the conduct of another).

280. 994 S.W.2d 635 (Tex. 1999).

of harm toward a readily identifiable person.”²⁸¹ In an equally direct fashion, the court answered in the negative.²⁸²

The court acknowledged that Thapar and Zezulka, the victim, did not have a doctor-patient relationship.²⁸³ Based on *Bird* and its progeny, the court therefore concluded that Thapar owed no duty to Zezulka as a nonpatient for the negligent treatment of Lilly.²⁸⁴ The court then turned to the issue of Thapar's failure to warn Zezulka, carefully distinguishing between warnings to third parties and warnings to patients concerning treatments that may affect third parties.²⁸⁵

Addressing the issue of a duty to warn, the court examined legislation protecting the confidentiality of patient disclosures to mental health care providers.²⁸⁶ The court concluded that Thapar would have violated the statute's confidentiality provisions had he told any of the Zezulkas of Lilly's threats.²⁸⁷ Following the conclusion that Thapar had no duty to directly warn Zezulka or his family, the court addressed the possibility of informing a law enforcement agency of the potential danger to Zezulka.²⁸⁸ The court again looked to legislation, which permitted but did not require mental health professionals to disclose possible danger to law enforcement agencies.²⁸⁹ The court noted that requiring Thapar to disclose the confidential communication to a law enforcement agency would be in conflict with the legislative intent.²⁹⁰

281. *Thapar v. Zezulka*, 994 S.W.2d 635, 636 (Tex. 1999).

282. *See id.* (reversing the court of appeal's judgment imposing a *Tarasoff/Thompson* duty).

283. *See id.* (reviewing the lack of doctor-patient relationship between Thapar and Zezulka).

284. *See id.* at 637-38 (concluding that “Thapar owes no duty to Zezulka, a third party non-patient, for negligent misdiagnosis or negligent treatment of Lilly”).

285. *See id.* at 638 (focusing specifically on the issue presented in this case). The court made this distinction to cover situations similar to that in *Gooden v. Tips*, in which a physician had failed to warn his patient of the effects of certain medications, and that failure resulted in a subsequent impact on third parties. *See id.* at 638 n.13.

286. *See Thapar*, 994 S.W.2d at 638 (examining the legislature's decision to “closely guard a patient's communications with a mental-health professional”).

287. *See id.* at 639 (recognizing that “disclosure by Thapar to one of the Zezulkas would have violated the confidentiality statute”).

288. *See id.* (addressing Zezulka's complaint that Thapar was negligent in not disclosing Lilly's threats to any law enforcement agency).

289. *See id.* (refusing to force disclosure).

290. *See id.* (explaining the court's ruling).

The court concluded by considering legislation as an indicator of current public policy in deciding whether to recognize common law causes of action.²⁹¹ The current legislation provides that a mental health professional is under no obligation to report potential danger posed by a patient and neither is the mental health professional shielded from liability for making good faith disclosures.²⁹² The court indicated that to impose a third-party duty would be to impose a "Catch-22" upon mental health providers: they either disclose confidential communication and face possible civil liability from their patients or refuse to disclose and be subject to potential civil liability from the victims' families.²⁹³ Pursuant to its view that legislation represents public policy, the Texas Supreme Court refused to impose a *Tarasoff/Thompson* duty upon mental health professionals.²⁹⁴

V. ARGUMENT FOR THE RECOGNITION OF A *TARASOFF/THOMPSON* DUTY IN TEXAS

An analysis of the factors utilized by courts in the majority of jurisdictions to impose a mental health care provider's duty to protect third parties from dangerous patients illustrates that such a duty should be adopted in Texas. Rather than relying solely upon judicial recognition of this duty, the Texas Legislature should impose a statutory duty to settle this area of the law. This Article proposes a statutory model of such a duty placed upon mental health care professionals that provides immunity from civil liability for good faith disclosures.

A. *Major Factors Favoring the Recognition of a Duty in Texas*

There are three factors that favor the recognition of a duty to warn third parties in Texas. The first factor is the special relationship exception. The second factor lies in the predictability of harm,

291. See *Thapar*, 994 S.W.2d at 639-40 (considering legislation significant evidence of public policy).

292. See *id.* at 640 (recognizing that "the statute does not shield mental-health professionals from civil liability for disclosing threats in good faith").

293. See *id.* (presenting the repercussions of imposing a *Tarasoff/Thompson* duty in the context of current legislation).

294. See *id.* (declining "to impose a common law duty on mental-health professionals to warn third parties of their patient's threats").

despite the inexact nature of the science of psychology. Finally, the third factor analyzes the foreseeability of the victim.

