

# DEVELOPMENTS IN VERMONT LAW

## STANDARD OF CARE, DUTY, AND CAUSATION IN FAILURE TO WARN ACTIONS AGAINST MENTAL HEALTH PROFESSIONALS

### INTRODUCTION

In *Peck v. Counseling Service of Addison County, Inc.*,<sup>1</sup> the Vermont Supreme Court bestowed a mixed blessing on the state's legal community. Ostensibly following the lead of the California Supreme Court in *Tarasoff v. Regents of the University of California*,<sup>2</sup> the *Peck* court established a duty for mental health professionals<sup>3</sup> to warn third parties of foreseeable danger posed by patients, including clinic outpatients.<sup>4</sup> Although the court's concern with preventing harm to potential victims<sup>5</sup> is laudable, the *Peck* decision is plagued by a number of problems, largely stemming from the court's handling of standard of care, duty, and causation.<sup>6</sup>

In its apparent zeal to incorporate the spirit of *Tarasoff* into Vermont tort law, the *Peck* court left confused the very cause of action it was so eager to recognize. Utilizing the statutory definition of mental health professional, the court took a sweeping ap-

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1. 146 Vt. 61, 499 A.2d 422 (1985).

2. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). *Tarasoff* is the leading case in which a duty was established for psychotherapists to warn third parties of the potential danger posed by a patient. See W. PROSSER & W. KEETON, ON TORTS 384 (5th ed. 1984). See also *infra* text accompanying notes 19-35.

3. *Mental health professional* is defined in VT. STAT. ANN., tit. 18, § 7101(13) (Supp. 1985) as "a person with professional training, experience, and demonstrated competence in the treatment of mental illness, who shall be a physician, psychologist, social worker, nurse or other qualified person designated by the commissioner."

4. *Peck*, 146 Vt. at 68, 499 A.2d at 427.

5. *Id.*

6. This note explores the boundaries of standard of care, duty, and causation as set forth in the *Peck* case. The *Peck* decision provides an inviting opportunity to discuss both foreseeability and proximate cause in negligence actions generally. Foreseeability (of plaintiff) will be addressed because of its relationship to standard of care and duty. See *infra* notes 33-34 and accompanying text. However, an in-depth discussion of proximate cause is beyond the scope of this note. For the present purposes, it is sufficient to recognize that Vermont case law does not distinguish between proximate cause and cause in fact. See, e.g., *Dodge v. McArthur*, 126 Vt. 81, 223 A.2d 453 (1966). For this reason, Vermont is among a minority of states that generally do not recognize foreseeable harm as a liability limiting factor in tort law. W. PROSSER & W. KEETON, *supra* note 2, at 290-91.

proach to requisite standard of care.<sup>7</sup> The result is an amorphous classification of questionable value that invites otherwise unnecessary litigation to painstakingly explore the parameters of duty and causation. This result represents a significant departure from the *Tarasoff* line of cases, including cases cited by the court in its decision as persuasive.<sup>8</sup>

This note focuses on the court's extension and distortion of standard of care, duty, and causation.

### I. DUTY TO WARN

Six days after having an argument with his father and one day after visiting the Counseling Service of Addison County as an outpatient, John Peck set fire to his parents' barn.<sup>9</sup> Peck, who had previously participated in therapy sessions and had a history of "impulsive assaultive behavior," confided to his therapist that he "wanted to get back at his father" for things that were said during the argument.<sup>10</sup> When questioned by the therapist, Peck indicated that in retribution, he "could burn down his [father's] barn."<sup>11</sup> However, by the end of the session, and after discussing the "possible consequences of such an act, [Peck], at the request of the therapist, made a verbal promise not to burn down [the] barn."<sup>12</sup> The therapist believed Peck and took no further action in the matter.<sup>13</sup>

After the fire, Peck's parents filed a complaint against the counseling service, alleging negligence in the defendant's failure to warn of the potential danger and also alleging professional malpractice.<sup>14</sup> The trial court dismissed the action with prejudice, holding that under Vermont law there was no such duty to warn.<sup>15</sup> However, the court noted that had the duty to warn been a feature of Vermont tort law, it would have attached under the circum-

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7. See *Peck*, 146 Vt. at 63, 499 A.2d at 423.

8. See, e.g., *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185 (D. Neb. 1980); *McIntosh v. Milano*, 168 N.J. Super. 466, 403 A.2d 500 (1979); *Tarasoff*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14; cf. *Peck*, 146 Vt. at 69, 499 A.2d at 428 (Billings, J., dissenting).

