EXTENDING A PSYCHOTHERAPIST'S DUTY TO WARN BEYOND PROTECTING LIFE: WHO SHOULD LOCK THE BARN DOOR?

INTRODUCTION

In a case of first impression, *Peck v. Counseling Service of Addison County, Inc.*,[1] the Vermont Supreme Court held that a mental health professional[2] has an affirmative duty to take reasonable steps to protect an identifiable victim from threatened physical harm posed to him or her by the mental health professional's patient.[3] In so holding, the court, in a plurality opinion, imposed upon mental health professionals a duty to warn third persons of threatened physical harm directed presumably against human life.[4] Notwithstanding the court's protests to the contrary, a closer look at *Peck* reveals that an unfavorable consequence of the court's opinion is the extension of a therapist's duty to warn identified third persons when a patient threatens harm to their property.

I. *PECK:* CREATING A DUTY TO WARN

John Peck, the plaintiffs' son, was an outpatient at the defendant Counseling Service for one year.[5] A staff psychotherapist responsible for treating Peck then placed him in a vocational workshop, where he worked for approximately eight months until he was required to leave.[6] Two years later, during a temporary stay

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1. 146 Vt. 61, 499 A.2d 422 (1985) [hereinafter cited as *Peck II*].

2. VT. STAT. ANN. tit. 18, § 7101(13) (Supp. 1985), which was cited by the court, defines a mental health professional 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." *Peck II*, 146 Vt. at 63 n.2, 499 A.2d at 423 n.2.

3. *Peck II*, 146 Vt. at 63, 499 A.2d at 423. The procedural history of this case is as follows: The plaintiffs, Charles and Margaret Peck, appealed from a judgment order of the Addison Superior Court, which dismissed their case against the Counseling Service of Addison County, Inc. with prejudice. Following a bench trial, the court's findings of fact indicated that plaintiffs and defendants were equally negligent. However, the court did not find the defendant liable to the plaintiffs for property damages. Although the Vermont Supreme Court agreed with the trial court's finding that no duty to warn existed under current Vermont law, it reversed the lower court's dismissal and imposed a duty to warn, thereby modifying the negligence law of Vermont. *Id.* at 62-63, 499 A.2d at 423.

4. *Id.* at 67-68, 499 A.2d at 427.

5. Peck v. Counseling Service of Addison County, Inc., No. S114-80Ac, slip op. at 26 (Vt. Super. Ct. Jan. 18, 1983) [hereinafter cited as *Peck I*].

6. *Id.* at 26. Peck required job placement assistance because he was borderline mentally

with his parents, Peck and his father had a serious dispute,[7] resulting in Peck's leaving home.[8] He resumed counseling sessions with the defendant's staff psychotherapist who had previously treated him and told the therapist that "to get back at his father . . . he could burn down his father's barn."[9] The therapist informed Peck of the consequences of such an act and asked him to promise that he would not burn down the barn. Peck promised; the therapist believed him and did not disclose the threat to other staff members or to the plaintiffs.[10] On the night of June 27, 1979, John Peck set fire to his parents' barn; the barn was completely destroyed.[11]

In holding that the Counseling Service was negligent in failing to warn the plaintiffs of John Peck's threat to destroy their barn, the Vermont Supreme Court relied primarily on the celebrated case of *Tarasoff v. Regents of the University of California.*[12] Like *Peck, Tarasoff* involved a psychotherapist-patient relationship wherein the patient disclosed to his psychotherapist an intention to harm an identifiable victim.[13] In both California and Vermont, psychotherapist-patient communications are privileged, confidential information,[14] not subject to revelation. Citing similar authority,[15] the *Peck* and *Tarasoff* courts agreed that imposing a duty to warn curtails the psychotherapist-patient confidentiality privilege. Imposing such a duty creates two adverse consequences: first, mentally ill persons are deterred from seeking necessary treatment;[16] second, without the assurance of confidentiality, the psychotherapist-patient alliance is imperiled because the patient is reluctant to

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retarded and suffered from epilepsy, grand mal seizures, which precluded him from most kinds of employment. *See* Brief for Appellee at 9, *Peck II.*

7. *Peck I,* slip op. at 26.

8. *Peck II,* 146 Vt. at 63, 499 A.2d at 424. The serious dispute between father and son began when Charles Peck encouraged John Peck to falsify an application for social security supplemental benefits to fraudulently obtain additional benefits. During this argument, Charles Peck called his son "sick and mentally disturbed" and told him that he should be hospitalized. *Peck I,* slip op. at 26.

