THIRD PARTIES BEWARE:
THE TEXAS SUPREME COURT STRENGTHENS PSYCHOTHERAPIST-CLIENT CONFIDENTIALITY IN THAPAR v. ZEZULKA

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"We accept the verdict of the past until the need for change cries out loudly enough to force upon us a choice between the comforts of further inertia and the irksomeness of action."

INTRODUCTION

In Thapar v. Zezulka,2 the Texas Supreme Court opted against establishing a common law duty for psychotherapists to protect third parties from potential harm posed by their clients.3 Historically, the law has not acknowledged a mental health professional's duty toward individuals with whom no formal client-therapist relationship existed.4 However, some courts have created a ground for practitioner liability for injury caused by their clients to third parties.5 In an often cited opinion, Tarasoff v. Regents of University of Cali-

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1 Judge Learned Hand, in BARNES & NOBLE BOOK OF QUOTATIONS 10 (Robert L. Fitzgerald ed. 1987).

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

3 Id. at 638.


5 Id. (noting that a psychotherapist bears a duty to use her best professional judgment when predicting a client's propensity towards violence).
foramina, the court clearly revealed several "factors that influence the right to privacy versus the right to know."  

In establishing a duty to warn, courts must balance the rights of third parties against privacy interests of patients. While health care providers have a duty to use reasonable care in the treatment of clients, the costs of malpractice extend beyond treatment. For example, mental health professionals bear a duty to protect the public from the violence exhibited by their clients. However, clients have privacy interests that should be maintained at all times. Confronted with these conflicting policy and treatment interests, no clear answers arise to the question of when there should be a duty to warn. Under the current state of Texas law, only one statute provides guidance to psychotherapists. This statute allows them to disclose certain confidences, yet it neither mandates disclosure nor shields therapists from liability. Because the statute is not definitive, psychotherapists can be sued for both breaching and maintaining confidentiality.

Thapar is an important case not only for psychotherapists, clients, and injured third parties, but also for other service professionals (including attorneys). Part I of this case note describes the Texas Supreme Court's rationale in Thapar. Part II places Thapar within the continuum of cases addressing the duty to warn. Part III offers an analysis of Thapar, discusses the proper framework for establishing a common law duty to warn, and suggests a new standard for psychotherapists. This case note argues that the Texas Supreme Court should establish a common law duty to warn, even though creating such a duty might remove courts and psychotherapists from a "zone of comfort."

I. THE TEXAS SUPREME COURT'S RATIONALE IN THAPAR

A. Background

I. Facts

Freddy Ray Lilly (Lilly) was a Vietnam war veteran who served as an army intelligence specialist. As a result of his experiences during the war, Lilly frequented treatment facilities upon his return to the United States. Dr. Renu K. Thapar (Dr. Thapar), a psychiatrist, treated Lilly for the first time in May of 1985 at Memorial Southwest Hospital; treatment was initiated after Lilly slapped his stepfather at a family gathering. Dr. Thapar diagnosed Lilly as suffering from a moderate to severe case of post-traumatic stress disorder. His symptoms included paranoia and delusions specifically directed toward Vietnamese, African-Americans, and his stepfather, Henry Zuzulka (Zuzulka). Furthermore, Dr. Thapar acknowledged that Lilly's alcohol abuse was in remission. In July 1985, Dr. Thapar released Lilly from the hospital to the care of his mother and stepfather and was to continue Lilly's treatment on an outpatient basis.

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15 Id.
16 Id. at 507-08. (noting that such treatment facilities included both psychiatric hospitals and alcohol treatment centers).
17 Id. at 507-08.
18 Id.
19 Id. at 508. Post-traumatic stress disorder is characterized by the development of symptoms following the exposure to an extreme traumatic event involving direct personal experience. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 4th ed. (1994). This experience includes witnessing or being confronted with events that involve actual or threatened death or serious injury, or threats to the physical integrity of others. Id. The present event in the events includes intense fear, helplessness, or horror. Id. Symptoms include: (1) reexperiencing of the event; (2) avoidance of stimuli associated with the traumatic event; and (3) symptoms of increased arousal. Id. Individuals with posttraumatic stress disorder experience impaired affect modulation, dissociative symptoms, feelings of helplessness, social withdrawal, self-destructive and impulsive behavior, or a change from previous personality characteristics. Id. at 425.
16 Zuzulka, 961 S.W.2d at 508.
18 Id.
19 Id.
Dr. Thapar’s outpatient treatment consisted of both psychotherapy and psychotropic drug therapy. On June 18, 1986, Lilly was readmitted to the hospital because of difficulties he experienced while living in a trailer located behind his mother and stepfather’s house. A month later, Lilly was discharged again by Dr. Thapar. While receiving outpatient psychotherapy and drug treatment, Lilly resided with another psychiatric patient. Unable to continue living with a roommate, Lilly moved from the trailer and began to live on the street and, occasionally, at an Alcoholics Anonymous (AA) facility. Lilly stopped taking his medications and became increasingly upset with AA volunteers; in fact, he told Dr. Thapar that he wanted to react violently toward them.

In February 1987, Lilly was again readmitted to Southwest Memorial Hospital where Dr. Thapar noted that Lilly was experiencing flashbacks, nightmares, and feelings of paranoia. Once again, he was discharged with instructions to take his medication and continue outpatient treatment. Lilly was readmitted to the hospital and discharged twice more in 1987.

On May 16, 1988, Lilly was admitted to West Oaks Psychiatric Hospital where Dr. Thapar noted that while on medication, Lilly demonstrated symptoms of paranoia and delusions. After his discharge from West Oaks, Lilly missed several outpatient psychotherapy sessions, which Dr. Thapar noted in his file.

Once more, Lilly discontinued his drug treatment and was admitted to Southwest Memorial Hospital on August 23, 1988. Both the admission nurses and Dr. Thapar noted that Lilly was homicidal and wanted to kill his stepfather. However, their notes stated that Lilly “has decided not to [kill his stepfather] but that is how he feels.” According to hospital staff records, Lilly was pacing, neglecting his personal hygiene, avoiding other patients, and did not participate in therapy as usual. Dr. Thapar and the hospital staff failed to convey this information to Lilly’s family, even though Lilly’s mother visited the hospital often. The police were notified of neither Lilly’s threats nor his discharge.

On September 28, 1988, Lilly murdered his stepfather. Lilly explained to the police that he killed Zerulka because Zerulka intended to burn down his trailer. After Lilly’s arrest, his sister contacted Dr. Thapar and convinced her to report to the Harris County Jail that Lilly was dangerous and should be isolated from other inmates. Dr. Thapar then went to the hospital, dictated Lilly’s discharge summary, and obtained and altered the records of Lilly’s last hospitalization.

