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# Recent Cases

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# RECENT CASES

## Conflicts of Law—Federal Preemption—Aviation Law—Federal Common Law of Indemnity and Contribution on a Comparative Negligence Basis Will Govern in Mid-Air Collisions

### I. Facts and Holding

Appellant-defendants, the United States[1] and a national airline whose plane had been involved in a mid-air collision[2] while under radar direction from the FAA,[3] agreed to a settlement of the resulting actions for wrongful death that had been initiated in various federal district courts[4] and consolidated in the Southern District of Indiana.[5] Appellants then sought indemnity and contribution by cross-claim and third-party complaints against appellee-defendants, the owners[6] of the other plane involved in the collision and the estate of its student pilot. The appellees contended that since no right to indemnity and contribution existed under the laws of the state where the collision occurred, no claim was stated upon which relief could be granted.[7] The appellants contended, however,

1. The United States was joined as a defendant under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) *et seq.* (1970).

2. On September 9, 1969, a mid-air collision occurred between Allegheny Airline Flight 853 and a Piper Cherokee aircraft operated by Robert W. Carey in the airspace northwest of Fairland, Indiana. Carey, a student pilot, was engaged in a solo cross-country flight as part of his training required for a private pilot's license. The Allegheny flight was en route to Indianapolis' Weir Cook Airport from Cincinnati, Ohio. For additional details concerning the mid-air collision, see the companion case Allegheny Airlines, Inc., v. United States, 504 F.2d 104, 107-08 (1974).

3. Indianapolis Approach Control, a Federal Aviation Agency facility, had radar contact with and was directing the Allegheny flight. 504 F.2d at 108.

4. Suits were brought in the United States District Courts for the Eastern District of New York, Southern District of Indiana, Southern District of Ohio, Southern District of West Virginia, Northern District of Illinois, Eastern District of Tennessee, and District of Connecticut. *In re* Mid-Air Collision Near Fairland, Indiana, 309 F. Supp. 621, 623-24 (Jud. Pan. Mult. Lit. 1970).

5. The Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407 (1970), assumed jurisdiction over the various actions and transferred them to the United States District Court for the Southern District of Indiana for the supervision of pre-trial discovery. *Id.*

6. The small aircraft was owned by Forth Corporation, a wholly-owned subsidiary of Brookside Corporation.

7. In the alternative, appellees contended that the memorandum of agreement between Allegheny's liability insurers and the United States, pursuant to which all wrongful death claims were settled, constituted the affirmative defense of voluntary payment and accord and satisfaction. Appellee Brookside also claimed the separate defenses of res judicata and collat-

that the federal government's interest in and preemption over the control of the nation's airways requires that a federal law of indemnity and contribution determined on a comparative negligence basis should govern in mid-air collisions.[8] The district court adopted the appellees' position.[9] On appeal the United States Court of Appeals for the Seventh Circuit, *held*, reversed in part[10] and remanded.[11] A federal law of indemnity and contribution determined on a comparative negligence basis governs the rights and liabilities of parties involved in aviation collisions. *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974.)

## II. BACKGROUND

The power of the federal judiciary to fashion federal common law, although not explicitly granted by Article III of the United States Constitution, has been recognized[12] as part of the judicial power necessary for the uniform disposition of matters potentially within the area of federal legislative jurisdiction.[13] In *Swift v. Tyson*,[14] the Supreme Court initiated a broad application of federal

eral estoppel based on the judgment entered in the district court in which Brookside was found not to be responsible for torts committed by its wholly-owned subsidiary Forth Corporation.

8. The appellants maintained alternately that a proper choice of law analysis in light of the instant multiplicity of state jurisdictions would result in the application of the laws on indemnity and contribution from another forum. The appellants also contended that the district court incorrectly applied Indiana law on indemnity and contribution.

9. The district judge also (1) dismissed the plaintiffs' wrongful death claims without prejudice contrary to the claims settlement agreement, in which the plaintiffs agreed to a dismissal with prejudice in exchange for the out-of-court settlement; (2) granted appellees' motion for summary judgment on the affirmative defenses of voluntary payment and accord and satisfaction; and (3) granted Brookside's separate motion for summary judgment based on the defenses of res judicata and collateral estoppel. *See* note 7 *supra*.

