TARASOFF v. REGENTS OF UNIVERSITY OF CALIFORNIA

Supreme Court of California

Vitaly TARASOFF et al., Plaintiffs and Appellants, v. The REGENTS OF the UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents.

S.F. 23042.

Decided: December 23, 1974

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On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff.[1] Plaintiffs, Tatiana's parents, allege that two months earlier Poddar confided his intention to kill Tatiana to Dr. Lawrence Moore, a psychologist employed by the Cowell Memorial Hospital at the University of California at Berkeley. They allege that on Moore's request, the campus police briefly detained Poddar, but released him when he appeared rational. They further claim that Dr. Harvey Powelson, Moore's superior, then directed that no further action be taken to detain Poddar. No one warned Tatiana of her peril.

Concluding that these facts neither set forth causes of action against the therapists and policement involved, nor against the Regents of the University of California as their employer, the superior court sustained defendants' demurrers to plaintiffs' second amended complaints without leave to amend.[2] This appeal ensued.

Plaintiffs' complaints predicate liability on two grounds: defendants' failure to warn plaintiffs of the impending danger and their failure to use reasonable care to bring about Poddar's confinement pursuant to the Lanterman–Petris–Short Act (Welf. & Inst.Code, § 5000ff.) Defendants, in turn, assert that they owed no duty of reasonable care to Tatiana and that they are immune from suit under the California Tort Claims Act of 1963 (Gov.Code, § 810ff.).

We shall explain that defendant therapists, merely because Tatiana herself was not their patient, cannot escape liability for failing to exercise due care to warn the endangered Tatiana or those who reasonably could have been expected to notify her of her peril. When a doctor or a psychotherapist, in the exercise of his professional skill and knowledge, determines, or should determine, that a warning is essential to avert danger arising from the medical or psychological condition of his patient, he incurs a legal obligation to give that warning. Primarily, the relationship between defendant therapists and Poddar as their patient imposes the described duty to warn. We shall point out that a second basis for liability lies in the fact that defendants' bungled attempt to confine Poddar may have deterred him from seeking further therapy and aggravated the danger to Tatiana; having thus contributed to and partially created the danger, defendants incur the ensuing obligation to give the warning.

We reject defendants' asserted defense of governmental immunity; no specific statutory provision shields them from liability for failure to warn, and Government Code section 820.2 does not protect defendants' conduct as an exercise of discretion. We conclude that plaintiffs' complaints state, or can be amended to state, a cause of action against defendants for negligent failure to warn.

Defendants, however, may properly claim immunity from liability for their failure to confine Poddar. Government Code section 856 bars imposition of liability upon defendant therapists for their determination to refrain from detaining Poddar and Welfare and Institutions Code section 5154 protects defendant police officers from civil liability for releasing Poddar after his brief confinement. We therefore conclude that

plaintiffs cannot state a cause of action for defendants' failure to detain Poddar. Since plaintiffs base their claim to punitive damages against defendant Powelson solely upon Powelson's failure to bring about such detention, not upon Powelson's failure to give the above described warnings, that claim likewise fails to state a cause of action.

1. Plaintiffs' complaints.

Plaintiffs, Tatiana's mother and father, filed separate but virtually identical second amended complaints. The issue before us on this appeal is whether those complaints now state, or can be amended to state, causes of action against defendants. We therefore begin by setting forth the pertinent allegations of the complaints.[3]

Plaintiffs' first cause of action, entitled "Failure to Detain a Dangerous Patient," alleges that on August 20, 1969, Poddar was a voluntary outpatient receiving therapy at Cowell Memorial Hospital. Poddar informed Moore, his therapist, that he was going to kill an unnamed girl, readily identifiable as Tatiana, when she returned hom from spending the summer in Brazil. Moore, with the concurrence of Dr. Gold, who had initially examined Poddar, and Dr. Yandell, assistant to the director of the department of psychiatry, decided that Poddar should be committed for observation in a mental hospital. Moore orally notified Officers Atkinson and Teel of the campus police that he would request commitment. He then sent a letter to Police Chief William Beall requesting the assistance of the police department in securing Poddar's confinement.

Officers Atkinson, Brownrigg, and Halleran took Poddar into custody, but, satisfied that Poddar was rational, released him on his promise to stay away from Tatiana. Powelson, director of the department of psychiatry at Cowell Memorial Hospital, then asked the police to return Moore's letter, directed that all copies of the letter and notes that Moore had taken as therapist be destroyed, and "ordered no action to place Prosenjit Poddar in 72–hour treatment and evaluation facility."

Plaintiffs' second cause of action, entitled "Failure to Warn On a Dangerous Patient," incorporates the allegations of the first cause of action, but adds the assertion that defendants negligently permitted Poddar to be released from police custody without "notifying the parents of Tatiana Tarasoff that their daughter was in grave danger from Posenjit Poddar." Poddar persuaded Tatiana's brother to share an apartment with him near Tatiana's residence; shortly after her return from Brazil, Poddar went to her residence and killed her.

Plaintiffs' third cause of action, entitled "Abandonment of a Dangerous Patient," seeks $10,000 punitive damages against defendant Powelson. Incorporating the crucial allegations of the first cause of action, plaintiffs charge that Powelson "did the things herein alleged with intent to abandon a dangerous patient, and said acts were done maliciously and oppressively."

Plaintiff's fourth cause of action, for "Breach of Primary Duty to Patient and the Public" states essentially the same allegations as the first cause of action, but seeks to characterize defendants' conduct as a breach of duty to safeguard their patient and the public. Since such conclusory labels add nothing to the factual allegations of the complaint, the first and fourth causes of action are legally indistinguishable.

2. Plaintiffs can state a cause of action for negligent failure to warn.

The second cause of action in plaintiffs' complaints alleges that Tatiana's death proximately resulted from defendants' negligent failure to warn plaintiffs of Poddar's intention to kill Tatiana and claims general and special damages. Ordinarily such allegations of negligence, proximate causation, and damages would establish a cause of action. (See Dillon v. Legg (1968) 68 Cal.2d 728, 733–734, 69 Cal.Rptr. 72, 441 P.2d 912.) Defendants, however, contend that in the circumstances of the present case they owed no duty of care to Tatiana or her parents and that, in the absence of such duty, they were free to act in careless disregard of Tatiana's life and safety.

