

# **PSYCHOTHERAPIST'S LIABILITY TO THIRD PARTIES IN THE U.S. AND IN THE CIVIL LAW LEGAL SYSTEM**

In this paper we intend to analyze the liability of psychiatrists and psychologists in the US and in the Civil Law System.

To do this, first we will analyze the legal regulation of psychotherapists in the US Legal System. Afterwards, we will examine legal regulation of psychotherapist's liability in Civil Law. Later, we will raise the feasibility of introducing into the Civil Law system a regulation regarding psychotherapist liability to third parties as the one the US Legal System has established. Finally, we will determine the possible consequences that the US Legal System regulation might cause, and its convenience.

## **I. Legal Regulation of psychotherapist Liability in the US Legal System**

### I.1. Before the Tarasoff case: liability of health professionals to third parties

The traditional limit of professional liability was the contractual relationship, between the professional and his client. Nowadays, this limit has been modified or repudiated by an increasing number of jurisdictions.

This trend started with *Palsgraf v. Long Island Railroad* (248 N.Y. 339, 162 N.E. 99 (1928)). In that case the New York Court of Appeals established a test of foreseeability to determine whether the actor had a duty of care to the injured party. If the actor should have reasonably foreseen that his actions would injure the plaintiff, he would be held liable for those injuries.

Subsequently, extension of a psychotherapist's liability to third parties was extended to a series of cases involving contagious diseases in the early 20's.

For example, in the case of *Skillings v. Allen*, 143 Minn. 323, 173 N.W. 663 (1919) the Supreme Court of Minnesota found a valid cause of action against a physician treating a patient for scarlet fever when he failed to advise her parents that the disease was infectious and advised that it was safe to visit her.

Afterwards, in *Merchants National Bank & Trust Co. of Fargo v. United States* (administrator and personal representative of the Estate of Eloise A. Newgard, deceased, suing on behalf of her three minor children (United States District Court, District of North Dakota, 1967.272 F. Supp. 409)), the United District Court of North Dakota held the United States liable for the death of Eloise A. Newgard, who was killed by his mentally ill husband after Dr. Truman M.

Cheney, Counseling Psychologist at the Veterans Administration Hospital at Fort Meade, made arrangements to put him on leave at the ranch owned by Mr. and Mrs. Clarence A. Davis. This case served as precedent for the imposition of liability to psychiatric facilities for the release of patients that the institution knew or should have known to be dangerous.

After this case, in *Hilkerman v. Borgess Medical Center*, (157 Mich. App. 314, 403 N.W.2d 547 (1987)), the court explained that the existence of a special relationship, such as that between a physician and patient, was premised on the notion of control over the patient. Hence, where a patient's hospitalization was voluntary, no duty should be imposed due to the facility's inability to compel the patient confinement.

#### I.2. Tarasoff v. Regents of University of California (551 P.2d 334 Cal. 1976)

On August, 1969 a student of the University of California at Berkeley, Prosentjit Poddar, confided to Dr. Lawrence Moore, a psychologist employed by the Cowell Memorial Hospital at the University of California at Berkeley, his intention to kill Tatiana Tarasoff (another student at UC Berkeley with whom he was obsessed). After hearing this confidence, Dr. Moore requested the campus police to detain Poddar, but he was released briefly after being detained due to the fact that he appeared rational.

After his detention, Dr. Harvey Powelson, Dr. Moore's superior, directed that no further actions be taken to detain Poddar. No one warned Tatiana Tarasoff or her parents about her peril.

On October 27, 1969, Poddar killed Tatiana Tarasoff.

After her death, Tatiana's parents brought a suit against the Regents of University of California, alleging that Tatiana's death proximately resulted from defendant's negligent failure to warn Tatiana or others likely to apprise her of her danger.

In finding for the plaintiffs, the Court established as a general principle, that *"defendant owes duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous"*.

The majority in this case pursue three lines of analysis in reaching this conclusion.