10. On the basis of its decision in the companion case of Allegheny Airlines, Inc. v. United States, 504 F.2d 104 (7th Cir. 1974), the circuit court affirmed the grant of summary judgment for Brookside on the defenses of res judicata and collateral estoppel. *See* note 7 *supra*.

11. The instant case was remanded for a new trial pursuant to Seventh Circuit Rule 23, which requires that the new trial be heard before a different judge. The district court must determine the comparative negligence of each party.

12. Concerning the necessity of federal common law Justice Jackson asserted:

> Were we bereft of common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.

D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 470 (1942) (concurring opinion).

13. *See* Cheatham & Maier, *Private International Law and Its Sources*, 22 VAND. L. REV. 27, 58-59 (1968).

14. 41 U.S. (16 Pet.) 1 (1842). A Maine indorsee of a bill of exchange brought suit in a New York federal court against a New York acceptor, who refused to pay claiming fraud in the procurement of the bill. Disregarding the case law in New York, Justice Story, in finding that past consideration does constitute "value" to cut off the equitable defense of the accep-

common law when it refused to apply section 34 of the Judiciary Act of 1789,[15] which provided that state law should control in diversity cases. The Court held that section 34 did not extend to commercial contracts, which should be interpreted according to "the general principles and doctrines of jurisprudence."[16] Subsequently, the *Tyson* doctrine was expanded into other areas including wills,[17] torts,[18] contracts,[19] and damages,[20] and by 1888 the outcome of a suit in 28 types of cases was dependent upon where the case was docketed because the state and federal courts applied differing rules of common law.[21] After much judicial and congressional dissatisfaction, the *Tyson* doctrine was overruled in *Erie R.R. v. Tompkins*[22] in which Justice Brandeis stated that no federal common law exists separate from a state's protective powers that would govern the substantive outcome in federal cases only.[23] The *Erie* doctrine was extended rapidly as exemplified by the Court's holding in *Klaxon Co. v. Stentor Elec. Mfg. Co.*[24] that federal courts in diversity cases are governed by the conflict of law rules of the state in which they sit. Although the sweeping language of *Erie* tends to prevent the recognition of federal common law, particularly in diversity cases, the exercise of the power to formulate common law has continued in at least four areas in which an overriding federal interest exists.[25] First, when a state is a party to a controversy, the Court must fashion applicable law because state law, while relevant, is not controlling. For example, on the same day that *Erie* was announced,

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tor, asserted the principle that "questions of general commercial law" would be determined by federal law. The effect of the decision was that many state courts continued to apply their own rules of decision resulting in the outcome of suits being dependent upon whether the case was docketed in state or federal court.

15. Ch. 20, § 34, 1 Stat. 92.

16. 41 U.S. (16 Pet.) at 18.

17. Lane v. Vick, 44 U.S. (3 How.) 464 (1845).

18. Chicago City v. Robbins, 67 U.S. (2 Black) 418 (1862).

19. Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847).

20. Lake Shore & M.S.Ry. v. Prentice, 147 U.S. 101 (1893).

21. THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. Doc. No. 39, 88th Cong., 1st Sess. 686 n.74 (1964).

22. 304 U.S. 64 (1938). Tompkins, a citizen of Pennsylvania, was seriously injured by a passing train while he was walking along the railroad's right of way in Pennsylvania. Tompkins obtained a judgment in a New York federal court, the state in which the railroad was incorporated.

23. *See* Cheatham & Maier, *supra* note 13, at 57-58.

24. 313 U.S. 487, 496 (1941). *E.g.*, Griffin v. McCoach, 313 U.S. 498 (1941).

25. Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1026-42 (1967); Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 VAND. J. TRANSNAT'L L. 387, 388 (1973). For an alternative approach based on a presumption in favor of state law see Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

Justice Brandeis proclaimed in *Hinderlider v. La Plata River Co.*[26] that "federal common law" would continue to govern the apportionment between states of the water in interstate streams. Secondly, although not expressly required to do so, the Court has used the constitutional division of power between the states and the federal government to limit the exercise of state power in international law cases.[27] Thirdly, in admiralty cases, the Court has concluded from the constitutional provision extending jurisdiction of the federal courts to "all cases of admiralty and maritime jurisdiction"[28] that a uniform federal maritime law should govern in both federal[29] and state courts.[30] The broad scope of maritime law reflects the Court's recognition of an overriding federal interest in the uniform regulation and development of the commercial maritime industry. Fourthly, in cases concerning the proprietary interest of the federal government, overriding federal interests have resulted in the exercise of common law power by the Court. For example, in *Clearfield Trust Co. v. United States*,[31] a diversity case, federal law was held to control the rights of the government against the indorser of a federal check. The Court asserted that the "desirability of a uniform rule" applicable to federal commercial paper was "plain."[32] In *United States v. Standard Oil Co.*,[33] the Court asserted the need for uniformity of law when federal fiscal policy is involved, holding that federal law governed the right of the government to be indemnified for expenses incurred in treating a soldier injured by a civilian tortfeasor. Thus, the exercise of the power to formulate common law by the Supreme Court has been predicated upon the presence of an

26. 304 U.S. 92, 110 (1938). *Cf.* Texas v. New Jersey, 379 U.S. 674 (1965) (escheat of intangibles).

27. Zschernig v. Miller, 389 U.S. 429 (1968) (invalidated state statute regulating when foreign heirs could inherit); *cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (act of state doctrine).

28. U.S. CONST. art. III, § 2.

29. Southern Pac. Co. v. Jensen, 244 U.S. 205, 214-15 (1917). *See generally* Friendly, *In Praise of Erie—And the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964).

30. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-11 (1953).

31. 318 U.S. 363 (1943).

32. *Id.* at 367. *E.g.*, D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) (tortious injury to commercial paper held by the federal government). For a current case on federal preemption see City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (preemption of aviation noise control). *See also* 40 J. AIR L. & COM. 341 (1974).

33. 332 U.S. 301, 310-11 (1947).

> Not only is the government-soldier relation distinctly and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified . . . should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines.

*Id.* at 310.

overriding federal interest in compelling national uniformity of rules.

Of course, the most direct method of establishing federal aviation law is by congressional action. The Federal Aviation Act of 1958[34] established exclusive federal control over the nation's navigable airways and at the same time provided the authority to develop aviation commerce and to establish the standards necessary to ensure aviation safety. Although various attempts have been made to establish federal control over the rights and liabilities of parties injured in aviation accidents, a federal court, reluctant to formulate aviation law and seeking manifestations of legislative intent, will discover much congressional disagreement. For example, a series of senatorial bills introduced in the 90th and 91st Congresses would have provided for exclusive federal jurisdiction over any action for damages from injury or death for any breach of a duty arising in the course of aviation commerce.[35] Because of opposition to interference with traditional state tort law, the bills died in committee.[36]

Because of the variations in the state laws, aviation accident recoveries in similar occurrences and within the same occurrence can differ substantially. The nature of this recovery inconsistency is revealed most dramatically by the application of the various conflict of law theories. The courts of many states still follow the rigid rule that the law of the place of the wrong governs.[37] In most aviation crash cases the "place of the wrong" is regarded as the state where the plane fortuitously crashes. Other courts employ a more modern approach to the selection of law based upon a choice of the law of the place with the most significant contacts.[38] These courts indicate,

34. 49 U.S.C. § 1301 *et seq.* (1970).

35. The "Holtzoff Bill" introduced into the Senate in 1968, provided for exclusive federal jurisdiction over civil actions arising out of the operation of aircraft. S. 3305, 90th Cong., 2d Sess. § 1 (1968). As a result of opposition, the "Admiralty Bill" patterned after the Death on the High Seas Act 46 U.S.C. §§ 761-62 (1970), was introduced, and provided for exclusive federal jurisdiction over any action for damages from injury or death for any breach of a duty arising in the course of aviation activity. S. 3306, 90th Cong., 2d Sess. § 1 (1968). Because of heavy attack on the breadth of the provisions, the "Tydings Bill", S. 691, 91st Cong., 1st Sess. § 1 (1969), was introduced limiting federal jurisdiction to only those cases involving substantial numbers of people and suits in multiple jurisdictions.