2. Procedural History

Lyndall Zerulka, Lilly’s mother and the deceased’s wife, sued Dr. Thapar for negligence resulting in the wrongful death of Zerulka. She claimed that Dr. Thapar “fraudulently concealed Lilly’s threats and dangerous condition from the date of discharge.”
until September 28, 1988." Furthermore, Lyndall Zezulka alleged that Dr. Thapar was "negligent in diagnosing and treating Lilly and negligent in failing to warn of Lilly's threats toward Henry Zezulka."43 Dr. Thapar filed a motion for summary judgment, which at first was denied, but later granted after a rehearing.44 The District Court held that Dr. Thapar owed no duty to Henry Zezulka because they did not maintain a doctor-patient relationship.45 Lyndall Zezulka then appealed.46

B. Proceedings Before the Texas First Court of Appeals

Writing for the court, Justice O'Connor reversed and remanded the case, holding that Dr. Thapar's lack of a doctor-patient relationship with Zezulka was not a defense to Zezulka's cause of action.49 The court noted that Dr. Thapar relied on traditional medical malpractice cases that required a doctor-patient relationship before a doctor could be held liable,50 and agreed that Lyndall Zezulka's plaintiff's claim included malpractice issues.51

44 Zezulka, 961 S.W.2d at 509.
45 Thapar, 941 S.W.2d at 836.
46 Zezulka, 961 S.W.2d at 509-10 (debating whether the plaintiff filed an untimely response to the rehearing).
47 Id. at 507.
48 Id. at 509-10.
49 Zezulka, 961 S.W.2d at 511. The court also held that even though the plaintiff failed to timely file an appeal bond, the existence of a timely filed notice of appeal was sufficient to invoke the court's jurisdiction. Id. at 509.
50 Id. at 510. See, e.g., Bird v. W.C.W., 868 S.W.2d 767, 769-70 (Tex. 1994) (concluding that a father cleared of child abuse charges could not sue the psychologist for negligently misdiagnosing sexual abuse because there was no physician-patient relationship between the father and the psychologist); Mettger v. Sebek, 892 S.W.2d 20, 41 (Tex. App.—Houston [1st Dist.] 1994) (writing denied) (citing Bird and concluding that "a mental health care professional owes no professional duty of care to a third party to not negligently misdiagnose a condition of a patient"); Wilson v. Wissel, 828 S.W.2d 231, 233-35 (Tex. App.—Annaillie 1992, writ denied) (affirming the trial court's decision that a doctor hired to conduct an examination solely for the purpose of insurance is not liable for failure to disclose the findings from that exam because the doctor's duty extends only to the one requesting the examination). Fought v. Soko, 821 S.W.2d 218 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (holding that placing a telephone call to a doctor at home does not initiate the doctor-patient relationship).
51 Zezulka, 961 S.W.2d at 511.

Dr. Thapar relied upon Flynn v. Houston Emergency, Inc.52 in her defense. However, in deciding to hold Dr. Thapar liable, the court distinguished the case from the facts at hand:

In Flynn, the plaintiff alleged that the doctor was negligent in treating a patient who had recently ingested cocaine. The Plaintiff argued that the doctor breached a duty to the public by not keeping the patient in the hospital or warning him not to drive until the effects of the cocaine wore off.53 The court concluded that contrary to Flynn, in the present case the safety of a particular person was at issue, not the safety of the public at large.54 Noting Tarasoff v. Regents of University of California,55 the court explained that "[b]ecause Dr. Thapar allegedly knew of a specific threat to a specific person, she may have had a duty to warn that person, based on facts to be developed at trial."56 Furthermore, the court stated that in 1979 the Texas Legislature formed an exception to confidentiality in the therapist-client relationship by publishing guidelines for health care professionals concerning clients who might be dangerous to themselves or others.57 The court explained that because the events leading to this suit took place in 1988, this case was governed by the Act of August 27, 1979.58 This 1979 statute stated:

52 869 S.W.2d 403, 404-06 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (indicating that the plaintiff was injured by a patient who had visited the defendant physician before the accident, and that the physician had failed to warn the patient not to drive because of his ingestion of cocaine; also holding that the physician had no duty to the plaintiff or to the public at large).
53 Zezulka, 961 S.W.2d at 511.
54 Id. at 511.
55 851 F.2d 334, 335 (Cal. 1988) (holding that when a psychotherapist determines that a client presents a serious danger of violence to a specific, identifiable victim, the psychotherapist incurs an obligation to use reasonable care to protect that intended victim against such danger).
56 Zezulka, 961 S.W.2d at 511.
57 Id.; 1979 Tex. Gen. Laws 512 (repealed 1991) (current version at Tex. HEALTH & SAFETY CODE § 611.004 (Vernon 1997)).
58 Zezulka, 961 S.W.2d at 511.
59 § 610, 1979 Tex. Gen. Laws at 514. The current statute Tex. HEALTH & SAFETY CODE § 611.004(a)(2) (Vernon 1997) implements the same standard. A professional may disclose
The court reasoned that "[b]y enacting article 5561h, § 4(b)(2), the Legislature anticipated that a doctor or other health care professional might acquire information from treatment about a threat to another person. In such cases, there is no confidential relationship that prevents the disclosure of the information."60 The court held that Dr. Thapar's assertion that no doctor-patient relationship existed between herself and Zezulka failed to provide a defense to the cause of action.61 The court thus reversed and remanded the cause for further proceedings.62

C. Appeal to the Supreme Court of Texas

A unanimous Texas Supreme Court reversed the appellate decision.63 Writing for the court, Justice Enoch concluded that there was no common law duty for mental health professionals to warn third parties of their clients' threats.64 The court distinguished this case from Tarassoff65 by noting that Texas has never recognized such a duty to warn third parties.66 Without addressing the differences between California and Texas jurisprudence, the court concluded there was no duty to warn because "the confidentiality statute governing mental-health professionals in Texas makes it unwise to rec-

60 Zenzulka, 961 S.W.2d at 511.
61 Id.
62 Id.
63 Thapar v. Zenzulka, 994 S.W.2d 635, 636 (Tex. 1999).
64 Id. at 640. Justice Enoch's opinion addressed several issues on appeal: whether a psychotherapist may be liable under the tort laws of negligence for failing to warn specific third parties when a client explicitly makes threats toward a particular person; and whether the psychiatrist provided negligent diagnosis and treatment. Id. at 626-27. Justice Enoch opined that Dr. Thapar owed no duty to either Henry Zenzulka or Lynndall Zenzulka, a third party nonpatient, for negligent misdiagnosis or negligent treatment of Lilly. Id. at 637-38, citing Binz v. W.C.W., 868 S.W.2d 767, 769-70 (Tex. 1994) (noting that a psychologist may not be sued by a third party for misdiagnosing sexual abuse because of an absence of a doctor-patient relationship between the psychologist and the third party). In essence, the Texas Supreme Court agreed with the Court of Appeals, concluding that Dr. Thapar was entitled to summary judgment on the latter issue. Thapar, 994 S.W.2d at 637-38.
65 851 F.2d at 335 (holding that health professionals have a duty to warn identifiable third parties from the threats of their clients).
66 Thapar, 994 S.W.2d at 637-38.
played a public policy argument to bolster its decision.76 Unlike the child abuse statutes requiring mandatory disclosure—which impose both criminal liability for failure to report and provide civil and criminal immunity for good faith disclosure—the statute in this case did none of these things.78 According to the court, "mental-health professionals make disclosures at their peril."79 Justice Enoch described a "Catch-22" situation where if psychotherapists are under a common law duty to warn, then if the threat proves to be idle after disclosure, they may be liable to the client.80 However, if they do not notify third parties, they may be liable to the victim's family due to their failure to warn.81 Justice Enoch reasoned against imposing a common law duty to warn because it would conflict with the Legislature's policy.82