First, the Court cited earlier medical cases from other jurisdictions that imposed a duty on physicians to notify third parties who are likely to come into contact with a patient suffering from a contagious disease.

Second, the Court looked to Section 315 of the Restatement of Torts Second, which provides that there is no duty 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.

Third, the court undertook a policy analysis and concluded that the need to protect persons from serious harm outweighed the possibly destructive effects on the patient–psychotherapist relationship that might be caused from a rule requiring disclosure to third parties.<sup>1</sup>

The Tarasoff case was settled by the parties out of court prior to retrial.<sup>2</sup>

### I.3. After Tarasoff’s Case

After the Tarasoff case, some Legislatures have codified the rule stated in it<sup>3</sup>.

The California Civil Code §43.92, for example, establishes that no duty arises unless the patient has communicated to the psychotherapist “*a serious threat of physical violence against a reasonably identifiable victim*”, and this duty is discharged by making “*reasonable efforts to communicate the threat to the victim and to a law enforcement agency*”.<sup>4</sup>

Also, Lexis Nexis establishes that in general, 2 restatements and 6 statutes has been created in harmony with this case.<sup>5</sup>

## **II. Legal regulation of psychotherapist’s liability in Civil Law.**

An example of Civil Law legislation that can be used to compare the responsibility of psychotherapists in both systems is the Peruvian legislation. Now, I will analyze the articles of the laws of the Peruvian legal system that I think, could apply to the psychotherapist’s liability before third parties. The criminal code, the civil code and the ethic and deontology code of the Peruvian Medical College can be of help to understand the regulation (or should we say lack of regulation) of this issue in this legal system.

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<sup>1</sup> Also, regarding the confidentiality issue, the Court refers to the Principles of Medical Ethics of the American Medical Association (1957), section 9, which state that: “*A physician may not reveal the confidence entrusted to him in the course of medical attendance... unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community*”. In light of this, the court affirmed that “*the protective privilege ends where the public peril begins*”.

<sup>2</sup> Ralph Reisner & Christopher Slobogin, Law and the Mental Health System. Civil and Criminal Aspects, 2d ed., West Publishing Co (1990), PG 130-131

<sup>3</sup> See, e.g., N.J. Stat. Ann §2A:62A-16b (West 1996)

<sup>4</sup> Aaron Twerski & James A. Henderson Jr., Torts: Cases and Materials, Aspen Publishers (2003). PG 309 - 317

<sup>5</sup> Statutes: Cal Fam Code @ 216, Cal Gov Code @ 820.2, Cal Gov Code @ 856, Cal Wel & Inst Code @ 5154, HRS @ 503, Mont. Code Anno., @ 50-16-529.

Restatements: Restat 3d of the Law Governing Lawyers, @ 51 and Restat 2d of Torts, @ 895D.

II.1. Criminal Code: The article 13 of the Peruvian Criminal Code establishes that *"he who does not impede the realization of a felony will be punished: (1) if he has the legal duty to impede it (...)"*.

Due to the fact that there is no duty established in the Peruvian Legal System regarding Psychiatrists or Psychologist's (hereinafter, psychotherapist) liability, I don't think this article would be of too much help in this specific case.

On the other hand, article 127 of the Peruvian Criminal Code establishes that: *"he who finds another person hurt or in estate of great and imminent danger and omits from offering immediate help, being able to do it without risk for his own person or of a third party, or if he abstains from reporting to the authorities, will be punished with a prison for no more than one year and with a fine of between thirty to one hundred twenty days."*

I consider that from this article it could be implied that in the Peruvian legal system there exists a duty to rescue, that would include the duty of the psychotherapist's to protect (or rescue) third parties when they know to a substantial certainty that this third parties will be harmed by one of their patients.

Regarding the security measures, article 72 of the Peruvian Criminal Code establishes that the confinement will only be applied when a person realize an act considered as a felony, and from the act and the personality of the agent it could be predicted a future conduct that revels a high probability of the commission of new felonies.