36. *Hearings on Aircraft Crash Liability Before the Subcomm. on Improvement in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 240-41 (1969).

37. Paoletto v. Beech Aircraft Corp., 464 F.2d 976 (3d Cir. 1972) (applied law of the place of the injury rather than of the place of the negligence); Quandt v. Beech Aircraft Corp., 317 F. Supp. 1009 (D. Del. 1970) (applied Italian law).

38. Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962), *cert. denied* 372 U.S. 912 (1963); Manos v. TWA, Inc., 295 F. Supp. 1170 (N.D. Ill. 1968); Long v. Pan Am. World Airways, Inc., 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965) (New York court was neutral, but had jurisdiction); *cf.* Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (court, as a matter of public policy, refused to apply Massachusetts law).

however, that the law of the "place of the wrong" governs on the issue of the negligent or tortious quality of an act.[39] The choice of law problem under the more modern approach can be compounded in federal court practice when numerous aviation injury cases are consolidated in a district court located in the jurisdiction where the crash occurred[40] because a change of venue from one federal court to another requires that the transferee court apply the law that the transferor court would have applied.[41] As an additional complicating factor, the Supreme Court has held that in aviation injury actions brought under the Federal Tort Claims Act,[42] the whole law of the place where the wrongful act occurred, including its conflict of law rules, governs the rights and liabilities of the parties, rather than the law of the place where the injury or death occurred.[43] Damage limitations on recoveries for wrongful death in aviation cases provide a good example of the substantial variation that can occur. If 350 passengers die as the result of a mid-air collision and if the forum court applies the doctrine of the place of the most significant contacts, the court might be required to try issues relating to 350 victims and their survivors to determine the damage law applicable to each victim's case. Conceivably, the forum court could apply the law of each of the fifty states,[44] which would result in full recovery in some cases and severe restrictions on damages in others. For example, if the collision occurred over Colorado, which statutorily limits damages to $35,000, some courts would avoid this limitation by employing the "grouping of contacts" doctrine in an appropriate case while other courts would apply the Colorado limitation, based upon the rigid *lex loci* doctrine, even if the victim came from a state which did not have a damage limitation. The same variations in recovery would be possible if the 350 suits were brought in various states and consolidated in a Colorado district court because, absent federal preemption, a Colorado district court would be obliged, after consolidation, to apply the conflict of law rule of the state in which the suit was originally brought. When the conflict of law problem

39. Manos v. TWA, Inc., 295 F. Supp. 1166 (N.D. Ill. 1968).

40. *See generally* Kennedy, *Counterclaims, Cross-Claims and Impleader in Federal Aviation Litigation*, 38 J. AIR L. & COM. 325 (1972).

41. Van Dusen v. Barrack, 376 U.S. 612 (1964). Bailey & Broder, *Choice of Law—Mass Disaster Cases Involving Diversity of Citizenship*, 38 J. AIR L. & COM. 285, 286 (1972).

42. 28 U.S.C. § 1346(b) *et seq.* (1970).

43. Richards v. United States, 369 U.S. 1 (1962).

44. Ten of fifty states have a statutory limitation on wrongful death recovery: Colorado, $35,000; Kansas, $35,000; Massachusetts, $50,000; Minnesota, $35,000; Missouri, $50,000; New Hampshire, $60,000; Oregon, $25,000; Virginia, $50,000; West Virginia, $110,000; and Wisconsin, $35,500. 2 J. KENNELLY, LITIGATION AND TRIAL OF AIR CRASH CASES, ch. 6, at 2 (1968).

centers on indemnification and contribution, the potential inconsistencies are equally great. Thus, a partially negligent tortfeasor may or may not be indemnified or allowed to obtain contribution depending on which conflict of law rules are applied.[45] No decision, however, has considered the issue of whether an overriding federal interest exists in air commerce sufficient to preempt state tort law and to impose federal common law to eliminate inconsistent results arising out of the adjudication of the same or similar accidents because of the application of conflicting choice of law rules.