In analyzing this contention, we bear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. As stated in Dillon v. Legg, supra, at page 734, 69 Cal.Rptr. at page 76, 441 P.2d at page 916: "The assertion that liability must . be denied because defendant bears no 'duty' to plaintiff 'begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. [Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' (Prosser, Law of Torts [3d ed. 1964] at pp. 332–333.)" Rowland v. Christian (1968) 69 Cal.2d 108, 113, 70 Cal.Rptr. 97, 100, 443 P.2d 561, 564, listed the principal considerations: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." [4]

Although under the common law, as a general rule, one person owed no duty to control the conduct of another [5] (Richards v. Stanley (1954) 43 Cal.2d 60, 65, 271 P.2d 23; Wright v. Arcade School Dist. (1964) 230 Cal.App.2d 272, 277, 40 Cal.Rptr. 812; Rest.2d Torts (1965) 315), nor to warn those endangered by such conduct (Rest.2d Torts, supra, § 314, com. c; Prosser, Law of Torts (4th ed. 1971) § 56, p. 341), the courts have noted exceptions to this rule. In two classes of cases the courts have imposed a duty of care: (1) cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct (see Rest.2d Torts, supra, §§ 315–320); and (2) cases in which the defendant has engaged, or undertaken to engage, in affirmative action to control the

anticipated dangerous conduct or protect the prospective victim. (See Rest.2d Torts, supra, §§ 321–324a.) 6 Both exceptions apply to the facts of this case.

Turning, first, to the special relationships present in this case, we note that a relationship of defendant therapists to either Tatiana or to Poddar will suffice to establish a duty of care; as explained in section 315 of the Restatement Second of Torts, a duty of care may arise from either "(a) a special relation . 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 . between the actor and the other which gives to the other a right to protection."

Although plaintiffs' pleadings assert no special relation between Tatiana and defendant therapists, they establish as between Poddar and defendant therapists the special relation that arises between a patient and his doctor or psychotherapist.7 Such a relationship may support affirmative duties for the benefit of third persons. (See Fleming & Maximov, The Patient or His Victim: The Therapist's Dilemma (1974) 62 Cal.L.Rev. 1025, 1027–1031.) Thus, for example, a hospital must exercise reasonable care to control the behavior of a patient which may endanger other persons.8 A doctor must also warn a patient if the patient's condition or medication renders certain conduct, such as driving a car, dangerous to others.9

Although the California decisions that recognize this duty have involved cases in which the defendant stood in a special relationship both to the victim and to the person whose conduct created the danger,10 we do not think that the duty should logically be constricted to such situations. Decisions of other jurisdictions hold that the single relationship of a doctor to his patient is sufficient to support the duty to use reasonable care to warn of dangers emanating from the patient's illness. The courts hold that a doctor is liable to persons infected by his patient if he negligently fails to diagnose a contagious disease (Hofmann v. Blackmon (Fla.App.1970) 241 So.2d 752), or, having diagnosed the illness, fails to warn members of the patient's family (Wojcik v. Aluminum Co. of America (1959) 18 Misc.2d 740, 183 N.Y.S.2d 351, 357–358; Davis v. Rodman (1921) 147 Ark. 385, 227 S.W. 612; Skillings v. Allen (1919) 143 Minn. 323, 173 N.W. 663; see also Jones v. Stanko (1928) 118 Ohio St. 147, 160 N.E. 456.)

More closely on point, since it involved a dangerous mental patient, is the decision in Merchants Nat. Bank & Trust Co. of Fargo v. United States (D.N.D.1967) 272 F.Supp. 409. The Veterans Administration arranged for the patient to work on a local farm, but did not warn the farmer of the man's background. The farmer consequently permitted the patient to come and go freely during nonworking hours; the patient borrowed a car, drove to his wife's residence and killed her. Notwithstanding the lack of any "special relationship" between the Veterans Administration and the wife, the court found the Veterans Administration liable for the wrongful death of the wife.

As the present case illustrates, a patient with severe mental illness and dangerous proclivities may, in a given case, present a danger as serious and as foreseeable as does the carrier of a contagious disease or the driver whose condition or medication affects his ability to drive safely. We conclude that a doctor or a psychotherapist treating a mentally ill patient, just as a doctor treating physical illness, bears a duty to use reasonable care to give threatened persons such warnings as are essential to avert foreseeable danger arising from his patient's condition or treatment.

As we stated previously, a duty to warn may also arise from a voluntary act or undertaking by a defendant. Once the defendant has commenced to render service, he must employ reasonable care; if reasonable care requires the giving of warnings, he must do so. Numerous cases hold that if a defendant's prior conduct has created or contributed to a danger, even if that conduct itself is non-negligent or protected by governmental immunity, the defendant bears a duty to warn affected persons of such impending danger. (See Johnson v. State of California (1968) 69 Cal.2d 782, 796–797, 73 Cal.Rptr. 240, 447 P.2d 352, and cases there cited; Rest.2d Torts, supra, § 321 and illus. to com. (a), § 323 and com. (c).)

The record in People v. Poddar (1974) 10 Cal.3d 750, 111 Cal.Rptr. 910, 518 P.2d 342 indicates, and plaintiffs' complaints could be amended to assert, that following Poddar's encounter with the police, Poddar broke off all contact with the hospital staff and discontinued psychotherapy. From those facts one could reasonably infer that defendants' actions led Poddar to halt treatment which, if carried through, might have led him to abandon his plan to kill Tatiana, and thus that defendants, having contributed to the danger, bear a duty to give warning.

Defendant therapists advance two policy considerations which, they suggest, justify a refusal to impose a duty upon a psychotherapist to warn third parties of danger arising from the violent intentions of his patient. We explain why, in our view, such considerations do not preclude imposition of the duty in question.

First, defendants point out that although therapy patients often express thoughts of violence, they rarely carry out these ideas. Indeed the open and confidential character of psychotherapeutic dialogue encourages patients to voice such thoughts, not as a device to reveal hidden danger, but as part of the process of therapy. Certainly a therapist should not be encouraged routinely to reveal such threats to acquaintances of the patient; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened. In singling out those few patients whose threats of violence present a serious danger and in weighing against this danger the harm to the patient that might result from revelation, the psychotherapist renders a decision involving a high order of expertise and judgment.