II. PLACING THAPAR WITHIN THE CONTINUUM OF CASES

A. History of the Duty to Warn

1. Tarasoff v. Regents of University of California83

Tarasoff is well known among mental health professionals in the United States,84 and has spawned a wave of legal commentary and judicial criticism.85 In Tarasoff, an outpatient client told his psychologist that he intended to kill an individual identified as Tatiana Tarasoff.86 Two months after making this threat, the patient killed Tatiana.87 The plaintiffs, Tatiana's parents, sued the psychologists and the university who employed them for failure to warn of the impending danger.88 The defendants claimed they had no duty of reasonable care to Tatiana or her parents, and "were free to act in careless disregard of Tatiana's life and safety."89 The California Supreme Court held:

When a therapist determines, or . . . 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. The discharge of this duty . . . may call for him to warn 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.90

The court reasoned that the policy of protecting the general public outweighs the consequences of potentially unnecessary warnings.91 According to Tarasoff, if a mental health professional reasonably believes a client has revealed a serious risk of violence towards an identifiable third party, then the mental health professional has a duty to use reasonable care to protect the identified

76 Id.
77 Tex. Fam. Code § 261.310(a) (Vernon 1997). This statute states, "a person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report . . . ." Id. The statute also allows penalties for not reporting:
(a) A person commits an offense if the person has cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect and knowingly fails to report as provided in this chapter.
(b) An offense under this section is a Class B misdemeanor.


79 Thapar, 994 S.W.2d at 640 (noting that "[t]he confidentiality statute here does not make disclosure of threats mandatory nor does it penalize mental-health professionals for not disclosing threats in good faith").
80 Id.
81 Id.
82 Id.
85 See id. at 203 (noting that Tarasoff was not "warmly received by mental health professionals"). See, e.g., Nassar v. Parker, 435 S.E.2d 502, 504 (Va. 1993); Boynton v. Burglass, 590 S.E.2d 446, 447 (Va. App. 1999); Grossman, supra note 7, at 157-59 (359). See, e.g., Thapar v. Regents of the University of California, 994 S.W.2d 640 (Cal. 1999).
86 Tarasoff, 581 P.2d at 339.
87 Id.
88 Id. at 340.
89 Id. at 342.
90 Id. at 340.
91 Tarasoff, 581 P.2d at 347 (concluding that the "public policy favoring protection of the confidentiality of communications must yield to the extent to which disclosure is essential to avert danger to others").
third party from harm. Moreover, this duty may include contacting the identified party directly.  

2. Thompson v. County of Alameda  1984

Four years after Tarasoff, the California Supreme Court limited the Tarasoff duty in Thompson. 199 The court clarified the Tarasoff duty and explained that a mental health professional does not have a duty to warn third parties if the victim cannot be reasonably identified. 200 The court concluded:

In those instances in which the released offender poses a predictable threat of harm to a named or readily identifiable victim or group of victims who can be effectively warned of the danger, a releasing agent may well be liable for failure to warn such persons. . . . Plaintiffs' decedent was not a known, identifiable victim, but rather a member of a large amorphous public group of potential targets. Under these circumstances we hold that County had no affirmative duty to warn plaintiffs, the police, the mother of the juvenile offender, or other local parents. 201

The court narrowed the duty to warn doctrine by providing guidance to therapists and other professionals concerning when the duty may be triggered. 202

198 Id. at 340. See also Matthew A. Masek, The Physician's Duty to Warn Third Parties-Has Texas Gone Too Far? 27 (1997) (unpublished L.L.M. thesis, University of Houston Law Center) (on file with the University of Houston Law Center Library); Wexler, supra note 94, at 202. Wexler explains several themes presented in Tarasoff: a therapist must act to protect a third party when the therapist determines that the client poses a serious risk to another person; because the court utilized the words "intended" and "foreseeable," the therapist's duty may extend only to circumstances where the victim can be identified; a therapist has a number of reasonable options that can be used under these circumstances, with warning the victim being the standard response; therapists should be advised to also warn intended victims that are already, or at least partially aware of the client's violent tendencies. Id.

199 Masek, supra note 92, at 27.

200 614 P.2d 728 (Cal. 1980). Thompson involved a juvenile offender who was confined in a county institution. Id. at 730. The offender revealed to the "County" that if released he would "take the life of a young child residing in the neighborhood." Id. The County released the offender for temporary leave and within twenty-four hours he killed a young boy. Id.

201 Id. at 794.

202 Id. at 798.

203 Id.

204 Id.

205 B. Tracing Duty to Warn Cases in Texas

The Texas appellate court decisions addressing the duty to warn share several common themes. All involve third parties who were injured by patients. These third parties then sued the health care providers for failure to warn, allowing the courts to decide if and when there is a duty to warn in the absence of a doctor-patient relationship.

1. Williams v. Sun Valley Hospital

This case addressed the question of whether a hospital, treating a voluntarily admitted mental patient, has a duty to confine the patient in order to prevent injuries to the public. 206 A voluntarily committed patient diagnosed with schizophrenia climbed over a hospital wall, ran a mile from the hospital, and jumped in front of a car causing injuries to the driver. 207 The patient did not have a history of aggressive behavior and had never attempted to escape from hospital admission. 208 The driver sued the hospital for damages resulting from injuries sustained in the collision. 209

The Court of Appeals in El Paso held that the hospital did not breach any duty owed to the victim, stating:

Sun Valley Hospital breached no duty which it owed to [the plaintiff]. 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 hospitals and therapists for the unpredictable conduct of their patients with a mental disorder. In this case there was no duty to warn [the plaintiff] as she drove on a public street more than a mile from the hospital that a patient had escaped from a mental ward. 210

The Williams court endorsed the Thompson decision, holding that there is no duty to warn in the absence of an identifiable or foreseeable victim. 211

206 723 S.W.2d 783 (Tex. App.—El Paso 1987, writ ref'd n.r.e.).

207 Id. at 784.

208 Id. (noting that the patient was diagnosed with a type of undifferentiated schizophrenia not exemplified by aggressive behavior).

209 Id.

210 Id. (noting that the driver alleged that the hospital was negligent in the following: failing to construct a wall high enough to prevent patients from climbing over it; allowing patients to be in a area where they could escape; and failing to properly supervise the patient).

211 Williams, 723 S.W.2d at 787.

212 See Masek, supra note 92, at 34.
2. Kerrville State Hospital v. Clark

Although the Court of Appeals established a duty to use reasonable care when releasing mentally ill patients, the Texas Supreme Court reversed, basing its decision on sovereign immunity and completely ignoring the duty to warn and confidentiality issues. The patient, Gary Ligon, had a history of mental problems. Pursuant to a court order, Ligon was released on an outpatient commitment after one month in inpatient treatment at Kerrville. During his outpatient status, he brutally murdered his estranged wife. The victim's parents sued the hospital and the Texas Department of Mental Health and Mental Retardation for wrongful death.

After addressing a number of duty to warn cases including Williams and Tarasoff, the Court of Appeals held that the hospital owed a duty to use reasonable care in its release of Ligon. The court reasoned that "the risk, foreseeability, and likelihood of injury were high." Although the court did not directly address the issue of duty based on a failure to warn, the court noted that a threat "need not be made against a specific victim in order for the duty to warn to be imposed." Thus, the court reasoned that Ligon's wife was within the zone of danger and that Kerrville may have had a

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119 Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 585-86 (Tex. 1996) (holding that the use of oral medication instead of injection of medication before the patient's release does not include use of tangible property and does not fall within waiver of sovereign immunity under Texas Tort law).