## III. The Instant Decision

The instant court[46] initially recognized that the federal government has a strong interest in aviation commerce[47] by observing that Congress placed aviation in the complete and exclusive control of the federal government with the passage of the Federal Aviation Act.[48] Additional factors[49] considered by the court as indicative of

45. For an extreme example of an inequitable recovery see Tramontana v. S. A. Empresa, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied* 383 U.S. 943 (1966) where the Court applied the law of Brazil that limited wrongful death recovery to less than $140; the American decedent was killed in a collision between a United States Navy airplane, in which he was a passenger, and a Brazilian airliner over Rio de Janeiro, Brazil.

46. The court's holding was unanimous.

47. Without so finding, the court agreed with appellants that the district court failed to perform an adequate conflict of law analysis and to apply properly Indiana law on indemnity and contribution. Indiana law on indemnity and contribution was clearly summarized in McClish v. Niagara Mach. & Tool Works, 266 F. Supp. 987 (S.D. Ind. 1967) wherein the court stated:

> In the absence of express contract . . . Indiana follows the rule that there can be no contribution or indemnity as between joint tort-feasors.

*Id.* at 989. The *McClish* court, however, noted several exceptions: the doctrine of respondeat superior, non-delegable duty, and indemnity from supplier in products liability. *Id.* at 990. Where a party seeking indemnity is guilty of concurrent negligence, indemnity is prohibited. The court rejected the "active"—"passive" negligence exception which permits indemnity in favor of one guilty only of "passive" negligence. *Id.* at 990-91. The court finally noted that:

> [T]he right to indemnity may be implied at common law only in favor of one whose liability to a third person is solely derivate or constructive, and only as against one who has by his wrongful act caused such derivate or constructive liability to be imposed upon the indemnitee.

*Id.* at 991. This summary is believed to reflect the current status of the law in Indiana. *See* American States Insurance Co. v. Williams, 278 N.E.2d 295, 299-300 (Ind. Ct. App. 1972).

48. Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* (1970).

49. The court quoted Justice Jackson:

> Students of our legal evolution know how this Court interpreted the commerce clause . . . to lift navigable waters . . . out of local control and into the domain of federal control. (citations omitted) Air as an element in which to navigate is even more inevitahly federalized by the commerce clause than is navigable water . . . .
>
> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal com-

the magnitude of the federal interest included that the instant case arose from a mid-air collision in national airspace, that the government was made a party under the Federal Tort Claims Act,[50] and that the action was subject to the supervision of the Judicial Panel established by the Multidistrict Litigation Act.[51] The court then balanced the federal against the state government's interest in laws of indemnity and contribution and stated that the state interest is slight when compared to the predominant federal interest. Concluding that the federal government has a predominant, if not exclusive, interest in regulating the affairs of the nation's airspace, the court reasoned next that a federal common law of indemnity and contribution would eliminate the inconsistent results between similar occurrences and within the same occurrence occasioned merely by the fortuitous event of the collision. Thus, the court found that the rights and liabilities of the defendants, being federal in nature, would be governed by a federal common law on indemnity and contribution. Reasoning that a rule placing the entire burden of loss on one of two equally negligent tortfeasors is unjust,[52] the court next determined that indemnity and contribution should be applied on a comparative negligence basis—loss apportioned according to degree of fault.[53] Thus, recognizing federal preemption in aviation and refusing to sustain the fortuitous application of state law, the court held that a federal law of indemnity and contribution on a comparative negligence basis would govern the rights and liabilities of parties involved in mid-air collision cases.[54]

## IV. COMMENT

The instant court's decision appears well founded in its recogni-

mands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instructions from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

Northwest Airlines v. Minnesota, 322 U.S. 292, 303 (1944).

50. 28 U.S.C. § 1346(b) *et seq.* (1970). In the court's view, the Federal Tort Claims Act was not an obstacle to the formulation of a federal rule of indemnity and contribution due to the predominant federal interest in the nation's airways. 504 F.2d at 404 n.3.