The judgment of the therapist, however, is no more delicate or demanding than the judgment which doctors and professionals must regularly render under accepted rules of responsibility. A professional person is required only to exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [his] profession under similar circumstances." (Bardessono v. Michels (1970) 3

Cal.3d 780, 788, 91 Cal.Rptr. 760, 764, 478 P.2d 480, 484.) As a specialist, the psychotherapist, whether doctor or psychologist, would also be "held to that standard of learning and skill normally possessed by such specialist in the same or similar locality under the same or similar circumstances." (Quintal v. Laurel Grove Hospital (1964) 62 Cal.2d 154, 159–160, 41 Cal.Rptr. 577, 580, 397 P.2d 161, 164.) But within that broad range in which professional opinion and judgment may differ respecting the proper course of action, the psychotherapist is free to exercise his own best judgment free from liability; proof, aided by hindsight, that he judged wrongly is insufficient to establish liability.

In other words, the fact that a decision calls for considerable expert skill and judgment means, in effect, that it be tested by a standard of care which takes account of those circumstances; the standard used in measuring professional malpractice does so. But whatever difficulties the courts may encounter in evaluating the expert judgments of other professions, those difficulties cannot justify total exoneration from liability.

Second, defendants argue that free and open communication is essential to psychotherapy (see In re Lifschutz (1970) 2 Cal.3d 415, 431–432, 85 Cal.Rptr. 829, 467 P.2d 557); that "Unless a patient . is assured that . information [revealed by him] can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment . depends." (Sen. Committee on the Judiciary, comments on Evid.Code, § 1014.) The giving of a warning, defendants contend, constitutes a breach of trust which entails the revelation of confidential communications.

We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy (see In re Lifschutz, supra, 2 Cal.3d at p. 432, 85 Cal.Rptr. 829, 467 P.2d 557), and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault. The Legislature has undertaken the difficult task of balancing the countervailing concerns. In Evidence Code section 1014, it established a broad rule of privilege to protect confidential communications between patient and psychotherapist. In Evidence Code section 1024, however, the Legislature created a specific and limited exception to the psychotherapist-patient privilege: "There is no privilege . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." [11]

The revelation of a communication under the above circumstances is not a breach of trust or a violation of professional ethics; as stated in the Principles of Medical Ethics of the American Medical Association (1957) section 9: "A physician may not reveal the confidences 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." (Emphasis added.) We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield in instances in which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.

Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal. If in the exercise of reasonable care the therapist can warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest.

For the foregoing reasons, we find that plaintiffs' complaints can be amended to state a cause of action against defendants Moore, Powelson, Gold, and Yandell and against the Regents as their employer, for breach of a duty to warn Tatiana arising from the relationship of these defendants to Poddar.[12] The complaints can also be amended to assert causes of action against the police defendants for failure to warn on the theory that the officers' conduct increased the risk of violence. The judgment of the superior court, sustaining defendants' demurrers without leave to amend must therefore be reversed.

3. Defendants are not immune from liability for failure to warn.

We turn to the issue of whether defendants are protected by governmental immunity for having failed to warn Tatiana or those who reasonably could have been expected to notify her of her peril. We focus our analysis on section 820.2 of the Government Code.[13] That provision declares, with exceptions not applicable here, that "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion [was] abused." [14]

Noting that virtually every public act admits of some element of discretion, we drew the line in Johnson v. State of California (1968) 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352, between discretionary policy decisions which enjoy statutory immunity and ministerial administrative acts which do not. We concluded that section 820.2 affords immunity only for "basic policy decisions." (Emphasis added.) (See also Elton v. County of Orange (1970) 3 Cal.App.3d 1053, 1057–1058, 84 Cal.Rptr. 27; 4 Cal.Law Revision Com.Rep. (1963) p. 810; Van Alstyne, Supplement to Cal.Government Tort Liability (Cont.Ed.Bar 1969) § 5.54, pp. 16–17; Comment, California Tort Claims Act: Discretionary Immunity (1966) 39 So.Cal.L.Rev. 470, 471; cf. James, Tort Liability of Governmental Units and their Officers (1955) 22 U.Chi.L.Rev. 610, 637–638, 640, 642, 651.)

We also observed that if courts did not respect this statutory immunity, they would find themselves "in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government." (Johnson v. State of California, supra, 69 Cal.2d at p. 793, 73 Cal.Rptr. at p. 248, 447 P.2d at p. 360.) It therefore is necessary, we concluded, to "isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless

conduct contributed to the governmental decision." (Johnson v. State of California, supra, at p. 794, 73 Cal.Rptr. at p. 248, 447 P.2d at p. 360.) After careful analysis we rejected, in Johnson, other rationales commonly advanced to support governmental immunity,[15] and concluded that the immunity's scope should be no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions.

Relying on Johnson, we conclude that defendants in the present case are not immune from liability for their failure to warn of Tatiana's peril. Johnson held that a parole officer's determination whether to warn an adult couple that their prospective foster child had a background of violence "present[ed] no . reasons for immunity" (Johnson v. State of California, supra, at p. 795, 73 Cal.Rptr. 240, 447 P.2d 352), was "at the lowest, ministerial rung of official action" (id. at p. 796, 73 Cal.Rptr. at p. 250, 447 P.2d at p. 362), and indeed constituted "a classic case for the imposition of tort liability." Id., p. 797, 73 Cal.Rptr. at p. 251, 447 P.2d at p. 363; cf. Morgan v. County of Yuba (1964) 230 Cal.App.2d 938, 942–943, 41 Cal.Rptr. 508.) Although defendants in Johnson argued that the decision whether to inform the foster parents of the child's background required the exercise of considerable judgmental skills, we concluded that the state was not immune from liability for the parole officer's failure to warn because such a decision did not rise to the level of a "basic policy decision."

