



Legal Beat

By MICHAEL SEAN QUINN

To Squeal or Not to Squeal?

Insuring professionals against liability is a messy and uncertain business. Almost no professional engagement is immune from some criticism. There are always differences of opinion about the design and execution of complex tasks, especially those which presuppose judgment, involve many steps, and take a substantial amount of time. This point is even more true when the efforts of the professional produce less than optimal results.

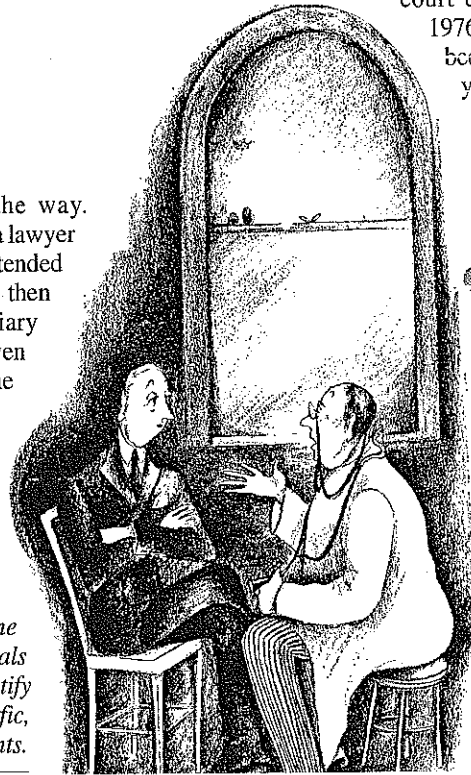


The difficulties of insuring professionals have been multiplied in the last several decades, because many states have expanded the scope of professional liability.

California has led the way. There, for example, if a lawyer fails to include an intended beneficiary in a will, then the intended beneficiary can sue the lawyer, even if he was never even the lawyer's client.

Similarly, in a celebrated case, *Tarasoff v. Regents of the University of California*, the California

In Thapar v. Zezulka, the Texas Supreme Court held that mental-health professionals have no legal duty to third parties to notify law enforcement officials of credible, specific, and immediate threats made by their patients.



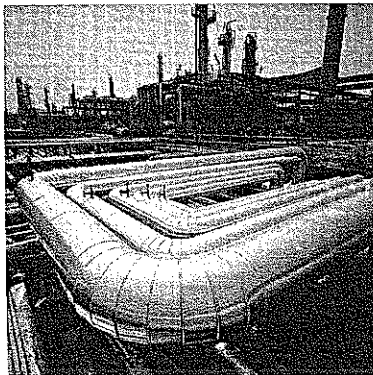
Supreme Court held that if a mental-health professional failed to warn a third party of a patient's threats, that professional could be liable to the third party. The court decided this case in 1976, and since then it has been assigned in all first year tort classes in every law school in the country. *Tarasoff* is one of the most widely debated tort cases of all times.



The Texas Supreme Court has adopted a much more cautious approach. In 1994, it decided that physicians (including mental health professionals) could be liable for professional malpractice only to those with whom they had a doctor-patient rela-

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tionship. In 1996, it decided that lawyers could be liable for professional malpractice only to their own clients. Thus, the court decided that lawyers could not be liable to intended third party beneficiaries.

In 1999, the *Tarasoff* question came before the court in *Thapar v. Zezulka*. In that case, a Houston Court of Appeals decided that the mental-health professional could be liable on a theory of negligence for failing to warn appropriate third parties when a patient makes a specific threat of harm regarding readily identifiable persons.

The facts were quite simple. Freddy Ray

Lilly had a history of mental problems and psychiatric treatment. Dr. Renu K. Thapar was a psychiatrist who treated Lilly beginning in 1985. She diagnosed Lilly as suffering from severe post-traumatic stress disorder, alcohol abuse, and both paranoid beliefs and delusions concerning his stepfather, Henry Zezulka, and people of "certain ethnic backgrounds," as the court delicately put it.

Thapar treated Lilly with psychotherapy and drugs for the next three years. During that period of time, Lilly was mostly an outpatient, but upon six or more occasions he was admitted to a psychiatric facility in

response to urgent treatment needs. Some of these pressing needs involved maintaining amicable living arrangements, although on one occasion he was admitted because he threatened to kill himself.

The psychiatrist notes indicate that in 1988, Lilly threatened to kill Zezulka and shortly thereafter did so. Lilly's mother and Zezulka's wife—the very same person—sued the psychiatrist. On June 24, 1999, Justice Craig Enoch, writing for a unanimous court, reversed the court of appeals and held that mental-health professionals have no relevant duty to third parties.

In other words, the Texas Supreme Court has held that even if a violence-prone psychiatric patient specifically threatens to kill a third party, and even if the mental-health professional fully believes that the patient can and will carry out the threat, the treating professional has no legally enforceable duty to warn the person whose life or health is

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in jeopardy. The court did not base its decision upon any public policy immanent in the common law. It did not base its decision on any moral considerations. Indeed, how could it? It based its decision on public policy as articulated by the legislature.

