1983

Affirmative Duty after Tarasoff

Shlomo Twerski

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol11/iss3/5

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
NOTES

AFFIRMATIVE DUTY AFTER TARASOFF

Introduction

At common law, there was no general duty to take affirmative action to prevent harm to another. Tort liability for negligence, though, was limited in several areas. Not only did the common law insulate defendants from liability for failure to act—referred to in this note as the affirmative duty rule—it also limited negligence liability in areas such as landowner liability and negligent infliction of emotional distress. In recent years, the California Supreme Court has departed from the common law limitations on landowner liability and emotional distress, and its revisions of the law have been


2. The classifications of trespasser, licensee, and invitee were used to determine the existence of the landowner's duty. Trespassers and licensees could generally recover only for willful or reckless injury, but not for a negligently maintained condition of the premises. An invitee was owed a duty of protection from any reasonably foreseeable harm. See, e.g., Oettinger v. Stewart, 24 Cal. 2d 133, 148 P.2d 19 (1944); Post v. Lunney, 261 So. 2d 146 (Fla. 1972); Gerchberg v. Loney, 223 Kan. 446, 576 P.2d 593 (1978).


accepted in other jurisdictions. When *Tarasoff v. Regents of the University of California* held a psychologist liable for the failure to take affirmative action to warn a potential victim of a dangerous patient, it would not have been unreasonable to question the future vitality of the affirmative duty rule in California. Yet in contrast to the unqualified abandonment of the limitations embodied in the old landowner liability and emotional distress rules, the court refrained from definitively excising the common law limitation on affirmative duty from California negligence law.

This note argues that it would be premature to eulogize the affirmative duty rule. The note examines the policies underlying the common law rule, and demonstrates how these policies affected application of the rule at common law. It then analyzes *Tarasoff* and a subsequent California case, *Thompson v. County of Alameda*, and concludes that despite talk of a departure from the affirmative duty rule, the California Supreme Court has not deviated from the spirit of the common law practice. In the course of this analysis, the note also suggests extending a duty to act to formerly exempt areas, where requiring affirmative activity would pose no danger to the interests protected by the common law rule.

**Affirmative Duty at Common Law**

At common law, there was no general duty to take affirmative action to prevent harm to another. This doctrine was clearly stated

---


7. *17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).*

8. *27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).*

9. *See cases cited supra note 1; RESTATEMENT (SECOND) OF TORTS § 314 (1965) [hereinafter cited as RESTATEMENT]; Bohlen, The Moral Duty to Aid Others as a Basis of Tort*
in *Buch v. Amory Manufacturing Co.*:¹⁰

Suppose A, standing close by a railroad, sees a two-year-old babe on the track and a car approaching. He can easily rescue the child, with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child’s injury, or indictable under the statute for its death.¹¹

The affirmative duty rule confined the search for fault to the actions of defendants. Harm resulting from their inactivity could not support a suit in tort.

The depth of the reluctance to find an affirmative duty to act is demonstrated by the extent to which the law has protected the failure to act from sanction. For example, in *Handiboe v. McCarthy*,¹² the court imposed no liability for the failure of the defendant’s servant to rescue plaintiff’s four year old son from a swimming pool filled with three feet of water.¹³ In *Osterlind v. Hill*,¹⁴ defendant ignored loud cries for help coming from a man hanging onto an overturned canoe.¹⁵ Yet, the court found no legal cause of action against defendant for the man’s subsequent drowning.¹⁶ *Sidwell v. McVay*¹⁷ involved the claim of a sixteen year old plaintiff who had been filling a pipe with gunpowder in defendant’s home.¹⁸ The defendant admonished the plaintiff for making a mess, but did not warn him of the dangerous nature of his activity.¹⁹ The court held that defendant had breached no duty, and thus was not liable for the foreseeable consequences of the youngster’s activity.²⁰ These are clearly some of the more unpalatable instances where the affirmative duty rule has been applied. Yet the severity of these decisions is an indication of the courts’ historic commitment to keep the failure to act free of

---

¹¹ 69 N.H. 257, 44 A. 809 (1898).
¹³ 160 N.E. at 302.
¹⁴ Id. at 75-76, 160 N.E. at 302.
¹⁵ Okla. 1955.
¹⁶ Id. at 758.
¹⁷ Id.
¹⁸ Id. at 759.
The affirmative duty rule also has notably outweighed the common law's special concern for intentional torts. Traditionally, a plaintiff suing for an intentional tort enjoyed a more liberal standard of causation, certainty of proof, and measure of damages than did his counterpart in a negligence case. Even the general reluctance to allow recovery for emotional distress was overlooked when the tort was intentional. Yet intentional tort actions required an affirmative act by the defendant. A defendant who intentionally failed to act was afforded the same deference as the negligently inactive defendant—there was no liability.

21. More recently, Cramer v. Mengerhausen, 275 Or. 223, 550 P.2d 740 (1976), held that the owner of a pickup truck had no duty to warn a mechanic working underneath the vehicle that the truck was about to slip off the jack. Id. at 227, 550 P.2d at 743. The holding employed the affirmative duty rule only to determine that the failure to warn did not constitute contributory negligence on the truck owner's own claim for injuries against the garage. Id.


24. The definitions of the intentional tort claims refer to active interference with the plaintiff. Thus, battery requires nonconsensual contact and assault requires an overt act. See W. Prosser, supra note 22, §§ 9, 10; see also Fletcher, Prolonging Life, 42 Wash. L. Rev. 999, 1008 & n.19 (1967) (trespass requires an affirmative act).

Professor Fletcher contends that the concept of intent is not readily applicable to the failure to act case. G. Fletcher, Rethinking Criminal Law § 8.4, at 625-28 (1978). He observes that "there is something odd about saying that in not rendering care . . . [a nurse] 'intends' the death of her patient." Id. at 626. According to Fletcher, one can only accuse an inactive bystander of wishing the harm to occur. Wanting something to happen, he argues, should not carry the same liability as intending it to happen. However, apart from the semantic distinction, Professor Fletcher does not have a convincing argument that there is a conceptual difference between the states of mind that exist when one acts and when one fails to act. If the law would recognize a duty to take affirmative action to prevent harm, an intentional decision not to render that assistance transcends the mere wish that the harm occur. While one may say that the nonactor is "wishing" for an event in which he is not taking part, no one would say that he is "wishing" that he remain inactive—he is intentionally not acting.

Use of the terms "affirmative duty" in discussing liability for failure to act does not restrict the analysis to negligence cases, where "duty" is commonly a stated element of the cause of action. The concept of duty exists as well in determining liability for an intentional harm. See Green, Duties, Risks, Causation Doctrines, 41 Tex. L. Rev. 42, 47-51 (1962).

25. Cases discussing the lack of an affirmative duty either fail to discuss the defendant's state of mind as a factor in precluding his liability or explicitly exonerate the intentional failure to act. Thus, the quote from Buch v. Amory Manufacturing Co., supra text accompanying notes 10-11, characterizes the hypothetical defendant as a "ruthless savage" and a "moral monster," but still exempts him from liability. See also Fletcher, supra note 24, at 1004 n.15.

Criticisms of the affirmative duty rule has centered on the "moral monster" cases, while its defenders focus on cases where the defendant is not certain that he should act. Professor Greg-
Alongside its implementation in civil law, the affirmative duty rule has also been utilized to bar the imposition of criminal liability. Thus, the *Model Penal Code* provides: "Liability for the commission of an offense may not be based on an omission unaccompanied by action"26 unless the law has explicitly imposed liability or a duty to act.27 This concept of extending immunity to one who fails to act in the criminal law parallels the treatment of affirmative duty in tort law. Not only is an omission exempt from civil liability, it is generally free of the criminal sanction as well.28 Although socially undesirable activity is punished, corresponding inactivity is usually not deemed a crime.