1. The Special Relationship

As a general rule, a person has no duty to protect third parties.²⁹⁵ An exception exists, however, when the defendant bears a special relationship to either the dangerous person or the endangered third party.²⁹⁶ *Tarasoff* and its progeny have held that the interaction between therapists and their patients embodies this special relationship.²⁹⁷ Thus, the *Tarasoff/Thompson* duty is based, in part, on a therapist's treatment of the patient.²⁹⁸

Generally, courts will look to the following factors to determine a special relationship: (1) whether the defendant took charge of the dangerous person, (2) whether the defendant knew or should have known that the dangerous person would be likely to cause harm to others, and (3) whether the defendant knew or should have known that the third party was in danger.²⁹⁹ Those who oppose the *Tarasoff/Thompson* duty argue that a therapist does not always have the degree of control that would warrant the imposi-

295. See RESTATEMENT (SECOND) OF TORTS § 315 (1965) (prohibiting imposition of a duty to protect third parties).

296. See D.L. Rosenhan et al., *Warning Third Parties: The Ripple Effects of Tarasoff*, 24 PAC. L.J. 1165, 1173 (1993) (construing the no duty rule as a special relationship exception that includes a therapist's relationship to his patient).

297. See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 343 (Cal. 1976) (acknowledging that the therapist-patient relationship is sufficient to satisfy the special relationship exception to the general rule that there is no duty to protect third parties); *Bradley v. Ray*, 904 S.W.2d 302, 311 (Mo. App. W.D. 1995) (holding the relationship between psychologists and patients as a type of "special relationship"); *Estates of Morgan v. Fairchild Family Counseling Ctr.*, 673 N.E.2d 1311, 1321-22 (Ohio 1997) (concluding that the psychotherapist-outpatient relationship is sufficient to impose a duty upon the psychotherapist).

298. See *Tarasoff*, 551 P.2d at 343 (noting that a relationship between a therapist and patient is sufficient to establish a duty of care); see also *Estates of Morgan*, 673 N.E.2d at 1321 (declaring that the "psychotherapist-outpatient relationship justifies the imposition of a common-law duty upon the psychotherapist to control the violent propensities of the patient"). The *Tarasoff* duty set reasonable parameters on a psychotherapist's liability for violent acts of outpatients. See *Tarasoff*, 551 P.2d at 343 (giving rise to a therapist's duty to exercise reasonable care in protecting patients and supporting affirmative duties for the benefit of third parties as well).

299. See RESTATEMENT (SECOND) OF TORTS § 319 (1965) (identifying the factors to be used when deciding if there is a relationship that would impose a duty to third parties).

tion of this duty.³⁰⁰ However, the duty only requires the therapist to warn of the behavior, not to control it, rendering this argument moot.

2. Predictability of Harm

A second factor favoring the imposition of the *Tarasoff/Thompson* duty is the predictability of harm.³⁰¹ Opponents of this rule have argued that psychiatry is an inexact science full of uncertainties.³⁰² The *Tarasoff/Thompson* duty, however, does not require that a therapist predict the future. Rather, the duty requires only that the care provider warn of predictable harm, as in the case of a patient who communicates a serious threat aimed at an individual.³⁰³

3. Foreseeability of the Victim

Foreseeability of the victim is perhaps the most compelling consideration in favor of the duty to warn.³⁰⁴ Although it would be unreasonable to require a therapist to identify specific potential victims, it is similarly unreasonable not to impose a duty to warn those who are readily identifiable.³⁰⁵ This principle rings particularly true in light of the immunity from liability for such disclosures.³⁰⁶

300. See *Estates of Morgan*, 673 N.E.2d at 1321-22 (recognizing those courts which refuse to impose a *Tarasoff* duty in an outpatient setting because of a lack of control over the patient).

301. See D.L. Rosenhan et al., *Warning Third Parties: The Ripple Effects of Tarasoff*, 24 PAC. L.J. 1165, 1173 (1993) (noting that *Tarasoff* requires foreseeability to impose a duty).

302. See *id.* at 1187 (inferring that because psychiatry is an inexact science, therapists may make inaccurate predictions).

303. See *id.* at 1202 (stating that the majority of practitioners acknowledge that *Tarasoff* applies when a patient makes a threat endangering someone's physical well-being).

304. See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976) (declaring that the most important consideration when determining duty is foreseeability).

305. See *generally Tarasoff*, 551 P.2d at 344 (expressing that when a doctor-patient relationship is entered into, the therapist assumes the responsibility of providing safety not only to the therapist's patient, but to any outside individual the therapist knows to be potentially harmed by the patient).