9. *Peck II,* 146 Vt. at 63-64, 499 A.2d at 424.

10. *Id.*

11. *Id.* at 64, 499 A.2d at 423-24.

12. Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

13. *Id.* at ___, 551 P.2d at 339, 131 Cal. Rptr. at 19.

14. *See* CAL. WELF. & INST. CODE, §§ 5000-5599 (West 1985); CAL. EVID. CODE § 1014 (West 1985). *See also* VT. STAT. ANN. tit. 12, § 1612(a) (Supp. 1983); VT. R. EVID. 503(b).

15. *See* Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma,* 62 CALIF. L. REV. 1025, 1038 (1974).

16. *Id.*

talk freely about innermost thoughts and feelings.[17] Effective treatment depends on discussion of these personal thoughts because they reveal the symptoms of particular mental illnesses.[18] Thus, the imposition of a duty to warn may actually diminish public safety, if mentally ill persons with violent tendencies are not treated effectively.[19] Finally, after balancing competing interests of nondisclosure of confidential information against protection of the threatened victim, both the *Peck* and *Tarasoff* courts imposed upon the psychotherapist an affirmative duty to warn the intended victim about the risk of impending danger.[20] Because neither psychotherapist warned, they were found negligent.[21] The circumstances of the two cases, however, are sufficiently dissimilar to render the *Tarasoff* holding inapplicable to *Peck*.

II. Protecting Persons vs. Protecting Property

The key factual difference between *Peck* and *Tarasoff* is that in *Tarasoff*, the patient confided to the therapist his murderous threats against plaintiffs' daughter, Tatiana Tarasoff.[22] In *Peck*, the patient threatened only to burn his father's barn.[23] A threat to kill, and consequently, killing, is irreparable; on the other hand, a barn can be replaced, usually from insurance proceeds. Agreeing with the trial court, the *Peck* court addressed this distinction between persons and property only briefly, in a footnote:

> The trial court concluded that if the law of Vermont did require a duty to warn, then a warning would be required on

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17. *Id.* at 1040.

18. *Id.*

19. *See* Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 Harv. L. Rev. 358, 365 (1976).

20. *Peck II*, 146 Vt. at 67, 499 A.2d at 427; *see also Tarasoff*, 17 Cal. 3d at ___, 551 P.2d at 348, 131 Cal. Rptr. at 28.

21. *Peck II*, 146 Vt. at 67, 499 A.2d at 427; *see also Tarasoff*, 17 Cal. 3d at ___, 551 P.2d at 353, 131 Cal. Rptr. at 33.

22. *Tarasoff*, 17 Cal. 3d at ___, 551 P.2d at 339, 131 Cal. Rptr. at 19. There are three other major distinctions between *Peck II* and *Tarasoff*. In *Tarasoff*, (1) the therapist in fact believed the patient would execute his threat of murder; (2) the plaintiffs were unaware of the patient's potential risk of harm and dangerous proclivities; and (3) California's confidentiality privilege includes a dangerous patient exception more directly applicable to the facts of that case. In *Peck II*, (1) the therapist in fact did not believe the patient would execute his threat; (2) the plaintiffs were found comparatively negligent for being aware of the patient's violent and dangerous proclivities and for provoking his crime; and (3) Vermont's confidentiality privilege does not include a dangerous patient exception directly applicable to the facts of this case.

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

> the facts of this case even though the threat to the plaintiffs was one of arson to their property rather than of physical harm to their persons. We agree. Arson is a violent act and represents a lethal threat of harm to human beings who may be in the vicinity of the conflagration.[24]

While the court thus summarily dismissed the person-property distinction, its reasoning fails for three reasons.

First, under the court's own guidelines, the facts of each case will determine whether a threat directed against property amounts to a threat of lethal assault. The *Peck* facts reveal that John's target was his father's unoccupied storage barn.[25] There was no life in the barn or its vicinity; Peck was aware of this because he was residing in his parents' home. The house was located approximately fifty yards from the barn. Moreover, the plaintiffs failed to adduce evidence indicating that the fire could have endangered life. Given these facts, the court's analysis strains the record.

Addressing the person-property distinction in the context of using deadly mechanical devices to protect property, Prosser points out the well-established distinction between occupied dwellings and unoccupied buildings as well as a correlated difference between the appreciable danger to life when either unoccupied or occupied property is feloniously entered, taken, or destroyed.[26] This correlation indicates that a lesser risk of harm is posed to human life when the invaded property is an unoccupied building rather than an occupied dwelling.[27] John Peck set fire to his father's unoccupied storage barn; the risk of lethal harm was therefore minimal.