We also noted in Johnson that federal courts have consistently categorized failures to warn of latent dangers as falling outside the scope of discretionary omissions immunized by the Federal Tort Claims Act.[16] (See United Air Lines, Inc. v. Weiner (9th Cir.1964) 335 F.2d 379, 397–398, cert. den. sub nom. United Air Lines, Inc. v. United States, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (decision to conduct military training flights was discretionary but failure to warn commercial airline was not); United States v. Washington (9th Cir.1965) 351 F.2d 913, 916 (decision where to place transmission lines spanning canyon was assumed to be discretionary but failure to warn pilot was not); United States v. White (9th Cir.1954) 211 F.2d 79, 82 (decision not to "dedud" army firing range assumed to be discretionary but failure to warn person about to go onto range of unsafe condition was not); Bulloch v. United States (D.Utah 1955) 133 F.Supp. 885, 888 (decision how and when to conduct nuclear test deemed discretionary but failure to afford proper notice was not); Hernandez v. United States (D.Hawaii 1953) 112 F.Supp. 369, 371 (decision to erect road block characterized as discretionary but failure to warn of resultant hazard was not).

We conclude, therefore, that the defendants' failure to warn Tatiana or those who reasonably could have been expected to notify her of her peril does not fall within the absolute protection afforded by section 820.2 of the Government Code. We emphasize that our conclusion does not raise the specter of therapists employed by government indiscriminately held liable for damages despite their exercise of sound professional judgment. We require of publicly employed therapists only that quantum of care which the common law requires of private therapists, that they use that reasonable degree of skill, knowledge, and conscientiousness ordinarily exercised by members of their profession. The imposition of liability in those rare cases in which a public employee falls short of this standard does not contravene the language or purpose of Government Code section 820.2.

4. Defendant therapists are immune from liability for failing to confine Poddar.

We sustain defendant therapists' contention that Government Code section 856 insulates them from liability for failing to confine Poddar. Section 856 affords public entities and their employees absolute protection from liability for "any injury resulting from determining in accordance with any applicable enactment . whether to confine a person for mental illness."[17] The section includes an exception to the general rule of immunity, however,, "for injury proximately caused by . negligent or wrongful act[s] or omission[s] in carrying out or failing to carry out . a determination to confine or not to confine a person for mental illness."

Turning first to Dr. Powelson's status with respect to section 856, we observe that the actions attributed to him by plaintiffs' complaints fall squarely within the protections furnished by that provision. Plaintiffs allege Powelson ordered that no detention action be taken. This conduct definitionally reflected Powelson's "determining . [not] to confine [Poddar]." Powelson therefore is immune from liability for any injuries stemming from his decision. (See Hernandez v. State of California (1970) 11 Cal.App.3d 895, 90 Cal.Rptr. 205.)

Section 856 also insulates Dr. Moore for his conduct respecting confinement, although the analysis in his case is a bit more subtle. Clearly, Moore's decision that Poddar be confined was not a proximate cause of Tatiana's death, for indeed if Moore's efforts to bring about Poddar's confinement had been successful, Tatiana might still be alive today. Rather, any confinement claim against Moore must rest upon Moore's failure to overcome Powelson's decision and actions opposing confinement.

Such a claim, based as it necessarily would be upon a subordinate's failure to prevail over his superior, obviously would derive from a rather onerous duty. Whether to impose such a duty we need not decide, however, since we can confine our analysis to the question whether Moore's failure to overcome Powelson's decision realistically falls within the protections afforded by section 856. Based upon the allegations before us, we conclude that Moore's conduct is protected.

Plaintiffs' complaints imply that Moore acquiesced in Powelson's countermand of Moore's confinement recommendation. Such acquiescence is functionally equivalent to "determining . [not] to confine" and thus merits protection under section 856. At this stage we are unaware, of course, precisely how Moore responded to Powelson's actions; he may have debated the confinement issue with Powelson, for example, or taken no initiative whatsoever, perhaps because he respected Powelson's judgment, feared for his future at the hospital, or simply recognized that the proverbial handwriting was on the wall. None of these possibilities constitutes, however, the type of careless or wrongful behavior subsequent to a decision respecting confinement which is

stripped of protection by the exceptionary language in section 856. Rather, each is in the nature of a decision not to continue to press for Poddar's confinement. No language in plaintiffs' original or amended complaints suggests that Moore determined to fight Powelson but failed successfully to do so due to negligent or otherwise wrongful acts or omissions. Under the circumstances, we conclude that plaintiffs' second amended complaints allege facts which trigger immunity for Dr. Moore under section 856.[18]

5. Defendant police officers are immune from liability for failing to continue Poddar in their custody.

Confronting, finally, the question whether the defendant police officers are immune from liability for releasing Poddar after his brief confinement, we conclude that they are. The source of their immunity is section 5154 of the Welfare and Institutions Code, which declares that "[t]he professional person in charge of the facility providing 72–hour treatment and evaluation, his designee, and the peace officer responsible for the detainment of the person shall not be held civilly or criminally liable for any action by a person released at or before the end of 72 hours." (Emphasis added.)

Although defendant police officers technically were not "peace officers" as contemplated by the Welfare and Institutions Code,[19] plaintiffs' assertion that the officers incurred liability by failing to continue Poddar's confinement clearly contemplates that the officers were "responsible for the detainment of [Poddar]." We could not impose a duty upon the officers to keep Poddar confined yet deny them the protection furnished by a statute immunizing those "responsible for . [confinement]." Because plaintiffs would have us treat defendant officers as persons who were capable of performing the functions of the "peace officers" contemplated by the Welfare and Institutions Code, we must accord defendant officers the protections which that code prescribes for such "peace officers."

6. Plaintiffs' complaints state no cause of action for exemplary damages.

Plaintiffs' third cause of action seeks punitive damages against defendant Powelson. Incorporating by reference the factual allegations of the first cause of action, plaintiffs assert that Powelson "did the things herein alleged with intent to abandon a dangerous patient, and said acts were done maliciously and oppressively."[20] The incorporated allegations speak only of Powelson's failure to bring about Poddar's commitment; they do not refer to his failure to warn Tatiana or her parents. Since we have concluded that Powelson is protected by governmental immunity from liability for his decision not to commit Poddar, plaintiffs' complaints state no basis for recovery of exemplary damages against Powelson.

7. Conclusion

For the reasons stated, we conclude that plaintiffs can assert the elements essential to a cause of action for breach of a duty to warn. The judgment of the superior court dismissing plaintiffs' action is reversed, and the cause remanded for further proceedings consistent with the views expressed herein.