306. See *generally* TEX. HEALTH & SAFETY CODE ANN. § 611.004 (Vernon 1992) (providing for exceptions to confidentiality and authorizing disclosure where imminent physical injury is probable in the eyes of the medical provider).

B. *Major Considerations for Imposing a Statutory Recognition of a Duty*

As revealed by the analysis of case precedent, the law surrounding the *Tarasoff/Thompson* duty is muddled.³⁰⁷ The statutory recognition of such a duty would settle the law, rather than leaving the courts to fashion a rule on a case-by-case basis. The following comprises the elements essential to a statutory recognition of the duty to protect third parties from dangerous patients.

1. Specifically Communicated Threat Requirement

Rather than imposing a blanket duty to protect third parties, a statutory recognition should require that there be a specific threat of danger against a readily identifiable person, which was communicated to the mental health care provider.³⁰⁸ Such a requirement would clarify for therapists when the duty arises. Additionally, this element would resolve therapist concerns that they are not able to reliably predict danger.

2. Requirement of Intent and Ability to Carry out the Threat Against a Reasonably Identifiable Person

In addition to requiring specificity, the statute should require sufficient evidence of the patient's intent and apparent ability to carry out the threat against a reasonably identifiable person.³⁰⁹ Including such a requirement would remain consistent with common law tort jurisprudence that has long viewed negligence in terms of foreseeability.³¹⁰ The requirement of intent coupled with the apparent ability to carry out the threat against a reasonably identi-

307. See *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 673 N.E.2d 1311, 1320-22 (Ohio 1997) (providing an outline of the current and opposing stances of jurisdictions regarding the *Tarasoff* duty).

308. See Timothy E. Gammon & John K. Hulston, *The Duty of Mental Health Care Providers to Restrain Their Patients or Warn Third Parties*, 60 MO. L. REV. 749, 768 (1995) (advocating a statutory model that would require the communication of a threat to the health care provider be of an identifiable victim).

309. See *id.* (proposing a statutory model requiring that a patient who communicates a specific threat to a therapist intend and be able to carry out such a threat against a reasonably identifiable victim for the therapist to be under a duty to warn or protect).

310. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928) (recognizing that the most important element in establishing a duty to prevent harm to another is the foreseeability of the victim).

able person would help ensure that foreseeability serves as a basis for the imposition of this duty.³¹¹

3. Alternatives to Disclosure and Exoneration

A third consideration, and perhaps of greatest concern to therapists, is the recognition of possible alternatives to providing an actual warning to the third party. Under current Texas law, disclosure of a patient's threats results in liability on the part of a mental health care provider for breach of doctor-patient confidentiality.³¹² Providing legislative immunity from liability when disclosure is deemed necessary would adequately protect mental health care providers in some situations. Other alternatives to breaching confidentiality, however, could include requiring hospitalization of the dangerous patient or involuntary commitment when necessary.³¹³

C. A Statutory Model

One model, that should be adopted in Texas, incorporates the above elements and has been proposed by commentators:

Mental Health Professionals' Liability for the Violent Acts of Patients.

Section 1. A mental health professional including psychiatrist, psychologist, licensed nurse practitioner and those operating under their discretion and supervision are immune from liability to persons other than a patient for failing to predict or warn or take precautions to protect others from a patient's violent behavior, except where:

- A) the patient communicates a threat of physical harm to the mental health professional, and
- B) the threat is coupled with the apparent intent and ability to carry out the threat that the patient will use physical violence to cause serious personal injury or death to reasonably identifiable persons.

Section 2. Regardless of any other provision of law, a mental health professional's duty to warn or take precautions arises only in the limited circumstances described in section 1.

311. *See id.* (stating that if the harm was not intentional, then one must look to foreseeability).

312. *See Thapar v. Zezulka*, 994 S.W.2d 635, 639 (Tex. 1999) (noting that no duty exists to disclose privileged information where the disclosure would violate the confidentiality of the doctor-patient relationship).

313. *See Timothy E. Gammon & John K. Hulston, The Duty of Mental Health Care Providers to Restrain Their Patients or Warn Third Parties*, 60 MO. L. REV. 749, 790 (1995) (noting a model for a Michigan statutory provision that proposes alternatives to disclosure).

Section 3. A mental health professional's duty to warn of or take precautions to protect another from the threatened violence of a patient is discharged by the mental health professional giving a warning or taking reasonable precautionary actions, including, but not limited to:

- A) communicating or attempting to communicate the threat to the potential victim or victims,
- B) informing a law enforcement agency having jurisdiction in the patient's or victim's place of residence of the threat, and the whereabouts of the patient and victims, if known,
- C) seeking civil commitment of the patient by initiating a formal process of commitment or taking reasonable steps precedent to initiating such a commitment, or
- D) providing medication or other medical treatment to the patient which is reasonably calculated to eliminate or decrease the threat.