9. *Peck*, 146 Vt. at 63, 499 A.2d at 424.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Peck v. Counseling Center of Addison County, Inc.*, No. S114-80Ac, slip op. at 40 (Super. Ct. 1983).

stances of the *Peck* case.<sup>16</sup> On appeal, the Vermont Supreme Court, relying on *Tarasoff* language, held that such a duty exists and remanded for judgment.<sup>17</sup>

## II. A SQUARE PEG IN A ROUND HOLE

A major problem with *Peck* is that while the court used *Tarasoff* to support its decision, the facts of the two cases are not sufficiently similar to yield the same result.<sup>18</sup> By funneling *Peck* into the *Tarasoff* mold, the court established a very broad standard of care which effects a very strict duty.

### A. Distinguishing *Peck*

The most significant distinction between *Tarasoff* and *Peck* is that in *Tarasoff* the defendant therapists were psychologists and psychiatrists, and the standard of care against which their actions were measured was that of each defendant's "professional specialty."<sup>19</sup> In *Peck*, however, the therapist was not identified in the opinion, but merely referred to as "a mental health professional within the definition of 18 V.S.A. 7107(13)."<sup>20</sup> By using the broad statutory definition of mental health professional, the court effectively precluded the application of standards of care specific to each of the individual specialties included under this heading.<sup>21</sup>

Additionally, in *Tarasoff* the assailant told the defendant therapist that he was going to kill the victim; the therapist believed this and predicted that the patient would carry out the threat.<sup>22</sup> However, John Peck never told his therapist that he was going to burn down the barn; rather, he merely suggested that he "could" burn down the barn.<sup>23</sup> This is an important distinction, particularly since Peck ultimately promised he would not burn

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16. *Peck*, slip op. at 38; 146 Vt. at 63, 499 A.2d at 424 n.3.

17. *Peck*, 146 Vt. at 68, 499 A.2d at 427.

18. See *infra* notes 21-26 and accompanying text.

19. *Tarasoff*, 17 Cal. 3d at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.

20. The therapist in *Peck* was, in fact, a psychological counselor with a master's degree in education and an advanced certificate in counseling. *Peck*, slip op. at 26.

21. It is worth noting that in two cases following *Tarasoff*, which were cited by the Vermont Supreme Court in *Peck*, the defendant therapists were psychiatrists, whose actions were gauged against the prevailing standards of that specialty. See *Lipari*, 497 F. Supp. 185; *McIntosh*, 168 N.J. Super. 466, 403 A.2d 500.

22. *Tarasoff*, 17 Cal. 3d at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.

23. *Peck*, 146 Vt. at 64, 499 A.2d at 424.

down the barn, and the therapist believed he would not.<sup>24</sup>

Finally, in *Tarasoff* neither the victim nor members of the victim's family were aware of the danger posed.<sup>25</sup> By contrast, the plaintiffs in *Peck* were aware of John's propensity for dangerous behavior and were found, at trial, to be fifty percent comparatively negligent in the destruction of the barn.<sup>26</sup>

### B. Foreseeability and the Chain of Causation

In *Tarasoff*, the California Supreme Court had to overcome apparent gaps in the chain of causation because no direct relationship existed between the victim and the defendant.<sup>27</sup> The court dealt with this concern by focusing on the special relationship between a therapist and his or her patient.<sup>28</sup> Writing for the court, Justice Tobriner noted that "[s]uch a relationship may support affirmative duties for the benefit of third persons."<sup>29</sup> In determining when a duty to warn arises, the court balanced a number of factors, including "foreseeability of harm to the plaintiff" and "closeness of the connection between the defendant's conduct and the injury suffered."<sup>30</sup>

The *Tarasoff* court concentrated on the premise that "legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done."<sup>31</sup> The parameters of duty as described

24. *Id.* Justice Billings focused on this point in his dissent in *Peck*. Billings noted that in *Tarasoff* the defendant "did, in fact, predict that the patient would kill the plaintiffs' daughter." *Id.* at 69, 499 A.2d at 428 (Billings, J., dissenting). By contrast, the counselor in *Peck* had a good faith belief that "there was [no] threat to person or property by the patient." *Id.* As such, Billings reasonably concluded no duty to warn arose in *Peck*. *Id.*

25. *Tarasoff*, 17 Cal. 3d at 433, 551 P.2d at 341, 131 Cal. Rptr. at 21.