120 Kerrville, 900 S.W.2d at 429.

121 Id.

122 Kerrville, 900 S.W.2d at 436 (naming that Ligon was inclined to violence when not taking antipsychotic drugs).

123 Kerrville, 900 S.W.2d at 436 (noting that Ligon was inclined towards violence when not taking antipsychotic drugs).

124 Id. at 437. The court agrees with the analysis of the California Supreme Court in Hammson v. County of Mariposa, 775 P.2d 1122 (1989), which stated:

"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. The foreseeable victim is one who is said to be within the zone of danger . . . subject to probable risk of the patient's violent conduct. Id. at 1127-28.

3. Kehler v. Endaly

This case, reviewed by the Fort Worth Court of Appeals, involved an individual who was treated for both depression and generalized anxiety disorder. Bigby, the patient, had neither made any threats toward a third party nor identified any specific victim. Bigby exhibited suicidal tendencies that required hospitalization, outpatient therapy, and medication. Eleven days after Bigby left the hospital against his physician's medical advice, he murdered two former co-workers, a friend, and that friend's son. The victims' family filed suit against the doctors and hospital for negligently failing to warn.

After analyzing Tarasoff and applicable Texas cases, the court commented that "Texas only recognizes duties to third parties if the potential act is foreseeable." In fact, the court stated "[w]hile it is likely a foreseeable duty would be recognized in Texas under a Tarasoff/Thompson fact situation with an identifiable victim, this case would nevertheless fail to fall within its parameters." Although the Court of Appeals acknowledged the usefulness and validity of a Tarasoff-type duty, it did not adopt the duty in this particular case because there was not a foreseeable victim.

125 Kerrville, 900 S.W.2d at 437 n.13.

126 Id.

127 933 S.W.2d 321 (Tex. App.—Fort Worth 1996, writ denied).

128 Id. at 323-24 (explaining that the patient's successive diagnoses included schizoaffective disorder, major depression with melancholia, passive-aggressive personality, anti-social traits, and dysthymic disorder).

129 Id. at 327.

130 Id. at 323.

131 Id. at 324 (noting that hospital nurses and Bigby's doctor encouraged him to return to the hospital and continue medication).

132 Kehrer, 933 S.W.2d at 331-32.

133 Id. (citing Wheston Van Linns, Inc. v. Mason, 925 S.W.2d 722, 727-30 (Tex. App.—Fort Worth 1996, writ dism'd)).

134 Id. at 332.

135 Id. at 333-32. See also Williams v. Sun Valley Hosp., 723 S.W.2d 783, 787 (Tex. App.—El Paso 1987, writ ref'd n.r.e.) (holding that in the absence of a foreseeable victim there is no duty to warn).
4. Limon v. Gonzaba\textsuperscript{126}

Much like the preceding cases, this case states that there is no duty to warn without a foreseeable victim.\textsuperscript{127} Limon, depressed and previously suicidal, was in treatment with a counselor for substance abuse.\textsuperscript{128} Although upset by his ex-wife’s recent phone calls, Limon stated that he presently felt neither suicidal nor homicidal.\textsuperscript{129} However, shortly after treatment, Limon went to his ex-wife’s home and shot her.\textsuperscript{130}

After reviewing the California and Texas cases, the court noted that “[i]t has no trouble following the philosophical underpinnings of Tarasoff and Thompson.”\textsuperscript{131} These cases required foreseeability of an identifiable victim.\textsuperscript{132} In the present case, the court noted that Limon did not say or hint that he wanted to hurt anyone, and in fact denied being homicidal.\textsuperscript{133} The court held there was no foreseeability that would create a duty on the part of the counselor, relying on the fact that the homicide came as a surprise, both to the counselor and Limon’s daughter.\textsuperscript{134} The Court of Appeals concluded that cases might exist that would initiate a duty to warn third parties in the mental health field.\textsuperscript{135} Once again, however, the court used the foreseeability prong to eliminate any duty to warn analysis.\textsuperscript{136}

III. WHY A COMMON LAW DUTY TO WARN IS NECESSARY

A. Analysis of the Texas Supreme Court’s Rationale

The court in \textit{Thapar} misinterpreted the legislative intent of the Texas Health and Safety statute that allows disclosure of confidential information, but does not mandate it.\textsuperscript{137} The court should have instead adopted a common law duty to warn, focusing on the factors used in \textit{Pruett v. Johnson}\textsuperscript{138} to establish the framework of the duty.

1. Legislative Intent Was Misinterpreted

In \textit{Thapar}, the Texas Supreme Court’s rationale for refusing to extend a common law duty to warn was flawed. The court misinterpreted the Legislature’s intent regarding exceptions to confidentiality. The court concluded that the intent of the Legislature was to leave the decision to disclose confidential information in the hands of mental health professionals.\textsuperscript{139} The court reviewed the Texas statute concerning confidential information and found that disclosure is only allowed to medical or law enforcement when the health professional determines there is a probability of imminent harm to the patient or third party.\textsuperscript{140} Therefore, the court declined to impose a common law duty to warn because the Legislature made disclosure permissible but not mandatory.\textsuperscript{141} The court reasoned that imposing

\textsuperscript{126} 940 S.W.2d 236 (Tex. App.—San Antonio 1997, pet. denied).
\textsuperscript{127} Id. at 240.
\textsuperscript{128} Id. at 237 (noting that the counselor was not a physician and could not prescribe medicine or admit anyone into the hospital).
\textsuperscript{129} Id. (noting, however, that Limon’s daughter had told the counselor that her father was “a danger to himself and others and needed to be hospitalized”).
\textsuperscript{130} Id.
\textsuperscript{131} Limon, 940 S.W.2d at 240 (explaining that these cases are based on the common law duty to protect third parties). The court recognized two elements involved in foreseeability questions: The first question is whether a reasonable health provider could have foreseen that the patient would injure or kill someone. If a reasonable health care provider could have foreseen that harm would come to someone, then the second question arises—who is the intended victim? If the victim is identifiable, by name or otherwise, the duty to warn the intended victim arises. This may be a factual determination that needs to be decided by a jury. Id.
\textsuperscript{132} Id. (noting that the victim need not be named to satisfy the foreseeability requirement).
\textsuperscript{133} Id. at 241 (emphasizing that Limon reported being depressed as a result of his ex-wife’s phone calls, which is a normal human reaction and does not normally cause alarm).
\textsuperscript{134} Id. (noting that a specific threat will not always be present, therefore creating a gray area of foreseeability; but that “is not to say that no evidence is required to raise a foreseeable duty”).
\textsuperscript{135} Id. (noting that cases such as Tarasoff have a readily identifiable victim while other cases may not be as foreseeable yet, still produce an identifiable victim).
\textsuperscript{136} Limon, 940 S.W.2d at 240-41.
\textsuperscript{137} § 405, 1979 Tex. Gen. Laws at 514 (repealed 1991) (current version at Tex. HEALTH & SAFETY CODE § 611.004(a)(2) (Vernon 1997)).
\textsuperscript{138} 967 S.W.2d 391, 396-98 (Tex. 1998).
\textsuperscript{139} Thapar v. Zarulla, 994 S.W.2d 655, 640 (Tex. 1999) (explaining that the “statute here does not make disclosure of threats mandatory nor does it penalize mental health professionals for not disclosing threats”).
\textsuperscript{140} § 405, 1979 Tex. Gen. Laws at 514 (repealed 1991) (current version at Tex. HEALTH & SAFETY CODE § 611.004(a)(2) (Vernon 1997)).
\textsuperscript{141} Thapar, 994 S.W.2d at 639-40.
a legal duty upon health professionals would conflict with the Legislature's intent of not placing therapists in a "Catch 22" situation. Thus, therapists, regardless of their action or inaction, are left with a legitimate obligation to either maintain or disclose confidences, one of which inevitably will not be fulfilled. Many psychotherapists feel no such conflict because "the responsibility of assuring that their patients do not harm themselves or others seems entirely commensurate with their primary professional function of helping and healing." Thus, imposing a common law duty would expand, and not conflict with the Legislature's policy. The law could clarify the limits of the duty, set the standard of care, and limit liability for psychotherapists.