The professional to whom a threat is communicated may also discharge the duty under section 1 by informing a person designated by the professional's employer as the individual who has the responsibility to warn or take precautions, except that where the identified or potential victim is a minor the healthcare professional must inform appropriate authorities

Section 4. A mental health professional is immune from any and all liability under state statutes and from any common law rights or causes of action which protect patient privacy and confidentiality, for actions taken in good faith to discharge the duty which has arisen or may have arisen under section 1.³¹⁴

This proposed statute affords mental health care providers immunity from liability for breach of the confidential doctor-patient relationship.³¹⁵ Providing immunity may seem to welcome the cavalier disclosure of patient confidences. However, requiring a specific threat of death or serious bodily injury accompanied by the patient's intent and apparent ability to carry out the threat precludes any unnecessary disclosures.

Certainly the above model does much to clarify the law, to inform mental health care professionals of their duty to third parties, and to specify under which circumstances the duty arises. However, a few modifications are in order. Although, alternatives to

314. *Id.* at 792 (announcing a model statute).

315. *See id.* at 790 (offering a model statute that provides immunity to health workers).

disclosure are desirable,³¹⁶ the alternatives of initiating involuntary commitment proceedings and providing medication or other therapy would best be limited to situations in which the threat of harm is not imminent.³¹⁷ Involuntary commitment can be a lengthy proceeding, and often a significant period of time is required for the patient to benefit from medication or other therapy.³¹⁸ To allow for these alternatives in the face of a threat of imminent danger would be to frustrate the very goal of the statute, the protection of third parties from dangerous patients.³¹⁹

VI. CONCLUSION

Perhaps not since *Palsgraf* has a case so impacted American common law tort jurisprudence as *Tarasoff*.³²⁰ Though the majority of jurisdictions have adopted some form of the *Tarasoff/Thompson* duty to warn third parties of a patient's threats of harm, Texas has not.³²¹ This refusal has been steadfast even though the mental health care professional-patient relationship is the type that has traditionally given rise to such a duty and the imposition of such a liability would advance the public policy goal of preventing harm to foreseeable victims.

A statutory recognition of such a duty in Texas would resolve the confusion regarding the duty owed by the mental health care pro-

316. See *id.* at 780 (asserting that warning potential victims or law enforcement is problematic).

317. See John G. Fleming & Bruce Maximou, *The Patient or His Victim: The Therapist's Dilemma*, 62 CAL. L. REV. 1025, 1065-66 (1974) (suggesting that a therapist has a range of alternatives when danger by a patient is imminent and should choose the least invasive method).

318. See *Roland v. State*, 489 S.W.2d 797, 801 (Tex. App.—Fort Worth 1999, no pet. h.) (providing that treatment can be administered over the patient's objection only after monthly re-authorization and examining).

319. See Bruce A. Amgo, *Paternalism, Civil Commitment and Illness Politics Assess the Current Debate and Outlining a Future Direction*, 7 J.L. & HEALTH 131, 144 (1993) (explaining the problems in predicting the dangerous behavior of patients); see also Timothy E. Gammon & John K. Hulston, *The Duty of Mental Health Care Providers to Restrain Their Patients or Warn Third Parties*, 60 MO. L. REV. 749, 794-95 (1995) (discussing the difficulties encountered when a therapist attempts to involuntarily commit a patient).

320. See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976) (concluding that legal duties cannot be discovered with facts). But see *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928) (stating that an apparent risk determines a tort, not the facts).

321. See *Thapar v. Zezulka*, 994 S.W.2d 635, 636 (Tex. 1999) (proclaiming that Texas courts do not impose a duty on doctors to warn third parties of a patient's harmful threats).

fessional to third parties. Specifically, a statute, thorough in its consideration of the issue, would clarify which factors trigger the duty. This explicit clarification would provide clear guidelines as to when a therapist's disclosure, in an effort to protect a third party, violates the physician-patient privilege.

Important issues at stake: patient confidentiality, personal safety, professional ethics, to name but a few. Each will need to be carefully weighed when fashioning a statutory mental healthcare provider duty to third parties. Let the Texas Legislature keep in mind, however, the words of one of the most commonly cited phrases from *Tarasoff*, "[t]he protective privilege ends where the public peril begins."³²²

322. *Tarasoff*, 551 P.2d at 347 (clarifying when public safety issues outweigh the patient's confidentiality concerns).