From this it can be concluded that a psychotherapist who wants to stop a patient from hurting others will not be able to ask the judge for his confinement, unless this patient has commit a felony in the past. It will only be possible for the psychotherapist to warn the third party(s) and the authorities of the existing danger.

II.2. Civil Code: To determine if a psychotherapist can be hold liable for the harm caused by one of his patients to third parties under the Peruvian Civil Law, it is important first to evaluate each element necessary to configure the civil responsibility in the Peruvian Civil system. The elements of civil liability contemplated in it are the following:

*Capacity to be hold liable before others*: For this legal system, a person has capacity to be liable before others for the harm committed when the tortfeasor has the ability to discern (articles 458 of the Civil Code).

In this case, due to the fact that psychotherapists in principle have this ability, they would comply with this element.

*The unlawfulness of the conduct:* Article 1969 of the Civil Code establishes that *"he who, intentionally or by negligence, causes harm to other person, has to indemnify him. The author of the damage has the burden to proof his innocence"*.

The damage caused by a psychotherapist would be the one inflicted by his omission to warn the threat made by their patient of harming others.

*The attribution factor:* This element refers to the title in which someone is liable. It is the reason of the duty to compensate.

The negligence of professionals, as an attribution factor, is described in the article 1762 of the Peruvian Civil Code, which establishes that: *"if the professional service implies the solution of professional issues or technical problems of special difficulty, the professional will respond for the harm he causes only in cases of reckless disregard"*.

Also, in the Peruvian civil system, intentional torts can be divided in direct torts (the tortfeasor acts with the intent to cause a damage) and the indirect intentional torts (the tortfeasor acts knowing that his act can trigger a damage to another, assuming that risk).

So, in this case, for the psychotherapist to be liable, he should have to commit an indirect intentional tort (not warning of the threat of his patient to others), that should be considered a reckless disregard in his profession (as will be seen, the Medical Ethic and Deontology Code establishes the psychotherapists duty to warn about their patient threats to others, so in principle this omission to warn could be considered as an reckless disregard in his profession).

*Causal connection, between the tortfeasors act and the damage:* Article 1985 of the Peruvian Civil code establishes that *"the indemnification comprises all the consequences that derived from the action or omission (...), having to exist a causal relation between the act and the produced harm"* (emphasis added).

So, to proof that the damaged caused by the patient was a direct consequence of the negligence of the psychotherapist, the victim will have to proof that the omission of the psychotherapist to warn about his patient threats to the victim and the authorities, was the direct cause of the harm caused by his patient to her.

*The damage:* in the Civil Law system the damages can be economic or non economic. The economic damages are classified in out of pocket expenses and lost profits and the non economic damages refer to the pain and suffering of the plaintiff.

If the plaintiff proves the existence of this damages and the liability of the psychotherapist, the defendant will have to indemnify him for all of them.

After evaluating all the elements, and due to the fact that from the criminal code it can be implied a duty of the psychotherapists to warn regarding their patients threats, it would be possible for a victim of a psychotherapist's patient who first threatened to harm her, to recover a compensation from the psychotherapist for the damages suffered due to the psychotherapist omission to warn.

11.3. Ethic and Deontology Code of the Peruvian Medical College: The article 65 of the Ethic and Deontology Code establishes that: "The knowledge of a pathologic condition of the patient, that could result in harm to third parties, forces the doctor in charge to protect them by any means in his disposition, exonerating him from the duty of the professional secret in all which strictly refers to this and is directed to prevent that the harm be produced."

From this, it could be affirmed that for the medical profession in Peru it is acceptable for a psychotherapist to breach the professional secret duty when this action can prevent harm.

### **III. Feasibility of introducing to the Civil Law system a regulation regarding psychotherapist liability to third parties as the one the US Legal System has established.**

Regulation currently in force in the Peruvian system could make it possible to hold responsible (for criminal as well as civil liability) a psychotherapist who, knowing to a substantial certainty that one of his patients will harm other person, did not stop him, warning the victim and the authorities about this fact.