26. *Peck*, 146 Vt. at 68, 499 A.2d at 427.

27. *Tarasoff*, 17 Cal. 3d at 435-36, 551 P.2d at 343, 131 Cal. Rptr. at 23.

28. *Id.* at 436, 551 P.2d at 343-44, 131 Cal. Rptr. at 23-24.

29. *Id.*

30. According to the court, the "major" considerations are:

the 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 and prevalence of insurance for the risk involved.

*Id.* at 434-35, 551 P.2d at 342, 131 Cal. Rptr. at 22 (citations omitted).

31. *Id.*

in *Tarasoff* are consistent with Justice Cardozo's seminal opinion in *Palsgraf v. Long Island Railroad*.<sup>32</sup> The *Palsgraf* decision centered on the relationship between foreseeability and duty, ultimately addressing causation. In *Palsgraf* Cardozo stated, "[t]he risk reasonably to be perceived defines the duty to be obeyed and risk imports relation; it is the risk to another or to others within the range of reasonable apprehension."<sup>33</sup>

The "range of reasonable apprehension" or foreseeability, while always a critical focus in negligence actions, becomes particularly crucial in failure-to-warn cases. Prerequisite to foreseeability, however, is a meaningful standard of care. Along the continuum of causation, standard of care determines what is reasonably foreseeable, foreseeability determines duty, and duty factors into cause. Thus, the importance of a reliable standard of care cannot be overstated.<sup>34</sup>

The *Tarasoff* court and the *Peck* court each entertained amicus briefs regarding the appropriate standard of care for those against whom negligence was alleged. The distinction between the results in *Tarasoff* and *Peck* is that the California court sought to determine a reasonable standard of care specific to the parties in-

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32. 248 N.Y. 339, 162 N.E. 99 (1928).

33. *Id.* at 244, 162 N.E. at 100. It should be noted that the trial court discounted *Palsgraf* as not followed in Vermont. *Peck*, slip op. at 39. However, *Palsgraf* was specifically cited by the Vermont Supreme Court in *Baldwin v. State*, 125 Vt. 317, 215 A.2d 492 (1965). Moreover, the supreme court's language in *Peck* strongly resembles the language and rationale of the *Palsgraf* court, and Vermont case law is generally supportive of the proposition that Vermont is a *Palsgraf* state. See, e.g., *Peck*, 146 Vt. 61, 499 A.2d 422; *Morris v. American Motors Corp.*, 142 Vt. 566, 459 A.2d 968 (1982); *Rivers v. State*, 133 Vt. 11, 328 A.2d 398 (1974); *LaFaso v. LaFaso*, 126 Vt. 90, 223 A.2d 814 (1966); *Lavallee v. Pratt*, 122 Vt. 90, 166 A.2d 195 (1960); *Humphrey v. Twin State Gas & Elec. Co.*, 100 Vt. 414, 139 A. 440 (1927); *Woodcock's Adm'r. v. Hallock*, 98 Vt. 284, 127 A. 380 (1925); *Stevens v. Dudley*, 56 Vt. 158 (1883).

However, once negligence to a foreseeable plaintiff (or to a member of a class to which a duty is owed) has been demonstrated, the defendant may be held liable for all resulting harm, foreseen and unforeseen. See, e.g., *Dodge v. McArthur*, 126 Vt. 81, 223 A.2d 456 (1966). The unforeseeable consequences issue is a question of proximate cause, not duty, and, therefore, is unrelated to a *Palsgraf* analysis.

34. Dean Prosser has stressed that standard of care "must make proper allowance for the risk apparent to the actor." W. PROSSER & W. KEETON, *supra* note 2, at 174. This statement reflects the reality that what is foreseeable to an individual, particularly an individual involved in the provision of mental health care, is dependent upon that person's level of training and expertise. As such, what is reasonably foreseeable to a board certified psychiatrist may not be foreseeable to a counselor, even a well-qualified counselor. This distinction is important because if harm to the victim is not reasonably foreseeable by the defendant, then no duty attaches. Absent duty, there can be no breach.

volved, while the Vermont court couched standard of care in general terms relating to the mental health profession. The consequences of Vermont's approach is an operative standard of care, generally applicable to mental health professionals.<sup>35</sup> This is particularly problematic, considering the case law and literature that discusses the difficulty of making psychiatric predictions with any degree of certainty.<sup>36</sup>