The majority's opinion correctly holds that when a psychiatrist, in terminating treatment to a patient, increases the risk of his violence, the psychiatrist must warn the potential victim. However, I do not agree with the majority's conclusion that the psychiatrist must also disclose threats of violence based solely on his prior psychiatrist-patient relationship. Further, I do not agree with the majority's holding that police officers shall become subject to the same duty.

I

DUTY TO DISCLOSE BASED ON PSYCHIATRIST–PATIENT RELATIONSHIP

Generally, one person owes no duty to control the conduct of another. (Richards v. Stanley (1954) 43 Cal.2d 60, 65, 271 P.2d 23; Wright v. Arcade School Dist. (1964) 230 Cal.App.2d 272, 277, 40 Cal.Rptr. 812; Rest.2d Torts (1965) § 315.) Exceptions arise only in limited situations where (1) a special relationship exists between the defendant and the injured party giving the latter a right to protection, or (2) a special relationship exists between the defendant and the active wrongdoer imposing a duty on the defendant to control the wrongdoer's conduct. The majority does not contend the first exception is applicable to this case.

Overriding considerations of policy compel the conclusion that the duty to warn a potential victim may not be founded on the mere existence of a psychiatrist-patient relationship.

The imposition of a duty depends on policy considerations. (Dillon v. Legg (1968) 68 Cal.2d 728, 734, 69 Cal.Rptr. 72, 441 P.2d 912.) The principal considerations include the burden on the defendant, the consequence to the community, the prevention of future violence, and the foreseeability of harm to the plaintiff. (Rowland v. Christian (1968) 69 Cal.2d 108, 113, 70 Cal.Rptr. 97, 443 P.2d 561.)

Although the majority fleetingly acknowledges these considerations, it neglects applying them to our case. More specifically, the majority opinion fails to realistically evaluate the devastating impact their new duty will have on the field of mental health—and the repercussions resulting to society.

The importance of psychiatric treatment is well-recognized in California, reflected in this court's recent statement, "We recognize the growing importance of the psychiatric profession in our modern, ultra-complex society. The swiftness of change—economic, cultural, and moral—produces accelerated tensions in our society, and the potential for relief of such emotional disturbances offered by psychological therapy undoubtedly establishes it as a profession essential to the preservation of societal health and well-being." (In re Lifschutz (1970) 2 Cal.3d 415, 421–422, 85 Cal.Rptr. 829, 832, 467 P.2d 557, 560.)

Successful psychotherapy demands confidentiality. (In re Lifschutz, supra, 2 Cal.3d 415, 422, 85 Cal.Rptr. 829, 467 P.2d 557.) "It is clearly recognized that the very practice of psychiatry vitally depends upon the reputation in the community that the psychiatrist will not tell." (Slovenko, Psychiatry and a Second Look at the Medical Privilege (1960) 6 Wayne L.Rev. 175, 188.)

Assurance of confidentiality is important in three ways.

First, without a substantial guarantee of confidentiality, people requiring treatment will be deterred from seeking assistance. (See Senate Judiciary Committee's comment accompanying section 1014 of the Evid.Code; Slovenko, supra, 6 Wayne L.Rev. 175, 187–188; Goldstein and Katz, Psychiatrist–Patient Privilege: The GAP Proposal and the Connecticut Statute (1962) 36 Conn.Bar J. 175, 178.) It remains an unfortunate fact in our society that a stigma attaches to people seeking psychiatric guidance (apparently increased by the propensity of people considering treatment to see themselves in the worst possible light) creating a well-recognized reluctance to seek aid. (Fisher, The Psychotherapeutic Professions and the Law of Privileged Communications (1964) 10 Wayne L.Rev. 609, 617; Slovenko, supra, 6 Wayne L.Rev. 175, 188; see also Rappeport, Psychiatrist–Patient Privilege (1963) 23 Md.L.J. 39, 46–47.) This reluctance is alleviated by the psychiatrist's assurance of confidentiality.

Second, the guarantee of confidentiality is important in eliciting the full disclosure necessary for effective treatment. To carry out the cure, the doctor must first diagnose the disease. Candor is essential to psychiatric diagnosis. This diagnostic process requires "a searching evaluation of the given personality in the light of his past experiences and current relationships" (Heller, Some Comments to Lawyers of the Practice of Psychiatry (1957) 30 Temp.L.Q. 401), requiring intensive examination of "innate and constitutional factors, the history of the individual's emotional, educational, cultural, vocational and medical backgrounds, the influence of sexual and aggressive instincts, so-called ego or personality strength, judgment and reality-testing." (Id. at p. 402.) Summarily stated, "The process involves a prying into the most hidden aspects of personality, a prying which discloses matters theretofore unknown even to the conscious mind of the patient." (Slovenko, supra, 6 Wayne L.Rev. 175, 185.)

The assurance of confidentiality is essential to bringing about full disclosure since the psychiatric patient approaches treatment with conscious and unconscious inhibitions to revealing his innermost thoughts. (Goldstein and Katz, supra, 36 Conn.B.J. 175, 178; Guttmacher and Weihofen, Privileged Communications Between Psychiatrist and Patient (1952) 28 Ind.L.J. 32, 34.) "Every person, however well-motivated, has to overcome resistances to therapeutic exploration. These resistances seek support from every possible source and the possibility of disclosure would easily be employed in the service of resistance." (Goldstein and Katz, supra, 36 Conn.Bar J. 175, 179; see also, 118 Am.J.Psych. 734, 735.) Until a patient can trust his psychiatrist not to violate their confidential relationship, "the unconscious psychological control mechanism of repression will prevent the recall of past experiences." (Butler, Psychotherapy and Griswold: Is Confidentiality a Privilege or a Right? (1971) 3 Conn.L.Rev. 599, 604.) [1]

Third, even if full disclosure is accomplished, assurance that the confidential relationship will not be breached is necessary to maintain the patient's trust of his psychiatrist, the very means by which treatment is effected. "[T]he essence of much psychotherapy is the contribution of trust in the external world and ultimately in the self, modelled upon the trusting relationship established during therapy." (Dawidoff, The Malpractice of Psychiatrists, 1966 Duke L.J. 696, 704.) Patients will be helped only if they can form a trusting relationship with the psychiatrist. (Id. at p. 704, fn. 34; Burnham, Separation Anxiety (1965) 13 Arch.Gen.Psychiatry 346, 356; Heller, supra, 30 Temp.L.Q. 401, 406.) Conversely, all authorities appear to agree treatment will be frustrated if the trust relationship cannot be developed because of collusive communication between the psychiatrist and others. (See, e.g., Ralph Slovenko (1973) Psychiatry and Law, p. 61; Cross, Privileged Communications Between Participants in Group Psychotherapy (1970) Law and the Social Order, 191, 199; Hollender, The Psychiatrist and the Release of Patient Information (1960) 116 Am.J.Psychiatry 828, 829.)