2. The Absence of Common Law Factors

This case note asserts that establishing a common law duty would neither undermine the Legislature's intentions nor conflict with the existing Texas statute. When two conflicting constitutional rights are presented, judgment must indicate which takes precedence. In the absence of legislative guidelines, courts must ascribe values. Some scholars believe the duty to warn is "well established and overrides any statutory duty of confidentiality." A year prior to Thapar, the Texas Supreme Court, in Prased v. Johnson, addressed whether, separate and apart from a statute, the court should establish a common law duty to third parties to warn an epileptic patient not to drive. The applicable statute was similar to the statute in the instant case. Specifically, in Prased the court addressed

the Texas Health and Safety Code section stating that treating physicians are permitted, but not required, to inform the Department of Public Safety or the Medical Board of the name of a patient who has been diagnosed with a disorder that could impair one's driving. Much like the statute analyzed in Thapar, the statute in Prased contained no specific conduct mandated for the physician; therefore, the court employed a common law analysis to determine whether a common law duty to warn should exist. Although Thapar contained facts differing from Prased, the court in Thapar failed to address these common law factors in its analysis. In fact, the court avoided any such discussion by declining to impose a common law duty to warn when disclosing information has been made permissible by the statute.

3. Common Law Analysis Developed by the Texas Supreme Court

a. Social, Economic, and Political Questions

First, the particular facts in Thapar must be analyzed through a social, economic, and political framework. The right to privacy is an essential element in health care. Legal and medical authorities

142 Id. at 640 (noting that with a mandatory duty to warn, a therapist can incur liability from communicating a threat that later turns out to be false, or by failing to disclose a threat that later turns out to be true).
143 See id., supra note 85, at 274.
144 Id. at 274-75, 274 n.22 (explaining that when disclosing the confidences of a patient who poses a threat to others, such psychotherapists "see themselves as advancing, not compromising, the patient's interest.").
145 Grossman, supra note 7, at 158.
146 Id.
147 Pamela D. Armstrong, Confidentiality, Warning, and AIDS: A Proposal to Protect Patients, Third Parties, and Physicians, 4 TUCSON L. REV. 301, 306 (1989) (claiming that even though statutes require confidentiality between physicians and their patients that "duty is superseded by the more rudimentary common law duty to warn").
148 907 S.W.2d 291, 296, 298 (Tex. 1995) (holding that the benefit of warning an epileptic not to drive is small, but the consequences of imposing a duty on physicians is great).
149 See TEX. HEALTH & SAFETY CODE § 12.096 (Vernon 1997).
150 Prased, 907 S.W.2d at 396-97.
151 Prased, 907 S.W.2d at 392-93 (citing Prased, an epileptic suffered a seizure while driving and hit Prased's car resulting in her death. Prased's family sued the defendant doctor who was treating the epileptic patient for failing to warn his patient not to drive, and for failing to report the patient's condition to the State Medical Advisory Board. Compare Thapar, 994 S.W.2d at 656-57, a case where the doctor failed to warn third parties or law enforcement personnel of a patient's threats.
152 Thapar, 994 S.W.2d at 640 (citing Prased in its conclusion that there is no need to establish a common law duty when a statute is permissive. But see Prased, 907 S.W.2d at 396 (where the analysis is inconsistent with Thapar because a common law duty to warn was addressed although the statute was deemed permissive).
153 In deciding whether to impose a common law duty, the Texas Supreme Court has applied factors developed and identified in prior cases. See, e.g., Prased, 907 S.W.2d at 397; Graff v. Board, 859 S.W.2d 919, 920 (Tex. 1993) (identifying social, economic, and political considerations); Greater Houston Transportation Co. v. Phillips, 801 S.W.2d 823, 825 (Tex. 1990) (weighing risk, foreseeability, and likelihood of injury against social utility of an actor's conduct); Mitchell v. Missouri-Kansas-Texas R.R. Co., 786 S.W.2d 659, 662 (Tex. 1990) (asserting that foreseeability is traditionally the most significant factor); Oils Engineering Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983) (indicating risk, foreseeability, likelihood of injury, and magnitude of burden should be considered).
154 Prased, 907 S.W.2d at 397; Graff, 859 S.W.2d at 920; Mitchell, 786 S.W.2d at 659 (quoting 1 TEXAS TORTS AND REMEDIES § 1.002 (1989)).
155 Grossman, supra note 7, at 137.
agree that a person’s fear of disclosure of confidences may lead him or her to avoid therapy or choose to withhold information. For many psychotherapists, the issue of absolute confidentiality is of chief importance and must “be defended to the hill—short of going to prison.” However, confidentiality may not be foremost on the minds of patients, who instead may be more concerned with recovering and having their expenses reimbursed by insurance. The demands of society through social, economic, and political forces might have changed the parameters of confidentiality. The Texas Supreme Court could be falling behind by failing to address these changes when deciding not to adopt a common law duty to warn.

The genesis of confidentiality in the psychotherapeutic field was premised on the fact that a patient’s “innermost secrets and fantasies shared with the therapist [would] not be communicated to others.” It is argued that as a result of this strict confidential relationship, the public welfare is enhanced because society will benefit from a healthier, more economically efficient population. In addition, while psychiatry was emerging in the 1950s, a majority of psychiatrists were treating violent patients using the psychoanalytic model which focuses on treating the individual pathology. However, as time passed, the underlying public health needs evolved, resulting in a more community-oriented approach to mental health care. Consequently, the fundamental importance of the concept of absolute confidentiality has eroded in the eyes of the public. As a result of the public environment becoming more complex, the needs of society have changed. No longer can patients seek treatment without being influenced by or influencing some other system. Moreover, these third party “systems” may be of great importance in treatment of individuals. It has been noted that violent patients are the “product of passion or paranoia” which is usually directed toward a person of “intense significance” to the patient. Even though a number of “systems” interact in treatment, including known third parties, scholars and practitioners currently remain hostile toward a duty to warn third parties because of adherence to an “individual pathology” model of violent behavior. However, researchers who have seriously studied types of interpersonal violence that can be prevented through treatment, agree that a relationship-based approach is warranted. Although critics of the duty to warn believe the client is betrayed, supporters believe the duty is very tolerable because the prospective victim could be some-
was more important than the interest in confidentiality.102 The Terasoff court viewed the need for societal protection as indispensable in the modern world; therefore, the possibility of unnecessary warnings was a "reasonable price to pay for the lives of possible victims that may be saved."103 The Texas Supreme Court should have adopted the Terasoff court's wise conclusion that "the protective privilege ends where the public peril begins."104