Prosser also distinguishes between crimes directed against human life and crimes against property. The latter, including arson, are not properly characterized as crimes involving immediate danger to any person:

> The use of deadly devices solely to protect property is highly questionable as a matter of sound policy. [G]enerally, there is no privilege to use deadly devices to protect property from burglary, arson, and perhaps other felonious taking or destruction of property not involving any [i]mmediate danger to

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24. *Id.* at 63 n.3.
25. *Peck I*, slip op. at 31.
26. W. Prosser & W. Keeton, The Law of Torts § 21 (5th ed. 1984).
27. *Id.*

any person.[28]

Characterizing arson as a property crime that does not involve any immediate danger to any person distinguishes a threat of arson from a threat of lethal assault. Although arson may result in personal injury, in this case John Peck's intended and actual victim was his father's unoccupied storage barn. Without relying on hindsight to minimize the personal injury risk involved in the *Peck* case, balancing the risk of harm to all interests still would not have rendered Peck's threat weighty enough to tip the scale toward disclosure.

Second, while it is true, as the trial court noted, that arson can have serious and potentially lethal consequences,[29] it is also true that many crimes against property can result in personal injury and even death. Based on the court's reasoning, therefore, a psychotherapist will have a duty to warn whenever a patient threatens harm to personal and real property that could in some way result in personal injury. If there is a duty to warn, it should not be a duty to warn of any risk of harm. The seriousness of the risk must outweigh the strong public policy of maintaining confidentiality to promote effective therapy. In this case, the risk of harm resulting from burning an unoccupied barn should not have outweighed the countervailing public interests.

Third, while the Vermont Supreme Court relied on *Tarasoff* for its general holding, it ignored a crucial distinction subsequently drawn by the California Supreme Court in similar cases. For instance, in *Thompson v. County of Alameda,*[30] the California Supreme Court restricted a psychotherapist's duty to warn to cases where the threat is to an identifiable or identified victim.[31] Under California law, therefore, a specific victim must be foreseeable before a therapist assumes a duty to warn.

The Vermont Supreme Court, on the other hand, based its finding that arson poses a threat to human life by presuming that arson poses a threat to the public-at-large, without regard to actual identifiable or identified arson victims.[32] In *Peck,* the court pre-

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28. *Id.*

29. *Peck I,* slip op. at 37.

30. Thompson v. County of Alameda, 27 Cal.3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).

31. *Id.*

32. *Peck II,* 146 Vt. at 63 n.3, 499 A.2d at 424 n.3 (See "human beings who may be in

sumptively used the terms "foreseeable victim" and "identified victim" throughout its opinion[33] in an attempt to adhere to the reasoning in *Tarasoff*. But *Tarasoff* and its progeny used those terms to refer to the specific person or persons against whom the threat of harm was directed. To seem consistent with *Tarasoff*, therefore, the Vermont Supreme Court indeed applied the terms "foreseeable" and "identifiable/identified" with reference to the protection of *the Pecks* as the persons named in the threat. However, the court's reasoning is disingenuous because the duty to warn was not imposed to protect the Pecks at all. Rather, relying on the trial court's finding that arson may be dangerous to anyone, the court imposed the duty to warn for just that reason—to protect anyone, identified or not, who may have been harmed. In so doing, *Peck* greatly extends the pool of "foreseeable" victims to anyone who just happens to be in the vicinity.

III. Other Jurisdictions Support the Person-Property Distinction

In *Tarasoff*, the court ruled that the strong public interest in supporting effective treatment of mental illness through safeguarding confidential communications was outweighed by the public interest in safety from *lethal assault*.[34] Subsequent case law in other jurisdictions has recognized the significance of the person-property distinction, requiring that the patient threaten lethal assault or at least physical injury directed against identifiable third persons. Cases following *Tarasoff* have all involved threats of lethal assault. In a Nebraska case, *Lipari v. Sears, Roebuck & Co.*,[35] plaintiff's husband was shot to death by a patient treated by a Veterans Administration psychiatrist.[36] Similarly, in a New Jersey case, *McIntosh v. Milano*,[37] plaintiff's daughter was murdered by the defendant psychiatrist's patient.[38]

In *Bellah v. Greenson*,[39] however, a California court refused to

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the vicinity").