### C. Standard of Care

The problems in *Peck*, however, extend beyond the capacity to make psychiatric predictions; more central is the distinction that must be made between psychiatric treatment as in *Tarasoff* and mental health counseling as in *Peck*. This distinction has been recognized in other jurisdictions following *Tarasoff*.<sup>37</sup> Both psychologists and psychiatrists are more highly trained and more sensitized to the contours of the mind and the emotions than are nurses, social workers, and counselors.<sup>38</sup> The functions served by each specialty are essentially separate and distinct. Contributing to this

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35. See, e.g., *Peck*, 146 Vt. at 68, 499 A.2d at 427. The *Peck* court held that "a mental health professional who knows, or based upon the standards of the mental health profession, should know that his or her patient poses a serious risk of danger to an identifiable victim has a duty to exercise reasonable care to protect him or her from that danger." *Id.* The connotation of this language is considerably broader than that used by the California Supreme Court in *Tarasoff*:

We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence. Obviously we do not require that the therapist, in making that determination, render a perfect performance; the therapist need only exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances.

17 Cal. 3d 435, 551 P.2d at 345, 131 Cal. Rptr. at 25 (citations omitted) (brackets in original). Although the Vermont Supreme Court quoted the above language in *Peck*, the thrust of the *Peck* decision does not reflect the narrow focus of *Tarasoff*. Consequently, even though the bracketed portion was included in *Peck*, its use seems to have been inadvertent because the Vermont court did not exert sufficient effort to make the language its own. This seems particularly so because immediately after citing the above language, the *Peck* court stressed that the standard against which a therapist's actions are to be measured are those of the "mental health professional community." *Peck*, 146 Vt. at 66, 499 A.2d at 426.

36. See, e.g., *Cocozza & Steadman, The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976); *Lipari*, 497 F. Supp. at 192; *Tarasoff*, 17 Cal. 3d at 435, 551 P.2d at 345, 131 Cal. Rptr. at 25; see also *Peck*, 146 Vt. at 69, 499 A.2d at 427 (Billings, J., dissenting).

37. See, e.g., *Lipari*, 497 F. Supp. 185; *McIntosh*, 168 N.J. Super. 466, 403 A.2d 500.

38. For example, in its findings of fact, the trial court determined that "it is not required that counselors be licensed or certified by any state agency or statute nor are there any required qualifications." *Peck*, slip op. at 29.

problem seems to be an almost universal misuse, in case law, of classifications that are terms of art within the mental health discipline. A New Jersey court took cognizance of this point in *McIntosh v. Milano*,<sup>39</sup> indicating that while *psychiatrist* and *therapist* are terms often used interchangeably, there is a subtle distinction, with *therapist* often having a "broader application."<sup>40</sup> This important point was overlooked in *Peck*.

The compelling question resulting from the *Peck* court's approach to standard of care is best phrased in Justice Mosk's cogent remark in his concurrence and dissent in *Tarasoff*: "[t]he question is, what standards?"<sup>41</sup> Mosk concurred in the result, but dissented from holding psychologists and psychiatrists to what he saw as an undefined standard.<sup>42</sup> Mosk's concern was aroused even though the applicable standard was that of the particular specialty involved.<sup>43</sup> This concern has also been raised in other cases in the *Tarasoff* line.<sup>44</sup> In *Peck*, however, the court was compelled by the facts to go far beyond requiring psychologists and psychiatrists to adhere to the determinable standards of particular specialties.<sup>45</sup> The court bundled the various classifications and levels of profession under the awning of a single standard. The question remains: what standard?

By developing a single, undefined standard of care, the court failed to adequately identify the point at which duty attaches. This formidable task has been passed on to the bar and trial-level judiciary. On a case-by-case basis, these participants in the judicial

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39. 168 N.J. Super. 466, 403 A.2d 500.

40. *Id.* at —, 403 A.2d at 507.

41. *Tarasoff*, 17 Cal. 3d at 451, 551 P.2d at 354, 131 Cal. Rptr. at 34 (Mosk, J., concurring and dissenting).

42. *Id.*

43. *Id.*

44. *See, e.g., Lipari*, 497 F. Supp. 185; *McIntosh*, 168 N.J. Super. 466, 403 A.2d 500.