Therefore, given the importance of confidentiality to the practice of psychiatry, it becomes clear the duty to warn imposed by the majority will cripple the use and effectiveness of psychiatry: many people, potentially violent—yet susceptible to treatment—will be deterred from seeking it; those seeking aid will be inhibited from making the self-revelation necessary to effective treatment; finally, requiring the psychiatrist to violate the patient's trust by forcing the doctor to disseminate confidential statements will destroy the interpersonal relationship by which treatment is effected.

The law recognizes the psychiatrist's ability to lessen a patient's propensity for violence. Indeed, this ability is so well-established that the majority, in its second reason for imposing a duty to warn, concludes that because the psychiatrists' conduct caused Poddar to discontinue treatment, the psychiatrists actually "contributed to the danger" that Poddar would act violently. (Ante, p. 135 of 118 Cal.Rptr., p. 135 of 529 P.2d.)

By imposing such duty on psychiatrists, the majority contributes to society's danger. Given the majority's recognition that under existing psychiatric procedures only a relatively few receiving treatment will ever present a serious risk of violence (ante, p. 136 of 118 Cal.Rptr., p. 560 of 529 P.2d.), the newly imposed duty will likely result in a net increase in violence—inconsistent with the policies of preventing future violence and of weighing the consequence to the community.

The majority overlooks the widespread impact of its new duty by pointing out that only a few psychiatric patients will ever really create a serious risk of violence and by assuming that the number of necessary warnings will similarly be few. (Ante, p. 136 of 118 Cal.Rptr., p. 560 of 529 P.2d.), This assumption strays from reality.

The psychiatric community recognizes that the process of determining potential violence in a patient is far from exact, being wrought with complexity and uncertainty. (See, Rector, Who Are the Dangerous? (July 1973) Bull. of the Amer. Acad. of Psych. and the Law 186; Kozol, Boucher, and Garofalo, The Diagnosis and Treatment of Dangerousness (1972) 18 Crime and Delinquency 371; Justice and Birkman, An Effort to Distinguish the Violent From the Nonviolent (1972) 65 So.Med.J. 703.) In fact, precision has not even been attained in predicting who of those having already committed violent acts will again become violent, a task recognized to be of simpler proportion. (Kozol, Boucher, and Garofalo, supra, 18 Crime and Delinquency 371, 384.)

This predictive uncertainty is fatal to the majority's underlying assumption that the number of disclosures will necessarily be small. As noted, above psychiatric patients are encouraged to discuss all thoughts of violence. And, as the majority concedes, they often express such thoughts. However, unlike this court, the psychiatrist does not enjoy the benefit of hindsight in seeing which few, if any, of his patients will ultimately become violent. Now, operating under the majority's duty, the psychiatrist—with each patient and each visit—must instantaneously calculate potential violence. The difficulties researchers have encountered in accurately predicting violence will be heightened for the practicing psychiatrist dealing for brief periods in his office with heretofore nonviolent patients. And, given the decision not to warn must always be made at the psychiatrist's civil peril, one can expect all doubts will be resolved in favor of warning.

Relying on sections 1013, 1014, and 1024 of the Evidence Code, the majority suggests that, in any event, the new duty's harmful impact on the community has already been balanced by the Legislature in favor of warning. However, this conclusion is faulty, failing to differentiate between the permissive language of section 1024 and the mandatory duty of the majority.

Section 1014 of the Evidence Code provides that "the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist." Section 1013 expressly provides that the patient is the holder of the privilege. Section 1024 provides, "There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger."

Section 1024 is solely permissive. When a psychiatrist has determined to his satisfaction that some sort of formal disclosure must be made to protect the patient or others, section 1024 precludes the patient from invoking the section 1014 privilege to prevent him from doing so.[2] Clearly, section 1024 neither imposes—nor contemplates—a legal duty mandating the psychiatrist to warn, and the impact of requiring him to warn is much greater than that of allowing him to do so.

Our sympathy for the victim of violent acts of the mentally ill should not blind us to the needs of the mentally ill or to the ultimate goal of reducing the level of violence. Because the majority's holding will severely impair the ability of the doctor to treat effectively, resulting in a net increase in violence, I cannot concur in the majority's new rule.

II

DUTY OF POLICE TO WARN

Although the police defendants get lost in the course of the majority's opinion, the holding concludes the officers may also be liable for failing to warn.

The ground for imposing liability on the police officers is unclear. The holding is so broad it may be understood, in light of the facts of this case, as meaning that the mere release of Poddar gave rise to the duty to warn. The majority not only imposes a new duty on police officers, but may also have held that jail and prison officials must now warn of potential violence whenever a prisoner is released pursuant to bail order, parole, or completion of sentence.

It is disturbing that the majority should take, by ambiguous statement and without discussion, the very broad step of imposing on a peace officer the near impossible duty to notify potential victims of threatened violence. The majority states that duty is dependent on considerations of policy—but the policy goes unexplained.

III

CONCLUSION

It appears the tragedy of Tatiana Tarasoff has led the majority of our court to unfairly penalize the professions of psychiatry and law enforcement, to the detriment of society.

I would permit plaintiffs to proceed against the psychiatrists for failure to warn on the theory the psychiatrist's conduct in terminating treatment increased the risk of violence. Absent such conduct, I would disallow a cause of action for failure to warn based solely on the existence of the prior psychiatrist-patient relationship. Finally, I conclude no justification has been shown for imposing the inordinate duty to warn on the police officers.

FOOTNOTES

1. The criminal prosecution stemming from this crime is reported in People v. Poddar (1974) 10 Cal.3d 750, 111 Cal.Rptr. 910, 518 P.2d 342.