Whatever the precedential value of common law rules, they have not bound contemporary decisionmakers. Many state courts, following the lead of the California Supreme Court decisions in *Dillon v. Legg*29 and *Rowland v. Christian*,30 have discarded the longstanding common law limitations on the recovery for negligent infliction of emotional distress and landowner liability.31 In the wake of this erosion of common law rules, it would be presumptuous to consider the common law’s affirmative duty rule as sacrosanct. However, *Dillon* and *Rowland* did not dismiss the old rules summarily. Rather, they thoroughly examined the reasons for the traditional rules and abandoned them only upon a determination that their underlying policies were no longer relevant. This careful policy analysis is notably absent in the affirmative duty decisions.

In *Dillon*, a mother’s claim for emotional distress upon witnessing her daughter’s injury32 set the stage for the court’s scrutiny of California’s “zone of danger” rule, which limited recovery for....

---

27. Id.
29. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
31. See cases cited supra note 6.
32. 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.
psychic trauma to those plaintiffs located within the area where the tortfeasor could have struck.\textsuperscript{33} The court explained that the significance of the zone of danger requirement was to demonstrate the presence of the plaintiff’s apprehension of impact.\textsuperscript{34} Since California had previously ruled that impact was not a necessary element in an action to recover damages for emotional distress,\textsuperscript{35} the court found no reason to sustain a rule requiring fear of impact.\textsuperscript{36} Another rationale for the zone of danger limitation was to prevent suits based on fraudulent claims of emotional distress.\textsuperscript{37} The court decided, however, that this was not sufficient reason to deny recovery to an entire class of emotional distress claims.\textsuperscript{38} Recognizing that the old rule also functioned to protect defendants from liability to a potentially infinite class of plaintiffs, the court fashioned new guidelines to limit actions for emotional distress to reasonably foreseeable plaintiffs.\textsuperscript{39} These new requirements mandated that a plaintiff be in close proximity to the accident, contemporaneously observe the accident, and share a close relationship with the accident victim.\textsuperscript{40}

\textit{Rowland v. Christian}\textsuperscript{41} attacked the common law classifications of the duties owed by a possessor of land to trespassers, licensees, and invitees. In analyzing these limitations on liability, the court noted the prominent stature that land traditionally held in English and American thought, the dominance and societal prestige which was once held by the British landowning class, and the heritage of feudalism as possible historical justifications for the formation of these rules.\textsuperscript{42} Yet the court observed that the classifications failed to reflect the factors germane to the imposition of liability in the contemporary setting, such as foreseeability, certainty of injury, burden

\footnotesize{\begin{enumerate}
\item This was the rule in California prior to \textit{Dillon}. Amaya \textit{v. Home Ice, Fuel \& Supply Co.}, 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), \textit{overruled in Dillon v. Legg}, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
\item 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.
\item 68 Cal. 2d at 733, 441 P.2d at 915-16, 69 Cal. Rptr. at 75-76.
\item \textit{Id.} at 735, 441 P.2d at 917, 69 Cal. Rptr. at 77.
\item \textit{Id.} at 735-39, 441 P.2d at 917-19, 69 Cal. Rptr. at 77-79.
\item \textit{Id.} at 739-41, 441 P.2d at 919-21, 69 Cal. Rptr. at 79-81.
\item The utility of these guidelines in limiting the class of plaintiffs is demonstrated by the denial of recovery in Hoyem \textit{v. Manhattan Beach City School Dist.}, 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978) and Justus \textit{v. Atchison}, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).
\item 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).
\item \textit{Id.} at 113, 443 P.2d at 564-65, 70 Cal. Rptr. at 100-01.
\end{enumerate}
on the defendant to prevent injury, and cost of insurance. Indeed, the court found that the old rules had actually become riddled with exceptions aimed at bringing the duty of a landowner in line with the general concepts of foreseeability of harm. After analyzing the common law rule, the Rowland court could not discern any policy that would not be furthered by implementing an ordinary negligence approach. The court thus ruled against sustaining the common law classifications.

The Dillon and Rowland approach of examining the policies behind the common law rules, and discarding them only when the policies are no longer relevant, suggests that a similar analysis should be undertaken with respect to the affirmative duty rule. Yet the California court’s decision in Tarasoff v. Regents of the University of California, finding psychotherapists liable for a failure to prevent a foreseeable injury caused by one of their patients, has led to speculation that the affirmative duty rule effectively was being eroded, although the court did not engage in any analysis of the rule’s policies. The Tarasoff opinion, in dictum, evidenced a desire to treat the failure to act situation with a foreseeability test, which would apply the same considerations utilized in traditional negligence cases. The court, however, rested its decision on a special relationship exception, which imposed a duty to act even at common law. The same court’s subsequent decision in Thompson v. County of Alameda, which denied the existence of a Tarasoff-type duty, cast further

44. 69 Cal. 2d at 114-16, 119-20, 443 P.2d at 565-66, 569, 70 Cal. Rptr. at 101-02, 105.
45. See id. at 117-18, 443 P.2d at 567-68, 70 Cal. Rptr. at 103-04.
46. Id. at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.
49. See 17 Cal. 3d at 434-35, 551 P.2d at 342, 131 Cal. Rptr. at 22.
50. Id. at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.
51. 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).
52. See id. at 751-59, 614 P.2d at 733-38, 167 Cal. Rptr. at 75-80. The Thompson court referred to the duty in Tarasoff as a special relationship exception to the general rule that one owes no duty to control the conduct of another. Id. at 751, 614 P.2d at 733, 167 Cal. Rptr. at 75. Thompson was then distinguished as not justifying a Tarasoff duty. Id. at 753, 614 P.2d at 734, 167 Cal. Rptr. at 76. Although these distinctions removed Thompson from the special areas where affirmative duty is imposed, placing it back in the realm of the general rule against imposition of an affirmative duty, the court also justified the absence of duty on the public policy grounds of effective operation of a parole system, making no reference to any
doubt on the imminent demise of the affirmative duty rule.

The extent to which the common law has employed the affirmative duty rule, in criminal as well as in tort law, in the area of intentional torts, and in unpalatable and shocking situations, suggests the existence of policies that may not be as easily dismissed as those encountered in Dillon and Rowland.

One of the policies behind the common law approach to affirmative duty is the impracticality of imposing a duty to act. The dictum in Tarasoff relies on the general duty guidelines—most notably foreseeability. This dictum implies that just as there is a duty to refrain from activity that foreseeably would result in harm to the plaintiff, there would be a corresponding obligation to act, when it is foreseeable that the plaintiff’s injury would be avoided through the defendant’s involvement. But unlike the foreseeability criterion's traditional application, which encourages the defendant to refrain from interfering with the plaintiff, the Tarasoff dictum appeals to the defendant to interject himself into the plaintiff's affairs in order to prevent foreseeable harm. This may not be universally desirable, as illustrated in the hypotheticals posed by Professor Gregory:

Suppose you are next in line at the ticket window and see the agent give the customer back ten dollars too much change. All you have to do is speak. But in doing so you may make a fool of the agent and a knave of the customer. I was in this position at a railway ticket office some months ago. The customer started away, counted his change—and then turned to the window and gave back the ten dollars. What if he had not done so? I doubt very much if I would have had the courage—or the gall—to intervene. Yet at the day's end the agent would have had to pay the ten dollars. To what extent is one his brother’s keeper? Should you tell somebody his house may be on fire when you're not sure? or that his car is illegally parked? or his fly is open? Where do you draw the line?

Professor Gregory's illustrations caution against imposing a general duty that would require one to act in situations where his involvement may not be beneficial.