45. Essentially, the *Peck* court was dealing with a case that fit poorly into the *Tarasoff* framework. Had the defendants in *Peck* been psychiatrists or psychologists who had knowledge of imminent danger to a third party, the court would have had a proper case with which to introduce the *Tarasoff* rationale into Vermont tort law. However, while the *Peck* court did not have a psychiatrist or psychologist as a defendant, nor did it have a defendant with actual knowledge of imminent danger to a third party, the court did have a "mental health professional" within the statute. Therefore, the facts, along with the statutory language, allowed the court to accomplish its desired result. However, despite the efforts of the court, an old adage is brought to bear—"hard facts make bad law." A more principled approach might have been for the court to have introduced the duty to warn through *Peck*, while acknowledging that under the specific circumstances of the case such a duty did not attach.

process must now forge chains of causation from amalgam and alloy through the institution of an amorphous and potentially arbitrary standard of care for a too broad professional classification. At the same time, the mental health community must respect a duty that has no real definition, but looms as an overshadowing threat to those who might transgress its invisible boundaries.

#### D. Notice Considerations

The maintenance of the duty to warn beyond the point at which warning is no longer necessary is an equally troublesome problem in *Peck*. The concept of duty to warn revolves around the protection of unsuspecting third parties.<sup>46</sup> Central to *Tarasoff* and the cases that have followed is that, absent warning by the defendant, the victim remained unaware of the pending assault. In *Peck*, however, the plaintiffs were found to have had notice, albeit constructive notice, of the potential danger.<sup>47</sup> Holding the defendants liable, under these circumstances, is a significant departure from the previously established parameters of this cause of action.<sup>48</sup> Consequently, *Peck* extends duty and subsequent liability beyond what is either reasonable or necessary.

#### CONCLUSION

In the final analysis, the *Peck* decision raises more questions than it answers. The court centered its discussion on foreseeability, recognizing the importance of that concept in negligence actions.<sup>49</sup> Unfortunately, the court provided no reliable means by which to measure standard of care.

Moreover, it is troublesome that the court extended the duty to warn so as to impose liability even when the purported danger is patent. In its aftermath, *Peck* dictates three options: (1) subsequent clarification by the Vermont Supreme Court of specific stan-

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46. See, e.g., *Tarasoff*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14; cf. W. PROSSER & W. KEETON, *supra* note 2, at 203.

47. The trial court found that the plaintiffs either "knew or should have known" that the argument would have caused John to react in such a violent manner. *Peck*, slip op. at 34; 146 Vt. at 68, 499 A.2d at 427. For a good discussion of the proposition of limiting a cause of action for failure to warn to those cases where the victim was unaware of the danger, see *Cairl v. State*, 323 N.W. 20 (Minn. 1982).

48. See *supra* note 47 and accompanying text.

49. The court specifically addressed "foreseeable victim[s]." *Peck*, 146 Vt. at 67, 499 A.2d at 426. This language strictly follows *Tarasoff* and is consistent with *Palsgraf*.

dards of care within the mental health community; (2) continued confusion among the trial bar and judiciary in determining what standard applies and when duty attaches; or (3) forced legislative action to redefine the current, broad definition of mental health professional. In the interim, there will inevitably be harsh consequences to unfortunate members of the various specialties of the mental health profession.

The preferred resolution to the problems created in *Peck* is legislative action. The legislature has the power to act on its own initiative, while the court is constrained to cases available for review. Because of this distinction, only the legislature has the means to clearly and effectively define the necessary standards of care relative to each of the various specialties of the mental health profession. This is not to say that the state legislature must undertake the arduous task of setting forth a multitude of standards relative to each specialty enumerated under section 7107(13) of title 18. Rather, the lawmakers should amend this section to include such language as "each mental health professional shall be held to the standard of professional care prevailing in the specific specialty in which he or she is qualified."

Additionally, the legislature should consider restricting the availability of a cause of action for failure to warn to instances where the victim would otherwise have been unaware of the danger. To hold a defendant liable in cases where the plaintiff had notice of the threat to his or her safety belies the reasoning behind the need for a duty to warn. In such cases, the warning itself becomes a mere superfluous gesture. There seem to be no sound policy reasons to hold a defendant liable for failing to inform an individual of something that he or she already knows or should know.

The court has attempted a bold and progressive step in Vermont tort law, but legislative assistance is necessary to strike a balance between the positive and negative implications of *Peck*.

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