33. *See, e.g., Peck II*, 146 Vt. at 67, 499 A.2d at 426. The court refers to Charles and Margaret Peck, or more accurately, their barn, as the "identified" or "identifiable" victims.

34. *Tarasoff*, 17 Cal.3d at ___, 551 P.2d at 346, 131 Cal. Rptr. at 26.

35. Lipari v. Sears, Roebuck and Co., 497 F. Supp. 185 (D. Neb. 1980).

36. *Id.* at 187.

37. McIntosh v. Milano, 168 N.J. Super. Law Div. 466, 403 A.2d 500 (1979).

38. *Id.* at ___, 403 A.2d at 502.

39. Bellah v. Greenson, 81 Cal. App.3d 614, 146 Cal. Rptr. 535 (1978).

extend the *Tarasoff* holding to impose a duty to warn where the risk is self-inflicted harm or property damage.[40] In *Bellah*, plaintiffs claimed that the psychotherapist was negligent in failing to warn them of the risk of harm to their *property* posed by heroin addicts with whom their daughter, the patient, associated, and, therefore, defendant was liable for damages for stolen property.[41] The court discussed the importance of preserving confidentiality for effective treatment of the mentally ill—that "were it not for the assurance of confidentiality in the psychotherapist-patient relationship, many in need of treatment would be reluctant to seek help."[42] The court concluded that *Tarasoff* should be read to require that "a therapist not disclose information unless the strong interest in confidentiality is counterbalanced by an even stronger public interest, namely, safety from violent assault."[43] Therefore, a psychotherapist in California is under no duty to disclose the contents of a confidential communication where the risk of harm is property damage.[44]

Finally, in a related context regarding the constitutionality of several mental health statutes that permitted psychotherapists to initiate treatment for a patient who had threatened to harm a third person's property, courts have repeatedly stricken the statutes as violative of a patient's due process rights.[45] Most notably, in *Suzuki v. Yuen*,[46] the United States Court of Appeals for the Ninth Circuit invalidated such a statute as unconstitutional, finding that "[b]ecause it would permit a state to deprive one of his liberty when he threatens to harm *any* property, it is too broad . . . ."[47] Emphasizing the value distinctions between protecting life rather than mere property interests, the Ninth Circuit was persuaded by the following passage written by a professor of law and psychiatry:

> Even if one accepts a simplistic concept of dangerousness,

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40. *Id.* at ___, 146 Cal. Rptr. at 539-40.

41. *Id.* at ___, 146 Cal. Rptr. at 537.

42. *Id.* at ___, 146 Cal. Rptr. at 539. (*citing* Fleming & Maximov, *supra* note 15 at 1041.)

43. *Id.*

44. *Id.*

45. *See, e.g.*, Stamus v. Leonhardt, 414 F.Supp. 439, 451 (S.D. Iowa 1976); Bell v. Wayne County General Hospital at Eloise, 384 F.Supp. 1085, 1096 (E.D. Mich. 1974); Lynch v. Baxley, 386 F.Supp. 378, 391 (M.D. Ala. 1974).

46. Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980).

47. *Id.* at 176.

> such as propensity to commit criminal acts, should one regard dangerousness to property as being of the same social significance as violence to the *person* of others? . . . Clearly, it makes a difference to society if an offender is dangerous because of his need to write graffitti on subway walls or if he is dangerous because he molests little children or has an uncontrollable impulse to murder.[48]

Admittedly, the property crime in *Peck* involves more danger than the crime of defacing property—most property crimes do. Nevertheless, the above quote illustrates the principled distinction between persons and property, which the *Peck* court should not have so summarily dismissed.

Conclusion

Valid arguments certainly exist in support of the *Peck* decision. These arguments, however, as well as the deficiencies in the court's rationale, should be more carefully considered before the court again speaks to a psychotherapist's affirmative duty to warn. Hopefully, the court will reconsider its position before any possible damage is done to the practice of psychotherapy in Vermont. Of course, *Peck*, as a plurality decision, cannot be the final word.

More important, however, is the potential reach of *Peck's* duty to warn to protect third person's property interests. Based on the few cases in which courts have squarely faced the issue of whether to extend a therapist's duty to protect property interests, and declined, the Vermont Supreme Court should consider the principled and practical distinctions between persons and property raised by these courts and more carefully tailor its next rationale and holding to reflect these concerns.

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48. *Id.* at n.4 (quoting Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. Pa. L. Rev. 439, 449-50 (1974)).