---

53. 17 Cal. 3d at 434-35, 551 P.2d at 342-43, 131 Cal. Rptr. at 22-23; see also Christensen v. Epley, 287 Or. 539, 556-57, 601 P.2d 1216, 1225-26 (1979) (Tongue, J., concurring).
54. Gregory, supra note 25.
55. Id. at 38.
Even when the defendant’s act would clearly be beneficial, imposition of an affirmative duty raises concerns that are not present in the traditional negligence duty. Liability for active intrusions on the plaintiff’s domain encourages the maintenance of the status quo by redressing its disruption; noninterference by one person in another’s affairs is the goal to be attained. Compliance with a traditional negligence duty, then, restricts the defendant from one particular course of action, while it leaves him free to engage in another activity as he pleases. An affirmative duty, though, invades the domain of the defendant by requiring him to participate in events to change the prevailing situation. Often, the nature or severity of the plaintiff’s loss will not clearly outweigh the defendant’s interest in either keeping to himself, or engaging in some other, perhaps more productive, activity. For one to comply with an affirmative duty, he must restrict himself from doing anything else that he may then desire to do. Where a tort duty will not maintain a status quo, but will interfere with an individual’s affairs, a close scrutiny is warranted to determine whether or not the degree of interference is such that noncompliance with the duty would be justified.

The societal interest in preserving the right to refrain from acting, even where there is no doubt as to the value of the activity, is exemplified in Goldberg v. Housing Authority.

The question whether a private party must provide protection

56. See Bohlen, supra note 9, at 220-21; McNiece & Thornton, supra note 9, at 1273.
57. See Bohlen, supra note 9, at 220-21. Professor Weinrib’s criticism of Bohlen on this point focuses on the temporal element of the injury. See Weinrib, The Case for a Duty to Rescue, 90 YALE L.J. 247, 252 (1980). He does not address Bohlen’s argument that nonfeasance maintains the status quo, while misfeasance introduces a new, negative component into the plaintiff’s situation.
58. The Restatement defines a negligent act as one which creates a risk of such magnitude as to outweigh the utility of the act or the manner in which it was done. RESTATEMENT, supra note 9, § 291. Section 292 lists the factors considered in determining utility: the social value of the interest advanced or protected by the conduct, the probability that such interest will be advanced or protected by the conduct, and the adequacy of an alternative means to advance or protect this interest.

The Restatement’s analysis focuses on a single, specific activity engaged in by the defendant. In the affirmative duty context, though, the utility of refraining from any activity is at question and would require an analysis of any alternative activity from which defendant would be restricted. This is a consideration in not imposing such a duty unless the risk is of such magnitude that it clearly outweighs any alternative conduct. While such a risk may arguably exist where another’s life is in danger, the Vermont statute that imposes a duty to aid the endangered requires assistance only when it can be rendered “without interference with important duties owed to others.” VT. STAT. ANN. tit. 12, § 519(a) (1973).
for another is not solved merely by recourse to "foreseeability." Ev-
everyone can foresee the commission of crime virtually anywhere and
at any time. If foreseeability itself gave rise to a duty to provide
"police" protection for others, every residential curtilage, every
shop, every store, every manufacturing plant would have to be pa-
trolled by the private arms of the owner. And since hijacking and
attack upon occupants of motor vehicles are also foreseeable, it
would be the duty of every motorist to provide armed protection for
his passengers and the property of others. Of course, none of this is
at all palatable.60

The court does not cast doubt on the desirability of protection from
crime, nor does it question the effectiveness of such activity. What is
not "palatable" is the extent to which people would be required to
inconvenience themselves and forgo their own, perhaps valuable, in-
terests for the prevention of harm to others.61

These concerns, which question the beneficial nature of the act
and consider the defendant's interest in keeping to himself, may be
added to the other duty factors considered by a judge or jury to de-
termine the existence of a duty in negligence cases.62 But the unpre-

60. Id. at 583, 186 A.2d at 293.
61. Professor Weinrib proposes that these concerns of individual liberty be addressed by
contrasting each situation with its complement in a contractual context: Where a contract to
act would be valid, the individual should be free to hold out for consideration in a contractual
relationship, absent which he is under no duty to act. Weinrib, supra note 57, at 268-73. This
equation of individual liberty concerns with liberty-to-contract values raises several questions:
Is Weinrib's approach paralleled in the traditional, active negligence setting? Wouldn't certain
contractual promises not to endanger or interfere, for a given consideration, be enforceable
under contract law? Why are liberty-to-contract values ignored in the active negligence set-
ing, where a tort duty may be imposed?

Professor Weinrib also rationalizes the special relationship exceptions as areas that fall
outside of liberty-to-contract spheres. Thus, in familial relationships, where courts abstain
from enforcing contracts, an affirmative duty is imposed. See id. at 270-71. But this certainly
does not explain other contexts of the special relationship, such as the employer-employee and
carrier-passenger relationships. Indeed, these relationships may have been engendered through
contract. Are the courts merely enforcing implied provisions of the contracts in these cases? Or
are they imposing a duty in a contractual relationship despite the fact that it is not called for
in the contract?

The uncertain relation between tort and contract duties is well demonstrated in Caldwell

62. Prosser divides the duty analysis into three sections: (1) existence of a
duty—whether the plaintiff's interests are entitled to legal protection at the hands of the de-
defendant; (2) general standard of care—the abstract standards, such as reasonable man, high
degree of care, or strict liability; (3) particular standard of care—what the reasonable man
would actually do. The first two are decided by the court, and the third by the trier of fact. W.
Prosser, supra note 22, § 37, at 206-08. The common law affirmative duty rule is triggered in
section (1); no duty at all exists where defendant has only failed to act. If an affirmative duty
could lie subject to the degrees of benefit and of noninterference in defendant's affairs, consid-
dictability of the ultimate conclusion of such balancing may leave many in doubt as to whether or not a duty exists in many situations. A retrospective determination of duty by the trial court may have different consequences where affirmative duty is involved than where a duty to refrain from acting is concerned. Faced with an opportunity to breach a traditional negligence duty, a defendant who is uncertain of the negligent nature of his act has the alternative of refraining from action. Curtailment or abandonment of defendant's activity will maintain the status quo, and defendant can simply avoid those areas where he may possibly incur liability. When the doubt concerns liability for failure to act, the only way a potential defendant can play it safe is to act in every such instance. Thus, the concerns regarding unbeneﬁcial activities and defendant's interest in not acting do not lend themselves to resolution by their inclusion in the duty factors at trial. A defendant is faced with the dilemma of whether or not to act long before the court will ever consider his individual situation. His only means of "playing it safe" is to act affirmatively and not to leave things as they are. This dilemma increases the likelihood that defendants will engage in activities that are not beneﬁcial and will forgo their own interests to avoid incurring liability.