b. The Risk, Foreseeability, and the Likelihood of Harm

The risk, foreseeability, and the likelihood of injury needs to be weighed against the social utility of the psychotherapist's warning.105 Critics of the duty to warn claim that the doctrine will endanger the therapeutic alliance, destroy the patient's expectation of confidentiality, upset treatment, and reduce public safety.106 Furthermore, opponents argue that a warning to a third party, if discovered by the patient, may set off the feared violence as the patient "lives up to" the psychotherapist's expectations.107 Notwithstanding these risks, the social utility of the duty to warn outweighs any countervailing concerns. The possibility of saving an identifiable victim's life, and potentially involving that individual in the patient's healing process through the use of family therapy, is more useful to society as a whole.108

Opponents also claim that even though the preservation of human life is a highly regarded public interest, psychotherapists cannot accurately predict which clients will be violent.109 In their opinion, mandatory disclosure will lead to increased costs for

103 Id. (citing Terasoff v. Regents of the Univ. of Cal., 851 P.2d 334, 346 (Cal. 1976) concluding that "[i]n this risk-infested society we can hardly tolerate the further exposure to danger that would result form a concealed knowledge of the therapist that his patient was lethal").
104 Almason, supra note 102, at 477 (citing Terasoff, 851 P.2d at 347).
105 Kressel v. Johnson, 967 S.W.2d 391, 397 (Tex. 1998); Graff v. Beard, 858 S.W.2d 918, 920 (Tex. 1993).
106 Stone, supra note 85, at 368.
107 Martin, supra note 85, at 308.
108 Refer to part III.A.3.a infra and accompanying notes (discussing the social, economic, and political factors supporting the need to adopt a common law duty to protect third parties in Texas).
109 See Grossman, supra note 7, at 159-60 (alleging that psychotherapists cannot predict violent behavior, and at most may only recognize intensification of violent thought).
mental health patients, including both a breach of confidentiality and the potential to be committed to a hospital.

Supporters argue that a psychotherapist, like any other type of physician, predicts, treats, and diagnoses based on medical probabilities and a patient's history. Furthermore, the Wisconsin and Colorado Supreme Courts have stated that psychiatrists may evaluate dangerousness effectively. The Wisconsin court reasoned that "the task of assessing dangerousness is not viewed as being beyond the competence of an individual therapist or a matter on which therapists cannot agree." 

Opponents also allege that a mandatory duty to warn would result in an increased commitment of clients into mental institutions without a reasoned or objective basis. However, civil commitment statutes are already in existence. Involuntary commitment according to these statutes is warranted if a threat of danger to one's self or others exists. Courts have opined that "the imposition of liability will not create any greater duty on the psychotherapist than that imposed by the civil commitment statutes." Finally, a mandatory duty to warn may motivate some psychotherapists to resort more quickly to commit clients, not because of fear of liability, but because they view commitment as less destructive than breaching confidentiality.


110 Id. (explaining that many times physicians have a statutory duty to warn third parties against possible exposure to contagious diseases and that psychotherapists are in a similar situation).

111 Id. at 572 (citing Schuster v. Allenburg, 424 N.W.2d 139 (Minn. 1988) and Perreira v. Colorado, 768 P.2d 1198 (Colo. 1989)).


113 McIntosh, supra note 109, at 571 (noting that "prophylactic" commitments without a strong basis will increase).

114 Id. at 572.

115 Id.

116 Id. at 573 (discussing that other courts have reasoned that although commitment may involve "deprivations of liberty" it can serve as preventative detention when a client poses a danger to oneself or third persons).

117 Matter, supra note 85, at 310.

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c. The Burden of Guarding Against the Injury

The magnitude of the burden of guarding against injury must be weighed against the consequences such protection places on the psychotherapist. Under the Tarasoff-like common law mandatory duty, psychotherapists "are not liable unless they have made or should have made a determination, applying professional standards, that a patient is dangerous to a third party and failed to take steps to protect the third party." Therefore, the implementation of the duty to warn depends upon the specific facts of each client's case. As stated in Tarasoff, a psychotherapist need only use "his or her own best judgment without liability; proof, aided by hindsight, that he or she judged wrongly is insufficient to establish negligence." Consequently, the burden on psychotherapists includes being aware of their duty toward identifiable and foreseeable third parties, and being "able to recognize situations in which that duty calls for protective action, and deciding which course of action best meets the demands of the situation without breaching their patients' privacy or trust." Accordingly, "[p]sychotherapists need only follow reasonable standards in predicting violence." Although it may appear that the burden resting on the shoulders of psychotherapists is immense, supporters of the duty caution clinicians not to "become intimidated by clients' statements of potential hostility; not every impulsive threat is evidence of imminent danger." Furthermore, the magnitude of the duty to warn is simply not immense. Supporters of the duty suggest that psychotherapists also should consider alternatives that could resolve or deter potential violence, solutions that would not compromise their ethi-

118 Paesel v. Johnston, 967 S.W.2d 391, 397 (Tex. 1998).

119 Brus, supra note 4, at 71 (commenting that the Tarasoff court stated that a psychotherapist has a duty to use reasonable care to protect foreseeable victims, not necessarily to warn third parties).

120 Id.

121 Tarasoff v. Regents of Univ. of Calif., 551 P.2d 334, 345 (Cal. 1976) (noting that there is a broad range of professional judgment which may differ at times).

122 Brus, supra note 4, at 71 (concluding that this may include using alternative means to fulfill the responsibility to third parties).

123 S. Knapo & L. Vande Creek, Tarasoff: Five Years Later, 13 Pace. J. Corpor. L. 511, 514-15 (1982) (claiming there is no failure to warn if the psychotherapist uses ordinary skill in determining the client does not have a propensity towards violence).

124 Id. at 513 (opining that recent behaviors are the best predictors of future violence by the client).
cal and legal obligations. These alternatives may include involuntary commitment, notification of law enforcement personnel, changing treatment options, or having the patient dispose of the weapon. Additionally, because the potential victim is usually a family member who often knows the client is attending therapy and exhibiting hostility, a skillful psychotherapist should be able to obtain the client’s consent to notify the potential victim.

The burden is further diminished by procedures psychotherapists could follow in determining whether a client presents a serious risk of violence to third parties. When assessing dangerousness a therapist must look at: (1) the seriousness of the threatened harm; (2) the likelihood that the client will actually harm the third party; (3) the standards in the therapeutic community for assessing dangerousness; and (4) the impact of protective action on the third party and client. When assessing the likelihood that the client will harm the third party other relevant factors include: (1) whether similar threats were made in the past and carried out; (2) any other history of violence; (3) whether the prediction is based only on the potential for dangerousness without a recent threat of harm; (4) any delusions by the client involving a third party; (5) degree of psychological manifestations; (6) cultural background; and (7) any abuse in the client’s past.