The Supreme Court held that § 611.002 of the Texas Health & Safety Code prohibits disclosures to third parties, except under specified conditions. None of those exceptions applies to the Thapar-Zezulka situation. Hence, Dr. Thapar, who was treating a person who threatened and eventually killed Zezulka could not lawfully make disclosure to the person threatened. After all, said the court, if disclosure is prohibited by a statute, then the physician can have no common law duty to warn. So far so good.

But, said the plaintiff, § 611.004(a)(2) permits disclosure to law enforcement authorities. Surely Thapar can be held liable to Zezulka for not making appropriate disclosure to the police. Surely they could have been counted upon to protect Zezulka, or—at least—warn him.

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The Supreme Court rejected this argument, as well. To be sure, Justice Enoch observed, the statute permits disclosure to law enforcement authorities. It does not, however, require it. "Imposing a [common law] legal duty to warn third parties of a patient's threats," observed Justice Enoch, "would conflict with the scheme adopted by the [Texas] Legislature by making disclosure of such threats mandatory." Hence, mental-health professionals have no legal duty to third parties to notify law enforcement officials of credible, specific, and immediate threats made by their patients.

III.

Obviously, this holding simplifies the law of professional malpractice as regards to mental-health professionals. Consequently, it also "de-messy-fies" malpractice insurance. The question of "Whither *Tarasoff* in Texas, a bell weather jurisdiction?" is answered. Shrink liability is clarified and restricted. The scope of coverage is crystallized.

Not every question was answered, of course. The rule in *Thapar* applies only to mental-health professionals. What about physical-health professionals? Do physicians of the body have the same or different duties? If a woman is told by her gynecologist that she has been infected with a dread disease, and she then-and-there threatens to kill (or castrate) her lover, what duties has the physician? (All sorts of permutations on this kind of situation are easily imaginable.) What if a mental-health professional does make disclosure to the police, but does it badly. Suppose the patient of the mental-health professional threatened to kill Jacob, but the professional wrote it down wrong and falsely told the police that her patient threatened to kill Paul? If Jacob is injured or killed, does the mental-health professional have liability?

IV.

This last situation points in the direction of negligent misrepresentation. In *McCamish, Martin, Brown & Loeffler v. F. E. Appling Interests*, decided on April 29, 1999, the Texas Supreme Court held that lawyers could be liable to non-clients for negligent misrepresentation. The facts in *McCamish* were somewhat convoluted. A case arose in a litigation arising out of the failure of a bank to fund certain loans. The plaintiff required that a lawyer certify that the bank had the authority to enter into the agreement. The lawyer did so at a time when



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the bank was in fact under voluntary supervision and hence incapable of entering into the very settlement agreement at issue. The lawyer who certified the bank's authority did not happen to know about the bank's status, although at least one other member of his law firm did. Subsequently, the bank was placed in receivership; the FSLIC repudiated the settlement agreement and pursued the settling party. That party sued the law firm, which certified the bank's competence to settle.

Justice Deborah Hankinson, writing for the court, held that although an attorney

could not be guilty of malpractice—negligent professional misconduct—with respect to anyone other than a client, a lawyer could be guilty of negligent misrepresentation to a non-client.

Obviously the *McCamish* case has enormous implications for many professionals. Perhaps accountants have the greatest potential liability to non-clients for negligent misrepresentation. But the *Thapar* case leaves open the possibility that mental-health professionals may have the same kind of liability. If, for example, Dr. Thapar had called the police and erroneously told them that

Lilly's mother was in danger, as opposed to his stepfather, then there might well be a cause of action for negligent misrepresentation.



Surely, privacy is an important issue in our society. Surely, patients in need of psychiatric and psychological care should feel free to express themselves and their counselors should maintain their confidences. At the same time, violent people should be restrained, and those who know that mayhem or murder is about to be committed should not stand idly by. Nor should the law permit them to do so. Hence, *Tarasoff* was rightly decided, and *Thapar* was wrongly decided. The Texas Supreme Court saw itself as bound by the language of the statute. It thought that a decision following *Tarasoff* would be inconsistent with the legislative scheme.

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The court is dead wrong about this. If an act is legally permitted, it may be lawfully chosen. Surely, sometimes, such acts should be chosen. If an act—calling the police—can be chosen, it may be negligent not to choose it. Moreover, there is no inconsistency at all between a legislature saying that someone is permitted to do something and the court saying that someone is required to do that very same thing. A conflict arises only if the legislature says "You must do it," and the court says "You must not do it," or vice versa. The fact that the legislature wanted to leave something to the discretion of the mental-health professional as a matter of statutory law does not imply that the common law must also leave the matter discretionary. Legislative enactments and common law are distinct sources of law and they can point in different directions without necessarily being in conflict.

So, the law of professional malpractice has been demystified to a certain degree. And the law of malpractice insurance has been "de-messy-fied" a little bit. It feels good. One wonders, however, if this is a move in the right direction. There is an axiom of general application: Messiness abounds. This is true of life. It is true of the law. It is true of insurance. □