Another rationale that has been advanced for the denial of an affirmative duty appears in Yania v. Bigan. Defendant Bigan was standing with Yania alongside a deep water-ﬁlled trench. Yania jumped into the water and drowned. Yania's widow ﬁled suit, alleging in part that Bigan failed to take reasonable steps to rescue her husband from drowning. The court excused Bigan from liability, quoting from Brown v. French:

64. Cf. Ehrlich & Posner, An Economic Analysis of Legal Rulemaking, 3 J. LEGAL STUD. 257, 262-63 (1974) (discussing adverse effects of vague criminal statutes on the average individual in his attempt to avoid even a slight risk of criminal punishment); Twerski, Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts, 57 N.Y.U. L. REV. 521, 534 (1982) ("The threat of liability may be as potent a deterrent as the actual liability itself." (footnote omitted)).
66. Id. at 318, 155 A.2d at 344.
67. Id.
68. Id. at 318-19, 155 A.2d at 344-45.
69. 104 Pa. 604 (1884).
If it appeared that the deceased, by his own carelessness, contributed in any degree to the accident which caused the loss of his life, the defendants ought not to have been held to answer for the consequences resulting from that accident. . . . He voluntarily placed himself in the way of danger, and his death was the result of his own act. . . . That his undertaking was an exceedingly reckless and dangerous one, the event proves, but there was no one to blame for it but himself. . . . [T]he result of his ignorance, or of his mistake, must rest with himself—and cannot be charged to the defendants. 70

The court in Yania was concerned with the contributorily negligent conduct of the victim, considering it sufficient reason to absolve the defendant from liability. In jurisdictions where comparative fault operates to reduce damages, 71 the problem of the careless victim can be resolved by apportioning the fault between the victim and the defendant, without totally denying recovery for breach of an affirmative duty. Additionally, the court's rationale will fail when the victim was endangered through no negligence of his own. Yania's focus on the acts of the victim, therefore, does not pose a convincing argument for exonerating failure to act. But the considerations surrounding the acts of the defendant, should he be required to act, were compelling reasons for the common law to allow a defendant to simply leave things as he found them without incurring liability. 72

The common law affirmative duty rule has been cast in its worst light with the following hypothetical: 73 A man is drowning in a river, observed by a good swimmer standing on a bridge. The swimmer continues to observe as the man drowns. Concluding that under present law the swimmer would not be liable, Professor Ames asked, "[O]ught the law to remain in this condition?" 74 Yet consider the

70. 397 Pa. at 322, 155 A.2d at 346 (quoting Brown v. French, 104 Pa. 604, 607-08 (1884)).
72. Some scholars have explained the common law's attitude toward affirmative duty by distinguishing the degree of culpability present in actively creating a new harm, from that which exists where the defendant "merely" failed to benefit the plaintiff. See Bohlen, supra note 9, at 220; McNiece & Thornton, supra note 9, at 1273. But this rationale does not address why a defendant does not have the same obligation and culpability in either case, and thus fails to get to the heart of the matter.
73. W. PROSSER, supra note 22, § 56, at 340-41; Ames, supra note 28, at 112.
74. Ames, supra note 28, at 112.
occurrences surrounding the recent crash of a jet into the Potomac River.\footnote{N.Y. Times, Jan. 14, 1982, at A1, col. 3.} A passerby, observing a drowning passenger's inability to grasp a line lowered from a rescue helicopter hovering overhead, leaped into the icy waters and brought the passenger ashore.\footnote{Id. at B6, col. 2.} The rescue was considered sufficiently unusual and heroic to merit honorable mention in the President's State of the Union Message.\footnote{N.Y. Times, Jan. 27, 1982, at A16, col. 6 & A17, col. 3.} Would Professor Ames have suggested a duty here? At least in this instance, one gets the feeling that the rescuer's act was not perceived as obligatory but as a voluntary, and thus heroic, rescue.

**The Special Relationship Exception**

The affirmative duty rule has not been applied by the courts in every instance of a failure to act. Rather, the courts have identified certain situations in which a duty to act will be imposed. These exceptions to the rule are enumerated in the *Restatement (Second) of Torts*\footnote{RESTATEMENT, supra note 9, §§ 314A-324A.} This section will seek to justify these exceptions in general, and will focus primarily on the special relationship exception embodied in section 315 of the *Restatement*.

Where a rule is employed to further specific policies, it follows that a departure from the rule is warranted in areas where the policies will no longer be effectuated. Thus, the affirmative duty rule's protective umbrella is not used to shield a defendant who has assumed responsibility for the plaintiff's safety.\footnote{Id. § 323.} Imposing a duty on the defendant to actively protect the plaintiff does not interfere with the defendant's autonomy—he has already interjected himself into the plaintiff's realm. On the question of the beneficial value of defendant's affirmative action, the court need not worry that it is encouraging activity of perhaps dubious value. The affirmative duty rule operates to relieve the courts from engaging in value judgments; when the defendant has himself made the judgment to act, the courts may require him to do so. This reasoning is especially persuasive where plaintiff relaxes his vigilance for his own security in reliance on the defendant's assumption of responsibility for his safety, leaving no doubt as to the benefit of the defendant's act.

Using a policy analysis approach makes it unnecessary to resort
to any characterization of a defendant's assumption of liability.\footnote{80} Thus, to impose liability, there is no need to find a particular act of a defendant that violated a duty not to act. Policy analysis goes beyond an omission-commission dichotomy to examine \textit{why} there should or should not be a duty to act. Where there is valid reason for imposing a duty, nonfeasance as well as misfeasance can support liability.

An affirmative duty also is held to lie where a special relationship exists. Section 315 of the \textit{Restatement (Second) of Torts} provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.\footnote{81}

This section of the \textit{Restatement} refers to two classes of cases. Subparagraph (a) imposes a duty on the defendant toward an indeterminate class of plaintiffs, to prevent a particular third party from causing harm to the plaintiffs. Subparagraph (b) requires the defendant to take steps to deter an indeterminate class of third parties from harming a particular plaintiff. The essence of the duty is identical in either case—"to control the conduct of a third person as to prevent him from causing physical harm to another."\footnote{82} The distinction between the two subparagraphs is in the type of situation which calls for a duty. Subparagraph (a), referring to a duty to control a specific individual for the protection of others, is phrased in terms of a duty to "control." Since the identifiable individual in subparagraph

\footnote{80. \textit{Cf. id.} at comment d (discussing the tendency of courts to seize upon trivial and insignificant affirmative conduct to impose a duty); \textsc{W. Prosser}, \textit{supra} note 22, \S\ 56, at 343-48 (discussing a trend of courts to impose liability on defendants based upon an insignificant act to circumvent the common law bar to liability); \textit{Weinrib}, \textit{supra} note 57, at 252 ("For principled use by courts, the unelaborated distinction between active and passive conduct is inadequate." (footnote omitted)).}

\footnote{81. \textit{Restatement}, \textit{supra} note 9, \S\ 315. The relationships creating a duty to protect include the relationship of a carrier to a passenger, an innkeeper to his guests, a possessor of land to invitees, a custodian to his charge, and a master to his servant. \textit{Id.} \S\S\ 314A, 314B, 320. A duty to control another's conduct is present in the relationship of a parent to his child, a master to his servant, a possessor to his licensee, and a custodian to a dangerous charge. \textit{Id.} \S\S\ 316-19.}

\footnote{82. \textit{Id.} \S\ 315.}
(b) is the particular beneficiary of the defendant's duty to exercise control over anyone who may cause harm, it is referred to as a right to "protection."

The obvious question raised by this section is, what constitutes a "special" relationship? But the Restatement suggests yet another factor to be analyzed. What will be considered a special relationship with respect to which particular type of affirmative duty? Although the Restatement's duties to "protect" and to "control" are identical in nature, what is deemed a special relationship for the imposition of a duty to control is not necessarily a special relationship with respect to a duty to protect. For example, a possessor of land must control the actions of a licensee, but has no duty to protect him from harm. Conversely, a common carrier has a duty to protect its passengers, but there is no corresponding duty to exercise control over their actions. The Restatement's special relationship thus may be sufficiently "special" to impose an affirmative duty in some contexts, while the same relationship is ordinary enough to preclude liability for a failure to act in other situations.