Finally, professional ethics for the mental health professions already promote the duty to protect others or the client from imminent harm. For example, one medical ethics code states that psychiatrists “may find it necessary, in order to protect the patient or the community from imminent danger, to reveal confidential information disclosed by the patient.” In addition, marriage and family therapists “may not disclose client confidences except: a) as mandated by law; b) to prevent a clear and immediate danger to a person or persons. . . .” Consequently, a burden would not be created by establishing a common law duty to warn because “the court [would] merely codify[] what had been required for some time by the ethical standards of the therapeutic profession itself.”

d. Superior Knowledge of the Risk and the Ability to Control the Client

Another consideration in the analysis of a common law duty to warn is whether the psychotherapist bears superior knowledge of the risk or a right to control the actor who caused the harm. Psychotherapists are trained professionals in mental health issues which may include determining an inclination towards violence. Psychotherapists are dedicated and trained to help clients “review the broad range of their lives, to relate the emotional impact of past events and issues on their current thinking and behavior, and to assist them to resolve the emotional conflicts that incapacitate and/or impair their relationships and performance in the real world in which they live.” The psychotherapist is in the best position not only to initiate protection for the potential victim, but also to help the client with violent issues. After Tarasoff, a movement began to require a mandatory duty on lawyers to divulge client confidences when the life or safety of a

211 McIntosh, supra note 100, at 572. See also Hines, supra note 209, at 23 (stating that “all professional organizations in the Western world whose members practice psychotherapy have taken the position that certain information must be revealed when there is clear and imminent danger to an individual or to society”).

212 Hines, supra note 209, at 210 (citing American Medical Association Principles of Medical Ethics § 9).


216 See also Hines, supra note 209 (discussing procedures and factors psychotherapists may use in determining whether a client is likely to be violent towards a third party).

217 Donnelly, supra note 158, at 199.
third party is at risk. In fact, Texas Model Rule 1.05(e) states, "[w]hen a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm... the lawyer shall reveal confidential information... to prevent the client from committing the... act." Violating this rule subjects the lawyer to discipline if the lawyer's actions are unreasonable under all existing circumstances. This is the same standard a psychotherapist must meet under a Tarasoff-type common law duty to warn.

Is Texas stating that lawyers are better equipped than psychotherapists to determine the propensity for violence? This author alleges that lawyers are not, the consequences for the client are the same, in that the covenant of confidentiality is broken. Why does the Texas Supreme Court, which has decided consistently against claims by third parties, require a higher standard from its lawyers, than from those who deal with mental health issues on a daily basis? A lawyer has no more control over a potentially violent client than a psychotherapist, and possibly has less. The psychotherapist has the option of warning the police, committing the client to a hospital, and/or changing therapy techniques. Consequently, the psychotherapist has the ability to determine potential violence by

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229 Merton, supra note 85, at 284 (noting, however, that the movement for a mandatory disclosure for lawyers has been halted).
231 Id. at 178 (commenting that the affirmative duty to act depends on how the situation "reasonably appears" to the lawyer).
232 See infra p. 273 and accompanying notes (discussing the standard of a "reasonable psychotherapist of ordinary skill" when determining if there is a duty to protect).
233 Other authors have come to the same conclusion, stating:

Clarity is no "standard of the profession" which even the most experienced attorney can reasonably use as a basis to discriminate between the empty threat and the truly ominous one... Lawyers have never promulgated the notion that they have the ability to detect a predilection for violence in clients. Merton, supra note 85, at 330.

234 Id. (noting that a duty to warn imposed on lawyers presents a number of the same problems experienced by therapists).
235 Thayer v. Zenniker, 94 S.W.2d 635, 640 (Tex. 1939) (concluding that in past cases, the court has declined to impose a duty to disclose to third parties).
236 See Bus, supra note 237 and accompanying text (discussing alternatives for psychotherapists to take when faced with a potentially violent client).

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e. The Efficacy of Warning in Preventing Injury

Finally, the effectiveness of a warning in preventing injury to third parties must be analyzed. Opponents of the duty to warn state that "[i]t is not acceptable to have the court merely assume 'a warning' is equivalent to 'a protection' when it uses that as a reason for violating the constitutional rights of untold numbers of present and future patients..." It is argued that issuing a warning does not protect and may even harm the victim. Opponents of the mandatory duty allege that warning the potential victim may result in a civil action against the psychotherapist for mental distress due to the warning. However, "[a]n action for mental distress by the third party based on fear and anxiety caused by a warning seems a bit farfetched." Lack of awareness by the potential victim of the client's feelings is uncommon, and even though the warning is probably upsetting, it is not a surprise. Finally, when the client recovers and is informed of the actions taken, the reaction is usually a positive one. As stated previously, a warning involves the potential victim in the client's healing process, so that both the client and the relationship have a chance to heal.
4. Decision Fails to Provide Guidance for Professionals

The Thapar court relied on the Legislature's "stated policy," but fails to provide real guidance to psychotherapists. Giving psychotherapists the "option" to disclose to medical or law enforcement personnel does not resolve the issue of when disclosures should be made. While not stating that a Tarasoff-type duty is not good law in Texas, the court observed that it has "never recognized the only underlying duty upon which such a cause of action could be based on a mental-health professional's duty to warn third parties of a patient's threats." This statement does not preclude the use of a Tarasoff duty; the Courts of Appeals have instead used a Tarasoff duty to warn in their analyses for years.

Despite the numerous arguments against a mandatory duty to warn third parties, "the ruling has now become a generally accepted theory of therapist liability," and the Texas Supreme Court should have adopted a similar duty. Consistency in the law is clearly necessary to afford psychotherapists notice concerning their possible liability and to facilitate the reduction of health care costs nationwide. The court claims that if there is a common law duty to warn a psychotherapist may incur liability for not warning, or incur liability for disclosing confidential information. This could be addressed by simply stating that liability is not incurred if reports are made in good faith.

B. A New Duty to Warn

As understood by President John F. Kennedy, "[t]here are risks and costs to a program of action. But they are far less than the long-range risks and costs of comfortable inaction." Although the Texas Supreme Court is comfortable with relying on the Legislature's policy in deciding the duty to warn cases, the death in Thapar is a tragedy that might have been avoided with a mandatory common law duty to warn. Most courts and legislatures in the United States have accepted the California Supreme Court's decision in Tarasoff as a "foundation for establishing duties of reasonable care upon psychotherapists to... protect potential victims [from] their [dangerous] patients." Texas should follow suit.