Although it is possible to imply a duty of a psychotherapist to warn the authorities and the victims from the threats made by their patients, it would be convenient that the legislature establishes, as the Ethic and Deontology Code of the Peruvian Medical College already does, the duty of the psychotherapist to break his professional secret duty and report the likelihood of a felony, when he knows to a substantial certainty that this felony will be committed by one of their patients against an identified victim.

### **IV. Possible consequences of the US Legal System regulation of the Psychiatrists and Psychologists liability – experts opinion**

In the Tarasoff case, one of the Justices (Justice Clark) dissented with the general opinion. The more compelling arguments that this Justice gave against imposing such liability upon psychotherapists included the following:

- A) The psychotherapist-patient relationship is predicated upon the psychotherapist's duty to preserve the secrets of the patient.
- B) If a patient knows that his aggressive thoughts may be revealed, he will not confide them to a psychotherapist, frustrating the psychotherapist's ability to help the patient.
- C) The ability of a psychotherapist to predict dangerous behavior on the part of a client is questionable, and over-reporting is encouraged by placing such potential liability on the psychotherapist.<sup>6</sup>

Notwithstanding the dissenting opinion of Justice Clark, the Tarasoff doctrine has become a generally accepted theory of psychotherapist liability in the United States.

## **V. Conclusion**

The Tarasoff case has been a leading case in the United States, which stated the liability of the psychotherapists before third parties.

It is our opinion that the application of this doctrine can help reduce criminal acts by mentally ill patients in a society, and therefore, can improve the peace and the security in the society.

That is why I encourage that this doctrine be introduced in the Civil Law legislation, via the inclusion in the Criminal Code of an article creating the duty of the psychotherapist to protect third parties from his patient criminal acts.

Regarding Justice Clarks opinion about the negative consequences that the application of the Tarasoff doctrine could bring in the society, we agree that the violation of the professional secret to stop mentally treated patients from probable criminal acts can cause dangerous consequences, but never the less, we consider that the positive results of this doctrine will surpass the negative ones.

Nevertheless, we consider that the psychotherapist reports of their patient threats, should be hold as a last resource.

First, psychotherapists should try to stop them from committing criminal acts by other means (like with the continuance of an efficient treatment).

Only after the failure of this treatment occurs, should they take the decision to report this menace.

## **LEGAL AUTHORITIES**

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<sup>6</sup> Shirley Darby Howell, Psychotherapy and the Law: "In a true dark night of the soul, it is always three O'clock in the morning" -- F. Scott Fitzgerald, 56 Ala. Law. 44 (1995)

### **Cases**

Palsgraf v. Long Island Railroad, 248 N.Y. 339, 162 N.E. 99 (1928)

Skillings v. Allen, 143 Minn. 323, 173 N.W. 663 (1919)

Merchants National Bank & Trust Co. of Fargo v. United States, U.S. dist., N.D. 272 F. Supp. 409 (1967)

Hilkerman v. Borgess Medical Center, 157 Mich. App. 314, 403 N.W.2d 547 (1987)

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

### **Statutes**

California Civil Code §43.92.

Peruvian Criminal Code, Articles 13, 72 and 127.

Peruvian Civil Code, Articles 458, 1762, 1969 and 1985.

Code of Ethics and Deontology of the Peruvian Medical College, Article 65

### **Periodical Materials**

Shirley Darby Howell, Psychotherapy and the Law; "In a True Dark Night of the Soul, it is Always Three O'Clock in the Morning" – F. Scott Fitzgerald, 56 Ala. Law. 44, 1995,

### **Books**

Aaron D. Twerski & James Henderson Jr., Torts: Cases and Materials, (Aspen Publishers) (2003).

Ralph Reisner & Christopher Slobogin, Law and the Mental Health System. Civil and Criminal Aspects, (2d ed. West Publishing Co. 1990).

### **Internet**

Official Site of the Medical Peruvian College, <http://www.cmp.org.pe/>