These distinctions can be rationalized by using a policy analysis approach. The special relationship is not intended to operate as a talisman that magically imposes an affirmative duty; rather, it serves as an indication that the defendant is so situated that a total denial of affirmative duty would not further the underlying policies of the rule. This would explain why a common carrier that undertakes to provide safe passage for its riders is charged only with the duty to maintain its passengers' safety in connection with that service. Since it has done nothing with regard to its passengers' ability to exercise control over their own actions, the usual qualms against requiring affirmative action exist and the carrier is placed under no duty to control. Conversely, the comments to the Restatement recognize that a landowner generally retains control over a licensee regarding the use of his land. In the course of exercising that control, the land-

83. Id. § 318.
84. The duty to protect found in id. § 314A(3) is limited to invitees.
85. Id. § 314A(1).
86. The Restatement's dichotomy of duties to protect and control, in lieu of a general duty to exercise reasonable care, is explained by one commentator as a consequence of the particular defendant's prior position as a protector or controller. See Murphy, supra note 48, at 169-72 (1980). But Professor Murphy does not explain why these particular relationships fall outside the bounds of the policies underlying the affirmative duty rule.
87. RESTATEMENT, supra note 9, § 318 comment a; see Harper & Kime, The Duty to Control the Conduct of Another, 43 YALE L.J. 886, 888-93 (1934).
owner must also seek to avoid a foreseeable harm to another. Yet this relationship is not sufficient to require him to act affirmatively to ensure a licensee's safety. His control of the licensee's use of his land does not lend itself to protect the licensee from harm in the course of that control.

One can take issue with these classifications, as did the court in Rowland v. Christian in imposing a duty on landowners to protect licensees. But the scrutiny revolves around policy—are the Restatement characterizations accurate, or do the particular relationships justify a greater duty? The principle, though, that may be inferred from these classifications is that exceptions to the affirmative duty rule are justified when they do not conflict with the policies behind the general denial of affirmative duty. Otherwise, broad application of the special relationship exception, without reference to these policies, may invade the very interests which the common law has so adamantly protected.

THE CALIFORNIA CASES

The vitality of the affirmative duty rule came into question following the California Supreme Court's decision in Tarasoff v. Regents of the University of California. While Tarasoff did not declare California's independence from the rule, its application of the special relationship exception without defining the necessary components of such a relationship fostered confusion and invited further erosion of the rule. This section analyzes the Tarasoff decision and its reception by courts in other jurisdictions. It also examines the effect of Thompson v. County of Alameda, another California case, on the status of the special relation exception to the affirmative duty rule.

Tarasoff v. Regents of the University of California

What is a Special Relationship?—Tarasoff v. Regents of the University of California involved the death of the plaintiff's daughter, Tatiana Tarasoff, who was shot and stabbed by Prosenjit Poddar. At the time, Poddar was an outpatient at a health facility

90. 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).
where he was undergoing psychotherapy. In the course of his therapy sessions, Poddar had confided his intention to kill Tatiana. Although the examining psychologists had determined that Poddar was indeed dangerous, Poddar remained free after only a brief detention by police and no steps were taken to inform Tatiana or her family of the threat on her life; Poddar proceeded to kill Tatiana.

The California Supreme Court upheld a wrongful death claim against the psychologists for failure to warn or otherwise to use reasonable care to protect Tatiana. Recognizing that under common law there was generally no duty to take affirmative action to protect another, the court noted that the foreseeability of injury to another could be a sufficient criterion upon which such a duty might be established. The court thus indicated a desire to depart from the affirmative duty rule once and for all. Yet, the court declined this opportunity to launch a fatal attack on the rule, since it held that the Tarasoff facts created a duty that was recognized at common law. Quoting the Restatement imposition of a duty to act in the event of a special relationship, the court held that “plaintiffs’ pleadings... establish as between Poddar and defendant therapists the special relation... [that] may support affirmative duties for the benefit of third persons.”

There are two major points in this opinion: First, the court expressed in dictum its view that the common law’s affirmative duty rule no longer stood on secure ground and indicated its willingness to eventually consider its continued legitimacy. Second, the court was silent as to what characteristics of this particular relationship justified a deviation from the common law rule. What occurs during an outpatient consultation that charges a therapist with duties from which the law otherwise exonerates him? The therapist, sitting in his office, encounters, perhaps for the first time, an apparently emotionally disturbed individual. By the end of their session he is convinced that his patient is dangerous. In what way has the therapist assumed responsibility for his patient’s further actions? Though he has en-

93. 17 Cal. 3d at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21.
94. Id. at 433, 551 P.2d at 341, 131 Cal. Rptr. at 21.
95. Id. at 450, 551 P.2d at 353, 131 Cal. Rptr. at 33.
96. Id. at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.
97. Id. at 434-35, 551 P.2d at 342-43, 131 Cal. Rptr. at 22-23.
98. Id. at 435-36, 551 P.2d at 343, 131 Cal. Rptr. at 23.
99. Id. at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.
100. Id. at 436, 551 P.2d at 343, 131 Cal. Rptr. at 23.
101. See id. at 434-35, 551 P.2d at 342-43, 131 Cal. Rptr. at 22-23.
gaged in treating the patient's illness, the therapist has not taken physical custody of the outpatient,\textsuperscript{102} and has not otherwise involved himself in the control of his conduct. He has made no judgment regarding the desirability of taking such control and imposing a duty to act would be a new interference in his affairs. If the common law rule were to be maintained, the court's label of "special relation" without further detail does not explain why the affirmative duty rule should be ignored.\textsuperscript{103}

In addition, the court's bare calculation that the Tarasoff facts created a special relation, accompanied by no identification of its necessary components, leaves the scope of the relationship exception vague and uncertain. Does a therapist-patient relationship center on the fact that the psychologist is doing a service at his patient's request, or does it exist as well when the examination is ordered by a court,\textsuperscript{104} sponsored by an employer,\textsuperscript{105} or conducted by the draft board? What are the significant factors of any relationship which will put defendants on notice of their duty to act?

Tarasoff's silence as to these factors not only left defendants in the dark, but succeeded in mystifying other courts. Seibel v. City and County of Honolulu\textsuperscript{106} demonstrates the confusion that ensued. In Seibel, the defendant was the prosecutor's office, which failed to prosecute a suspect, Paul Luiz, after he was brought in on suspicion of molesting a prostitute, despite knowledge of Luiz's criminal history and suspected involvement in this new offense.\textsuperscript{107} Luiz remained free—and killed the plaintiff's daughter.\textsuperscript{108} The court, in dismissing the claim, found that there was no special relationship duty since the defendant had no custody and had exercised no control over Luiz.\textsuperscript{109} The court, then, distinguished this case from Tarasoff:

\textsuperscript{102} See Bellah v. Greenson, 81 Cal. App. 3d 614, 620, 146 Cal. Rptr. 535, 538 (1978). While not clarifying which elements of the Tarasoff relationship justify a duty, the court recognized that they differ in some sense from actual physical custody, and thus may not support as extensive a duty as exists in a custody relationship.


\textsuperscript{105} One case held an employer liable for failing to disclose the results of an employer-sponsored examination where the tests showed that the employee had tuberculosis. See Wojcik v. Aluminum Co. of Am., 18 Misc. 2d 740, 183 N.Y.S.2d 351 (1959).

\textsuperscript{106} 61 Hawaii 253, 602 P.2d 532 (1979).

\textsuperscript{107} Id. at 254-56, 602 P.2d at 534-35.

\textsuperscript{108} Id.

\textsuperscript{109} Id. at 260-61, 602 P.2d at 537-38.
While it is true that in *Tarasoff*, the duty to take action to protect a person from harm at the hands of a dangerous third party was imposed in the absence of custody, the *Tarasoff* court found that the doctor-patient relationship, *in and of itself*, was sufficient to impose that duty.\(^{10}\)

But what was there in *Tarasoff* that, in the absence of custody, created a special relationship?