In Texas, numerous professionals are required to report child abuse, and lawyers are required to report criminal or fraudulent behavior that could result in harm to a third party. Because it is still unclear how psychotherapists must handle a violent patient, a common law mandatory duty to warn is most appropriate. Such a common law duty to warn would promote the use of more system-based therapy and would be more economically efficient. Constant compliance with the perceived problems of a mandatory duty to warn may prompt psychotherapists to "shift away from an intrapsychic model and... move... increasingly toward a presumably preferable interactionist model..." As a result, a common law mandatory duty to warn may actually enhance the effectiveness of therapy for clients prone to violence. Further, a common law duty that requires foreseeability of an identifiable victim, such as Henry

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26 Thapar v. Zenithka, 994 S.W.2d 650 (Tex. 1999) (concluding that: the Legislature enacted a punitive duty to warn).
27 See generally Tex. HEALTH & SAFETY CODE § 611.004(a)(2) (Vernon 1997).
28 Thapar, 994 S.W.2d at 658.
29 Refer to part II.B. infra and accompanying notes (demonstrating Texas Courts of Appeals decisions using the Tarasoff duty in their analyses).
30 Howell, supra note 157, at 49.
31 Almanza, supra note 182, at 605-96 (arguing that imposing a duty to warn which is subject only to malpractice liability, not personal liability, would help reduce health care costs while protecting the interests of therapists, third parties, and clients).
32 Thapar, 994 S.W.2d at 650 (delineating that a common law duty to warn would force psychotherapists into a "Catch-22" situation).
33 See, e.g., Tex. HEALTH & SAFETY CODE § 261.101(a) (Vernon 1997) (providing immunity for an individual's good faith reporting of child abuse and neglect cases).
34 BARKES & NOBLE BOOK OF QUOTATIONS 10 (Robert J. Fithreny ed. 1987).
35 Refers to part III.A.1 infra and accompanying notes (discussing the court's interpretation of the Legislature's intent to impose a discretionary, rather than mandatory duty).
36 Almanza, supra note 182, at 471.
37 See, e.g., TEX. HEALTH & SAFETY CODE § 261.101(a) (Vernon 1997) (requiring individuals to report child abuse or neglect).
38 TEX. DISCIPLINARY R. PRO'P. CONDUCT § 1.05(f) (reprinted in TEX. GOV'T CODE, tit. 2, subtit. G apps. A (Vernon 1997) (requiring lawyers to disclose confidential information to deter a client from committing a criminal act toward a third party that could result in death or serious bodily harm).
39 WEXLER, supra note 84, at 230 (noting that the available information from scholars and clinicians suggests that a couple or family therapy approach is warranted when a psychotherapist is required to treat a client who has threatened violence against a specific person).
40 See Rute, supra note 176 and accompanying text (discussing how a mandatory duty to warn would result in the internalization of costs which would be more economical).
41 Id.
Zuzulka in Thapar, would protect therapists from having to be "clairvoyant."223

To reduce the ramifications of breaching confidentiality—psychotherapists would have an obligation to inform clients of the duty to protect third parties.224 In the initial phases of therapy, while gaining informed consent to therapy, psychotherapists should discuss the limits of their expertise and the potential for divided loyalties.225 Some scholars contend that "open admission of the potential for failure and betrayal could allow a deeper trust to develop in the professional relationship."226

People who seek professional therapy because of violent thoughts and feelings usually do not want to hurt others and often believe such feelings are misguided.227 Typically, a patient "tells the therapist his thoughts because he 'wants help and . . . may feel that by telling the therapist of his desires, the therapist will do what she can to stop him.'"228 It is argued that a psychotherapist can deter the client’s violent desires and thoughts by warning the potential victim or by notifying law enforcement.229 This disclosure would protect the third party and remove the temptation to act out the violence.230 Accepting, at least in part, that successful therapy depends on confidentiality, it is important that patients also know what will remain confidential.231

A common law duty to warn would not place a burden on psychotherapists because they are already ethically obligated to act as reasonable clinicians with ordinary skill to protect third parties from violence perpetrated by their clients.232 This ethical duty is consistent with the demands of a mandatory common law duty to warn.233 Moreover, a common law duty to warn could protect psychotherapists by offering immunity from liability for good faith reporting similar to the protection afforded in reporting child abuse cases.234

Finally, a common law duty would not go against the Legislature’s policy but only extend it.235 A mandatory duty to disclose to medical or law enforcement personnel a patient’s propensity for violence towards an identifiable victim would protect third parties in as well as stay within the confines of the Legislature’s stated policy. At this point, an ordinary skilled psychotherapist is only required to act reasonably under the circumstances.236 After the warning, the type of action taken is in the hands of the law enforcement personnel. As a result of this good faith warning, a psychotherapist is free from liability to both the patient and third parties, and may focus on treatment.

Conclusion

In Thapar, the court incorrectly determined that a common law duty to warn should not exist. By choosing to defer to the Legislature’s policy, which was neither well defined nor realistic, the court relinquished the opportunity to make Texas law consistent with the majority of the nation and to comply with the wishes of the lower courts. Choosing a common law duty to warn does not conflict with the Texas statute allowing disclosure of confidences. In fact, a number of cases demonstrate that other priorities can override confidentiality, for example in child abuse and neglect cases. Additionally, lawyers in Texas are expected to breach confidentiality in the event a client poses danger to others. Thus, the fundamental importance

223 McIntosh, supra note 193, at 571, 573 (noting that requiring therapists to predict whether a patient will be violent towards a third party places them in the arena of "clairvoyants").

224 Horne, supra note 209, at 24 (noting that this could be done at the same time that the psychotherapist explains the requirement to report suspected instances of child abuse).

225 Morgan, supra note 85, at 271 (explaining that an honest exchange in which the client’s fears of disclosure can be discussed could diffuse or lessen the fear).

226 Id.

227 Almason, supra note 182, at 494.

228 Id.

229 Id., note 215, at 400.

230 Id. at 494.

231 Id.

232 Donnelly, supra note 158, at 200 (noting that confidentiality does not cover every contact between the therapist and client and having confidentiality cover every communication is impractical).

233 Id. at 201 (noting that it is ethically necessary for psychotherapists to form a reasonable opinion about the risk of danger posed by the client and take appropriate action which may require warning or involuntary hospitalization).


235 See Tex. HEALTH & SAFETY CODE § 611.004 (Vernon 1997).

236 Refer to part III.A.1 infra (arguing that a mandatory duty to warn is consistent with the intent of both the Legislature and practicing psychotherapists to prevent patients from hurting themselves or third parties).

237 See Mangalam, supra note 258 and accompanying text (arguing that a warning may deter a patient’s violent propensities, thereby protecting the potential victim).

238 Knapp, supra note 204, at 514.
of absolute confidentiality is diminished to compensate for other competing interests.268

A common law duty to warn that requires the victim to be foreseeable and identifiable protects psychotherapists to the extent that their actions must be only reasonable under the circumstances. A provision limiting liability for good faith reporting would protect therapists from the “Catch 22” situation described by the court in Thapar.269 Also, a common law duty requiring psychotherapists to report to law enforcement personnel would not be adverse to the Legislature’s confidentiality statute. Furthermore, notifying patients of the duty to warn may help protect them and possibly strengthen the therapist-patient relationship. In addition, a duty to warn may initiate a shift in the mental health field to using a more relationship-focused form of therapy. Finally, although many psychotherapists may be opposed to any type of duty to third parties, they must remember “that they owe the prominence of their specialty to the support provided them by public funds both directly and indirectly..."270 To maintain social and economic efficiency, psychotherapists must take into account potential victims’ lives in treatment decisions. Consequently, “[a]lthough a therapist, a person is still a citizen and he or she must protect and contribute to the common good. As a private citizen, the person of good conscience will not hesitate to warn an intended victim.”271

268 Donnelly, supra note 158, at 187.
269 Thapar v. Zerulla, 994 S.W.2d 635, 640 (Tex. 1999).
270 Donnelly, supra note 158, at 185 (noting that taxpayer money was not appropriated for special interests but for the general public welfare, specifically to train psychiatrists to treat the emotionally disturbed).