2. The therapist defendants include Dr. Moore, the psychologist who examined Poddar and decided that Poddar should be committed; Dr. Gold and Dr. Yandell, psychiatrists at Cowell Memorial Hospital who concurred in Moore's decision; and Dr. Powelson, chief of the department of psychiatry, who countermanded Moore's decision and directed that the staff take no action to confine Poddar. The police defendants include Officers Atkinson, Brownrigg and Halleran, who detained Poddar briefly but released him; Chief Beall, who received Moore's letter recommending that Poddar be confined; and Officer Teel, who, along with Officer Atkinson, received Moore's oral communication requesting detention of Poddar.

3. Plaintiffs' complaints allege that defendants failed to warn Tatiana's parents of the danger to Tatiana from Poddar. The complaints do not specifically state whether defendants warned Tatiana herself. Such an omission can properly be cured by amendment. As we stated in Minsky v. City of Los Angeles: "It is axiomatic that if there is a reasonable possibility that a defect in the complaint can be cured by amendment or that the pleading liberally construed can state a cause of action, a demurrer should not be sustained without leave to amend. (3 Witkin, Cal.Procedure, Pleading, § 844, p. 2449; accord La Sala v. American Sav. & Loan Assn. (1971), 5 Cal.3d 864, 876, 97 Cal.Rptr. 849, 489 P.2d 1113; Lemoge Electric v. County of San Mateo (1956) 46 Cal.2d 659, 664, 297 P.2d 638; Beckstead v. Superior Court (1971) 21 Cal.App.3d 780, 782, 98 Cal.Rptr. 779.) We believe a cause of action has been stated here." (11 Cal.3d 113, 118–119, 113 Cal.Rptr. 102, 107, 520 P.2d 726, 731).

4. See Merrill v. Buck (1962) 58 Cal.2d 552, 562, 25 Cal.Rptr. 456, 375 P.2d 304; Biakanja v. Irving (1958) 49 Cal.2d 647, 650, 320 P.2d 16; Walnut Creek Aggregates Co. v. Testing Engineers Inc. (1967) 248 Cal.App.2d 690, 695, 56 Cal.Rptr. 700.

5. This rule derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter. (See Harper & Kime, The Duty to Control the Conduct of Another (1934) 43 Yale L.J. 886, 887.) Morally questionable, the rule owes its survival to "the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue." (Prosser, Torts (4th ed. 1971) § 56, p. 341.) Because of these practical difficulties, the courts have increased the number of instances in which affirmative duties are imposed not by direct rejection of the common-law rule, but by expanding the list of special relationships which will justify departure from that rule. (See Prosser, supra, § 56, at pp. 348–350.)

6. A line of cases discussing the liability of a defendant who negligently provides an instrumentality by which a third person injures the plaintiff presents issues similar to the present case, although distinguishable in that such cases require the defendant only to take reasonable precautions to safeguard his own property. In Richards v. Stanley (1954) 43 Cal.2d 60, 271 P.2d 23, defendant left the ignition keys in her car; a thief stole the car and, driving negligently, injured the plaintiff. Relying on the rule that "Ordinarily, . in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another" (43 Cal.2d at p. 65, 271 P.2d at p. 27), the court affirmed a judgment for defendant. A year later, however, in Richardson v. Ham (1955) 44 Cal.2d 772, 285 P.2d 269, the court held that defendants who left a bulldozer unlocked could be held liable for damage caused after trespassers started the vehicle and then abandoned it to run amuck. Distinguishing Richards v. Stanley, the court stated that the "extreme danger created by a bulldozer in uncontrolled motion and the foreseeable risk of intermeddling fully justify imposing a duty on the owner to exercise reasonable care to protect third parties from injuries arising from its operation by intermeddlers." (44 Cal.2d at p. 776, 285 P.2d at p. 271.) In Hergenrether v. East (1964) 61 Cal.2d 440, 39 Cal.Rptr. 4, 393 P.2d 164, the court further limited the scope of Richards v. Stanley, and imposed liability upon a defendant, who parked his truck in a "skid row" area with the ignition keys in the truck, for damages caused by the reckless driving of a thief. Again the court distinguished Richards on the ground that "[S]pecial circumstances which impose a greater potentiality of foreseeable risk or more serious injury, or require a lesser burden of preventative action, may be deemed to impose an unreasonable risk on, and a legal duty to, third persons." (61 Cal.2d at p. 444, 39 Cal.Rptr. at p. 6, 393 P.2d at p. 166.) The cases thus exemplify an evolution from a rule of "no duty" to a rule in which imposition of a duty of care depends upon the foreseeability of serious injury and the burden of precautions. (See Schwartz v. Helms Bakery Limited (1967) 67 Cal.2d 232, 240–242, 60 Cal.Rptr. 510, 430 P.2d 68.)

7. The pleadings establish the requisite relationship between Poddar and both Dr. Moore, the psychotherapist who treated Poddar, and Dr. Powelson, who supervised that treatment. Plaintiffs also allege that Dr. Gold personally examined Poddar, and that Dr. Yandell, as Powelson's assistant, approved the decision to arrange Poddar's commitment. These allegations are sufficient to raise the issue whether a doctor-patient or psychotherapist-patient relationship, giving rise to a possible duty by the doctor or therapist reasonably to warn threatened persons of danger arising from the patient's mental illness, existed between Gold or Yandell and Poddar. (See Harney, Medical Malpractice (1973) p. 7.)

8. When a "hospital has notice or knowledge of facts from which it might reasonably be concluded that a patient would be likely to harm himself or others unless preclusive measures were taken, then the hospital must use reasonable care in the circumstances to prevent such harm." (Vistica v. Presbyterian Hospital (1967) 67 Cal.2d 465, 469, 62 Cal.Rptr. 577, 580, 432 P.2d 193, 196.) (Emphasis added.) A mental hospital may be liable if it negligently permits the escape or release of a dangerous patient (Underwood v. United States (5th Cir.1966) 356 F.2d 92; Fair v. United States (5th Cir.1956) 234 F.2d 288). Greenberg v. Barbour (E.D.Pa.1971) 322 F.Supp. 745, upheld a cause of action against a hospital staff doctor whose negligent failure to admit a mental patient resulted in that patient assaulting the plaintiff.