The difficulty with setting the bounds of the special relationship concept is evident in *Christensen v. Epley*.\(^{111}\) *Christensen* was an action for the wrongful death of a policeman who was stabbed by Thompson, a visitor to the detention center, while Thompson was assisting an inmate's escape.\(^{112}\) Among the named defendants was the matron who permitted Thompson to enter the detention center and visit the inmate.\(^{113}\) The Court of Appeals of Oregon upheld the plaintiff's wrongful death claim, reasoning that the facts could support the matron's legal duty to act.\(^{114}\) An equally divided Oregon Supreme Court affirmed the lower court's decision.\(^{115}\)

The opposing opinions of the Oregon Supreme Court demonstrate the difficulty the justices encountered in defining the bounds of the special relationship. The dissenting opinion of Justice Peterson limited the special relation duty to a custodial relationship, and thus found no such relationship between the matron and Thompson.\(^{116}\) This view is in direct disagreement with *Tarasoff*, and would severely limit the relationship duty. On the other hand, the conception of the special relationship set forth in Justice Tongue's concurrence reaches the other extreme:

> In my view, once a jailer allows a visitor to enter a jail, a "special relationship" arises within the meaning of § 315 between the jailer and the visitor of such a nature as to impose upon the jailer a duty to control the visitor's conduct so as, for example, to prevent the visitor from smuggling weapons to an inmate in the jail.

\(^{110}\) *Id.* at 261, 602 P.2d at 538 (emphasis added).
\(^{111}\) 287 Or. 539, 601 P.2d 1216 (1979).
\(^{112}\) *Id.* at 541, 601 P.2d at 1217.
\(^{113}\) *Id.*
\(^{115}\) *Christensen v. Epley*, 287 Or. 539, 542, 601 P.2d 1216, 1217 (1979). Since there was no majority on the issue of duty, the court chose not to issue a court opinion on this matter. *Id.* at 542, 601 P.2d at 1218.
\(^{116}\) *Id.* at 572-73, 601 P.2d at 1233 (Peterson, J., concurring in part, dissenting in part).
or, as in this case, to assist an inmate to escape from the jail.\textsuperscript{117}

One may question whether this view truly relies on the special relationship exception, or rather supports the imposition of a general duty on a matron to execute the principal functions of her job—namely to maintain the security of the facility. This would also include a duty to screen harmful visitors from entering a jail, where they may foreseeably inflict harm. But Justice Tongue's reliance on the special relationship is unmistakeable in his next extension of the duty to act:

In addition, I believe, . . . that a jailer, by undertaking the custody of a prisoner, undertakes a duty to prevent his escape and that, as a result, a "special relationship" arises within the meaning of § 315 between the jailer and a police officer who may be called upon to prevent such an escape or to apprehend the escaping prisoner.\textsuperscript{118}

This view goes far beyond Tarasoff. While Tarasoff did not explain why it found a special relationship, it did limit the bounds of the relationship to that between the patient and the therapist. Tarasoff recognized that no such relation existed between the doctor and the victim.\textsuperscript{119} Yet Justice Tongue is willing to find a duty-imposing relationship between the matron and the ultimate victim. Tarasoff's failure to elucidate the significant elements of the relationship that justify the imposition of a duty to act leaves us devoid of any basis on which to analyze the rift between Tarasoff's interpretation of Restatement section 315 and that of Justice Tongue.

Confusion with Tarasoff took a different form in Harland v. State.\textsuperscript{120} A resident at the California Veterans Home, Edgmon, had received permission to leave the premises. At the time, he was taking medication which impaired his ability to operate a car. On his return trip to the Home, the car he was driving collided with the plaintiffs' vehicle.\textsuperscript{121} The plaintiffs sued, arguing in part that the Home was duty bound to prevent Edgmon from driving in his condition.\textsuperscript{122}

The court found that the facts established a special relationship between Edgmon and the Home.\textsuperscript{123} Yet despite the existence of that

\textsuperscript{117} Id. at 552-53, 601 P.2d at 1223 (Tongue, J., concurring).
\textsuperscript{118} Id. at 553, 601 P.2d at 1223 (emphasis added).
\textsuperscript{119} 17 Cal. 3d at 436, 551 P.2d at 343, 131 Cal. Rptr. at 23.
\textsuperscript{120} 75 Cal. App. 3d 475, 142 Cal. Rptr. 201 (1977).
\textsuperscript{121} Id. at 480-82, 142 Cal. Rptr. at 204-05.
\textsuperscript{122} Id. at 480, 142 Cal. Rptr. at 204.
\textsuperscript{123} Id. at 481, 142 Cal. Rptr. at 204.
relationship, the court held that the Home was not obligated to pre-
vent Edgmon from driving in his impaired condition, because
Edgmon had not “surrendered his civil rights and his responsibility
for his own conduct.”124 If a special relationship is sufficient to cre-
ate a duty, how could the court concede to its existence and at the
same time deny its implications?

The *Harland* court appears to have been confounded by
*Tarasoff*’s determination of a special relationship without setting
forth the factors which went into that determination. Thus, after
*Tarasoff*, the *Harland* court had no basis upon which it could deny
the existence of a special relationship. Yet the court proceeded to
strip that “special” relationship of its attendant obligations because
the court found it inadequate to support the imposition of a duty. In
essence, if not in form, the court was saying that a special relation-
ship did not exist.

*Harland* can be distinguished on its facts from *Tarasoff*. As the
court noted, the *Tarasoff* defendants could have fulfilled their duty
by issuing a warning, while a duty in *Harland* would have required
the Home to interfere with Edgmon’s autonomy.125 It may also be
significant that the defendant in *Harland* was held liable on alterna-
tive grounds.125 Though the holding in *Harland* may be justified, its
failure to incorporate the factors on which it relied to deny a duty
into its consideration of the special relationship demonstrates the dif-
ficulty that the *Tarasoff* precedent created.

*An Alternative Approach to Understanding* *Tarasoff*.—In
*Rowland v. Christian*,127 the court intimated that expansions of the
exceptions to the landowners’ limited liability rule were not moti-
vated by the original policies for the exceptions, but were developed
to circumvent the harsh results of an unjust rule.128 In light of the
doubts expressed in the *Tarasoff* dictum concerning the overall legit-
imacy of the common law’s affirmative duty rule,129 and the vague-
ness with which the court applied the special relationship exception,
*Tarasoff*’s use of this exception may also appear to be a subterfuge
to escape the consequences of the common law’s rule against an af-
firmative duty. It is no wonder that Tarasoff has been perceived as having expanded the special relationship beyond its traditional bounds,\textsuperscript{130} a course which may lead to the complete erosion of the affirmative duty rule.\textsuperscript{131} Indeed, one scholar has predicted that courts eventually will impose a general affirmative duty based on the "special relationship [that] exists in the consciousness and understanding of all right-thinking persons."\textsuperscript{132}

Despite Tarasoff's inclination toward that direction, a close inspection of the opinion does not support the prognosis. Rather, Tarasoff is actually in line with common law principles. Tarasoff's imposition on a therapist of a duty to warn is premised on a line of cases dating back to the beginning of the century—the contagious disease cases.\textsuperscript{133} These cases have imposed liability on physicians for failure to warn those in the foreseeable path of a patient bearing a contagious disease. Tarasoff's duty to warn following a determination of a patient's predilection to violence was analogized to the similar duty occasioned by the discovery of an infectious disease.\textsuperscript{134} But where Tarasoff characterized its duty as arising from the special relationship between a patient and his therapist,\textsuperscript{135} this rationale is no-

\textsuperscript{130} See Pamela L. v. Farmer, 112 Cal. App. 3d 206, 211, 169 Cal. Rptr. 282, 285 (1980) (trend has been to expand the list of special relationships); Mann v. State, 70 Cal. App. 3d 773, 780, 139 Cal. Rptr. 82, 86 (1977) (special relationship is an expanding concept in tort law).

\textsuperscript{131} See Caldwell v. Bechtel, Inc., 631 F.2d 989, 999-1000 (D.C. Cir. 1980); Murphy, \textit{supra} note 48, at 175-76; \textit{Comment, supra} note 48, at 937-38; see also Weinrib, \textit{supra} note 57, at 248.

\textsuperscript{132} Murphy, \textit{supra} note 48, at 175-76 (footnote omitted). Contrast Professor Murphy's prediction with Professor Wayne Thode's assertion that "the fact that both plaintiff and defendant are members of the human race . . . does nothing to explain why this defendant is before the court." Thode, \textit{Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury}, 1977 \textit{Utah L. Rev.} 1, 5-6. See also id. at 9 & n.25.


The facts in \textit{Skillings v. Allen} may support liability without recourse to a duty to warn third parties, since the doctor affirmatively gave erroneous advice directly to the third party regarding the safety of the situation. \textit{See Edwards v. Lamb}, 69 N.H. 599, 45 A. 480 (1899). In \textit{Jones v. Stanko}, breach of a statutory duty to notify public health authorities may have been persuasive in finding liability.

\textsuperscript{134} 17 Cal. 3d at 437, 551 P.2d at 344, 131 Cal. Rptr. at 24.

\textsuperscript{135} \textit{Id.} at 436, 551 P.2d at 343, 131 Cal. Rptr. at 23.
tably absent in the disease cases.\textsuperscript{138}

The only case that makes any reference to the relationship, \textit{Davis v. Rodman},\textsuperscript{137} characterizes it in this manner:

The relation of a physician to his patient and the immediate family is one of the highest trust. On account of his scientific knowledge and his peculiar relation, an attending physician is, in a certain sense, in custody of a patient afflicted with infectious or contagious disease. And he owes a duty to those who are ignorant of such disease, and who by reason of family ties, \textit{or otherwise}, are liable to be brought in contact with the patient, to instruct and advise them as to the character of the disease.\textsuperscript{138}

Although the court does mention the trust placed in a physician by the patient's family, it is only one of several factors taken into account. The court also considers the doctor's scientific knowledge and his peculiar relation to the patient. Significantly, the court extends the duty to warn to include \textit{anyone} prone to encounter the patient, even those outside the patient's family. Thus, even \textit{Davis v. Rodman} does not promote a special relationship as a source for affirmative duty. The only common ground between the duty in the disease cases and the special relationship duty appears to be that the obligations imposed stand free of the dangers which necessitate the shelter of the affirmative duty rule. The facility of publicizing a diagnosis and the severity of the harm prevented thereby, remove the fears of encouraging activity of questionable value and interfering in the affairs of the defendant. However, the basis for the physician's duty differs from that of the special relation. Instead of examining the physician's particular status or relationship with regard to the propriety of imposing a duty, the physician's duty is based on the inherent beneficial nature and ease of the affirmative act itself. \textit{Tarasoff} also presented a situation where the ease of issuing a warning coupled with the gravity of the preventable injury rendered the affirmative duty rule inapplicable. Without resort to an analysis of the "special" nature of a therapist's relationship to his patient, an obligation lies to prevent a foreseeable danger from becoming an actual harm. The duty in \textit{Tarasoff} could then similarly extend to any context of the therapist-patient relationship, including the forensic and employer-

\textsuperscript{136} See cases cited supra note 133.
\textsuperscript{137} 147 Ark. 385, 227 S.W. 612 (1921).
\textsuperscript{138} \textit{Id.} at 391-92, 227 S.W. at 614 (emphasis added).
The emphasis for this duty is on the nature of the therapist's act—a factor that is constant regardless of the depth of his relationship with the patient.

While implicit in the disease cases, these considerations have been explicitly relied on elsewhere as sufficient grounds to impose an affirmative duty, despite the absence of a special relationship. In Hergenrether v. East, the defendants left the keys in the ignition of an unlocked truck, which they parked in a "skid row" neighborhood. An unknown individual drove the truck away and collided with the plaintiffs' vehicle, seriously injuring the plaintiffs. The court first stated that imposition of a duty on the defendants would require them to control another's conduct, and would ordinarily not exist without a special relationship. The court then continued:

[This] would not bar the door to recovery in all cases. Special 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.

The court concluded that the degree of harm occasioned by the defendants' conduct justified imposition of a duty to prevent it. Hergenrether demonstrates that there are alternative grounds to the special relationship—the "special circumstance" in which the policies behind the common law rule are not implicated and departure from the affirmative duty rule is justified.

Tarasoff, then, need not be read as broadly expanding the special relationship exception. It has merely extended a physician's recognized duty to warn of danger from a physical disease to a danger posed by a patient's mental disorder. Despite the dictum in the Tarasoff opinion heralding the possible abandonment of the affirmative duty rule, and the puzzling application of the special relationship exception, the holding in the case is consistent with the traditional implementation of the rule at common law.

139. See supra notes 104-05 and accompanying text.
140. 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964).
141. Id. at 442-43, 393 P.2d at 165-66, 39 Cal. Rptr. at 5-6.
142. Id. at 442, 393 P.2d at 165, 39 Cal. Rptr. at 5.
143. Id. at 444, 393 P.2d at 166, 39 Cal. Rptr. at 6.
144. Id.
145. Id. at 445-46, 393 P.2d at 167, 39 Cal. Rptr. at 7.
146. See also Mann v. State, 70 Cal. App. 3d 773, 139 Cal. Rptr. 82 (1977).
147. 17 Cal. 3d at 434-35, 551 P.2d at 342-43, 131 Cal. Rptr. at 22-23.
148. Another factor that has been noted as a motive for expanding physicians' liability is.
Thomson v. County of Alameda

Thomson v. County of Alameda involved the release of James F., a juvenile offender, from a county institution where he had been confined pursuant to a court order. The complaint alleged that the county was aware of James' tendency to assault young children and of an actual threat he had made to take the life of an unspecified young child. James was released on temporary leave in the custody of his mother, but no mention was made to her of his intention to kill. The plaintiffs' young son was murdered by James within twenty-four hours of his release.

The court dismissed the plaintiffs' action, deciding that the county's decision to release James, its selection of his custodian, and its supervision of her activities were statutorily immunized from liability. The court then dealt with the issue of the county's duty to warn of the danger created by James' release by distinguishing Tarasoff's duty to warn, since Tarasoff had involved a named or readily identifiable victim. Since James had endangered a "large amorphous public group of potential targets," there was not even an obligation to inform his mother of his violent intentions.

Justice Tobriner, author of the majority opinion in Tarasoff, dissented in Thomson. Citing the cases which he used to support the Tarasoff holding, he found no historical basis for an iden-

the public interest with which society has charged the medical sciences. See Fleming & Maximov, The Patient or His Victim: The Therapist's Dilemma, 62 CALIF. L. REV. 1025, 1031 (1974). This is reflected in McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (1979):

The relationship giving rise to that duty may be found either in that existing between the therapist and the patient, as was alluded to in Tarasoff . . . or in the more broadly based obligation a practitioner may have to protect the welfare of the community, which is analogous to the obligation a physician has to warn third persons of infectious or contagious disease . . . . The obligation imposed by this court, therefore, is similar to that already borne by the medical profession in another context.

Id. at 489-90, 403 A.2d at 512 (footnote omitted).