9. Kaiser v. Suburban Transp. System (1965) 65 Wash.2d 461, 398 P.2d 14, 401 P.2d 350; see Freese v. Lemmon (Iowa 1973) 210 N.W.2d 576 (concurring opinion of Uhlenhopp, J.)

10. Ellis v. D'Angelo (1953) 116 Cal.App.2d 310, 253 P.2d 675, upheld a cause of action against parents who failed to warn a babysitter of the violent proclivities of their child; Johnson v. State of California (1968) 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352, upheld a suit against the state for failure to warn foster parents of the dangerous tendencies of their ward; Morgan v. County of Yuba (1964) 230 Cal.App.2d 938, 41 Cal.Rptr. 508, sustained a cause of action against a sheriff who had promised to warn decedent before releasing a dangerous prisoner, but failed to do so.

11. Fleming and Maximov note that "While [section 1024] supports the therapist's less controversial right to make a disclosure, it admittedly does not impose on him a duty to do so. But the argument does not have to be pressed that far. For if it is once conceded . that a duty in favor of the patient's foreseeable victims would accord with general principles of tort liability, we need no longer look to the statute for a source of duty. It is sufficient if the statute can be relied upon . for the purpose of countering the claim that the needs of confidentiality are paramount and must therefore defeat any such hypothetical duty. In this more modest perspective, the Evidence Code's 'dangerous patient' exception may be invoked with some confidence as a clear expression of legislative policy concerning the balance between the confidentiality values of the patient and the safety values of his foreseeable victims." (Emphasis in original.) Fleming & Maximov, The Patient or His Victim: The Therapist's Dilemma (1974) 62 Cal.L.Rev. 1025, 1063.

12. Moore argues that after Powelson countermanded the decision to seek commitment for Poddar, Moore was obliged to obey the decision of his superior and that he therefore should not be held liable for any dereliction arising from his obedience to superior orders. Plaintiffs in response argue that Moore's duty to members of the public endangered by Poddar should take precedence over his duty to obey Powelson. Since plaintiffs' complaints do not set out the date of Powelson's order, the specific terms of that order, or Powelson's authority to overrule Moore's decisions respecting patients under Moore's care, we lack sufficient factual background to adjudicate this conflict.

13. No more specific immunity provision of the Government Code appears to address the issue.

14. Section 815.2 of the Government Code declares that "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." The section further provides, with exceptions not applicable here, that "a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." The Regents, therefore, are immune from liability only if all individual defendants are similarly immune.

15. We dismissed, in Johnson, the view that immunity continues to be necessary in order to insure that public employees will be sufficiently zealous in the performance of their official duties. The California Tort Claims Act of 1963 provides for indemnification of public employees against liability, absent bad faith, and also permits such employees to insist that their defenses be conducted at public expense. (See Gov.Code, §§ 825–825.6, 995–995.2.) Public employees thus no longer have a significant reason to fear liability as they go about their official tasks. We also, in Johnson, rejected the argument that a public employee's concern over the potential liability of his or her employer serves as a basis for immunity. (Johnson v. State of California, supra, 69 Cal.2d at pp. 790–793, 72 Cal.Rptr. 240, 447 P.2d 352.)

16. By analogy, section 830.8 of the Government Code furnishes additional support for our conclusion that a failure to warn does not fall within the zone of immunity created by section 820.2. Section 830.8 provides: "Neither a public entity nor a public employee is liable . for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device . was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care." The Legislature thus concluded at least in another context that the failure to warn of a latent danger is not an immunized discretionary omission. (See Hilts v. County of Solano (1968) 265 Cal.App.2d 161, 174, 71 Cal.Rptr. 275.)

17. Section 5201 of the Welfare and Institutions Code provides: "Any individual may apply to the person or agency designated by the county for a petition alleging that there is in the county a person who is, as a result of mental disorder a danger to others, or to himself, or is gravely disabled, and requesting that an evaluation of the person's condition be made." We believe that defendant therapists' power to recommend confinement as provided by section 5201 suffices to place them within the class of persons protected by section 856 of the Government Code. They are persons who can "determin[e] in accordance with [section 5201] whether to confine a person for mental illness."

18. Because Dr. Gold and Dr. Yandell were Dr. Powelson's subordinates, the analysis respecting whether they are immune for having failed to obtain Poddar's confinement is similar to the analysis applicable to Dr. Moore.

19. Welfare and Institutions Code section 5008, subdivision (i), defines "peace officer" for purposes of the Lanterman–Petris–Short Act as a person specified in sections 830.1 and 830.2 of the Penal Code. Campus police do not fall within the coverage of section 830.1 and were not included in section 830.2 until 1971.

20. Defendant Powelson points out that plaintiffs do not allege that Powelson knew Tatiana or plaintiffs, nor that his alleged malice or oppression was directed toward them. Such an allegation, however, is not essential to a cause of action for punitive damages. In Toole v. Richardson–Merrell Inc. (1967) 251 Cal.App.2d 689, 60

Cal.Rptr. 398, the court upheld an award of punitive damages against the manufacturer of a dangerous drug. Rejecting the contention that proof of a deliberate intention by the manufacturer to injure the users was essential to punitive damages, the court stated that "malice in fact, sufficient to support an award of punitive damages on the basis of malice as that term is used in Civil Code section 3294, may be established by a showing that the defendant's wrongful conduct was wilful, intentional, and done in reckless disregard of its possible results." (251 Cal.App.2d at p. 713, 60 Cal.Rptr. at p. 415.)

1. One survey indicated that five of every seven people interviewed said they would be less likely to make full disclosure to a psychiatrist in the absence of assurance of confidentiality. (See, Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Doctrine of Privileged Communications (1962) 71 Yale L.J. 1226, 1255.)

2. This purpose is made simplistically clear in the Law Revision Commission's comment accompanying section 1024: "Although this exception might inhibit the relationship between the patient and his psychotherapist to a limited extent, it is essential that appropriate action be taken if the psychotherapist becomes convinced during the course of treatment that the patient is a menace to himself or others and the patient refuses to permit the psychotherapist to make the disclosure necessary to prevent the threatened danger." (Italics added.)

TOBRINER, Justice.

WRIGHT, C.J., and MOSK, SULLIVAN and BURKE,* JJ., concur.McCOMB, J., concurs.