149. 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).
150. Id.
151. Id.
152. Id. at 759, 614 P.2d at 738, 167 Cal. Rptr. at 80.
153. Id. at 747-49, 614 P.2d at 730-32, 167 Cal. Rptr. at 72-74.
155. 27 Cal. 3d at 758, 614 P.2d at 738, 167 Cal. Rptr. at 80.
156. Id. at 757-58, 614 P.2d at 737-38, 167 Cal. Rptr. at 79-80.
157. Id. at 759, 614 P.2d at 738, 167 Cal. Rptr. at 80 (Tobriner, J., dissenting).
158. Id. at 760-61, 614 P.2d at 739, 167 Cal. Rptr. at 81 (Tobriner, J., dissenting).
Conceding that a victim cannot be directly warned when his identity is unknown, Justice Tobriner argued that a duty under *Tarasoff* would include apprising James' custodian of his threat to inflict harm. Indeed, the dissent concluded that the majority "misreads controlling precedent" and that the county's obligation to warn was "a matter of law and common sense."

It is truly difficult to see what effect the identifiability factor has on any of the policy considerations surrounding the imposition of an affirmative duty. Unlike *Tarasoff*’s imaginative creation of a special relation between a patient and his therapist, the county's custodial capacity over James clearly constituted a special relationship recognized at common law and specified in the *Restatement*. If not for the applicable immunity statute, James' release itself could have been grounds for the county's liability, although the victim would not have been readily identifiable. Why, then, should identifiability be a factor in the duty to warn James' mother? Additionally, the ease of informing James' custodian of the threat of severe harm justifies imposing a *Tarasoff* duty without recourse to the special relationship—again there is no discernable policy distinction relating to the degree of identifiability of a potential victim that would negate such a duty.

The difficulty with the *Thompson* holding goes beyond the court's failure to apply correctly the exceptions to the affirmative duty rule. The defendant had actually engaged in an affirmative act by releasing James. In the absence of an immunity statute, that act alone would support a traditional negligence claim since there was an active breach of duty. Immunity removes liability for the decision to release James, but does not cause the act to vanish into thin air. Thus, where a failure to warn escapes the immunity protection, that negligence is directly related to the improper act of releasing James. The policies of the affirmative duty rule do not even arise where liability is imposed for the defendant's negligent activity. The *Thompson* dismissal appears not to narrow *Tarasoff*’s imposition of affirmati-

159. *Id.* at 760-62, 614 P.2d 739-40, 167 Cal. Rptr. at 81-82 (Tobriner, J., dissenting).
160. *Id.* at 761, 764, 614 P.2d at 740-42, 167 Cal. Rptr. at 82-84 (Tobriner, J., dissenting).
161. *Id.* at 760, 614 P.2d at 738, 167 Cal. Rptr. at 80 (Tobriner, J., dissenting).
162. *Id.* at 764, 614 P.2d at 741, 167 Cal. Rptr. at 83 (Tobriner, J., dissenting).
163. See *Restatement, supra* note 9, § 319.
164. See *id.*; see also Semler v. Psychiatric Inst., 538 F.2d 121 (4th Cir), cert. denied, 429 U.S. 827 (1976).
tive duty, but to restrict a claim that should be recognizable under traditional negligence theory.

Throughout the Thompson decision, there is much reference to the legislative judgment that immunity is a necessary means of furthering the rehabilitative goals of probation and parole systems. It has been suggested elsewhere that Thompson should have been decided as a judicial extension of this immunity to cover the failure to warn. If the California Supreme Court were to indicate that this was the true direction of the decision, it would free Tarasoff of the arbitrary identifiability limitation that now hovers over it. A psychiatrist, upon a determination of the violent nature of a child, would be under a Tarasoff duty to inform the minor’s custodian, despite the child’s failure to identify the prospective object of his violent behavior. The policy analysis which justifies the result in Tarasoff suggests a duty wherever the policy considerations support its imposition, regardless of the degree of the victim’s identifiability.

IMPLEMENTING THE AFFIRMATIVE DUTY RULE AFTER Tarasoff

The affirmative duty rule has been the subject of much scholarly debate. Some feel that it encourages immoral behavior; others shrink from allowing our legal standards to become codifications of notions of morality. Economic factors and questions of individual liberty also arise as pros and cons for the abolition of the rule. Legislative action, ranging from statutory affirmative duty to protection of rescuers from liability, demonstrates some

165. 27 Cal. 3d at 753-54, 758, 614 P.2d at 735, 738, 167 Cal. Rptr. at 77, 80.
172. See VT. STAT. ANN. tit. 12, § 519(a) (1973).
dissatisfaction with the common law’s tolerance of one’s refusal to aid another. But unless its underlying policies are determined to have lost their significance, the rule should be perpetuated to the extent it furthers its objectives.

There is, however, room for movement by the courts. Policy considerations against imposing a duty to act can be used as guiding principles to replace the rigid application of an affirmative duty rule. The Tarasoff example can be extended to recognize duties in other cases where clearly beneficial activities are accompanied by a minimal interference with the defendant. Taking care to avoid the uncertainty which could force many to unduly forgo their own interests for the questionable benefit of others, the courts could set clear guidelines, transforming certain benevolent activities into civil duties. The mechanism for addressing Professor Ames’ concern for the drowning man already exists in the understructure of the affirmative duty rule. The courts should recognize that the rule was not aimed at protecting such inaction and, as in the contagious disease cases, should impose a duty on the good swimmer to rescue the drowning man. The rule would still protect the non-swimmer, and it would not require a heroic rescue from a burning building. There may be no duty to plunge into the icy Potomac but there could still be an obligation to toss in a lifesaver. The affirmative duty rule’s unpalatable results often can be avoided if the courts decline to shelter the inactivity that does not warrant the rule’s protection.

The guidelines for determining the scope of an affirmative duty based on a policy analysis exist in legislation enacted in Vermont:

A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

The statute penalizes a breach of this duty with a fine of up to

174. See the discussion supra at text accompanying notes 62-64.
175. Ames, supra note 28, at 112.
176. See cases cited supra note 133.
177. See supra text accompanying notes 75-77.
178. VT. STAT. ANN. tit. 12, § 519(a) (1973).
179. Id.
In jurisdictions where the intentionally inflicted tort carries harsher consequences for the defendant, intentional refusals to act where there is an affirmative duty can also be treated accordingly.

The essence of this proposal is not new. As early as 1908, Professor Ames suggested adoption of a similar standard. But the previous proposals have been cast in the form of assuming the moral standard as a legal one. Judicial inertia and the desire to maintain the protected interests of the affirmative duty rule may have militated against such a revolutionary shift in legal standards. Tarasoff illustrates that the same results can be achieved within the bounds of the traditional standards. Either through the special relationship duty or by way of special exceptions in appropriate situations, the courts have already recognized that the affirmative duty rule need not be automatically applied. The same rationale that requires a common carrier and a physician to act affirmatively at times can be extended to the good swimmer and the drowning man. The current legal standard, when applied with an eye toward its underlying policies, can be used to broaden the areas of affirmative duty without encroaching on the interests the common law rule seeks to protect.

Enlightened application of tort law in modern society, free of the common law's arbitrary barriers to liability, need not expand the concept of duty indiscriminately. Though Dillon v. Legg rejected the limitations offered by the common law for the emotional distress case, it did not deem it inconsistent to set new guidelines of its own. An enlightened approach may depart from rigid classifications, but can also impose new flexible limitations, which are appropriate when policy suggests that liability be curtailed. Adherence to the affirmative duty rule can thus continue, operating in the spirit of its underlying policies to shield defendants from liability where protection is warranted, but imposing a duty where no protection is justified.

Shlomo Twerski

---

180. Id. § 519(c). The fine is imposed for willful violation of the statute.
182. See Ames, supra note 28, at 113; Rudolph, supra note 171, at 501.
183. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).