51. 28 U.S.C. § 1407 (1970).

52. W. PROSSER, LAW OF TORTS, 305-10 (4th ed. 1971).

53. The court instructed that the trier of fact, when allocating loss that involves a settlement and not a judgment, must first establish that the settlement was reasonable. In the instant case the district court found the settlement to be reasonable.

54. Separately the court found, based on the policy that settlements are to be encouraged, that the settlement of the plaintiffs' claims did not constitute a valid defense of voluntary payment. Nor was the settlement found to constitute an accord and satisfaction. *See* note 7 *supra*. Finally, the court ruled that the district court erred in dismissing the plaintiffs' complaint without prejudice.

tion of the overriding federal interest in aviation commerce[55] and constitutes a logical extension of the exceptions to *Erie* already established in *Clearfield Trust*[56] and *Standard Oil*.[57] Although the right to indemnity and contribution is an important substantive right of the defendant-tortfeasor, the primary import of the instant case centers on the possibility and desirability of creating a more complete body of aviation common law governing the rights and liabilities of injured parties. Thus, the reasoning of the instant case might lead to the establishment of a federal common law action for wrongful death in aviation[58] collision cases. Reluctance in establishing this right is likely to be substantial, however, because the broad language of *Erie* chills significantly a federal court's exercise of its power to formulate common law, particularly in a diversity case. Further, legislative attempts to enact comprehensive aviation legislation providing for exclusive federal jurisdiction over civil damage actions have been unsuccessful because of congressional unwillingness to preempt a state's interest in protecting its citizens who have been injured in the course of aviation commerce.[59]

Nevertheless, despite this reluctance, the strong federal interests in air commerce provide a strong policy basis for federal preemption of the area. First, the exercise of common law power when an overriding national interest is presented has been partially obfuscated by the apparent desire of courts to justify the exercise of this power by incorporating statutory or constitutional sources in which to "find" the applicable law[60] rather than allow the power to stand alone. The Supreme Court has rejected even the view that congressional inaction necessarily precludes the independent exercise of judicial power in dealing with essentially federal matters.[61] The incorporation of statutory or constitutional sources by a court has relevance to the issue of whether the legal policies operative in

55. The objective of the Federal Aviation Act of 1958, as the instant court observes, is to foster the development of aviation commerce. 49 U.S.C. § 1346 (1970). For examples of plenary federal authority in aviation see Air Line Pilots Assoc. v. Quesada, 276 F.2d 892 (2d Cir. 1960) (age limitations for airmen); Rosenhan v. United States, 131 F.2d 932 (10th Cir. 1942) (airworthiness certificates for aircraft); and United States v. Drumm, 55 F. Supp. 151 (D. Nev. 1944) (airworthiness and pilot certificates). *See generally* Comment, *State Versus Federal Regulation of Commercial Aeronautics*, 39 J. AIR L. & COM. 521 (1973).

56. *See* note 31 *supra* and accompanying text.

57. *See* note 33 *supra* and accompanying text.

58. *See generally* Craig & Alexander, *Wrongful Death in Aviation and the Admiralty: Problems of Federalism, Tempests, and Teapots*, 37 J. AIR L. & COM. 3 (1971).

59. *See* notes 35-36 *supra* and accompanying text.

60. For two examples of this approach see D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) and Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). Maier, *supra* note 25, at 390-91.

61. United States v. Standard Oil Co., 332 U.S. 301, 306-07 (1947).

support of the rule applied were federal in origin. Secondly, state tort law, including wrongful death, indemnity and contribution, reflects the state's predominant interest in protecting its citizens not only because the rights and duties are largely local in nature but also because the state might be required to bear the burden of a citizen inadequately compensated for personal injury. On the other hand, since an aircraft's "airworthiness"[62] and the qualifications of pilots[63] and air-traffic controllers are subject to federal control as a part of the government's overall responsibility for air safety, the duty and breach thereof are uniquely federal. Recognizing strong federal interests over aviation and finding an inequitable variation in results without more, as normally occurs in preemption analysis, would ignore the important issue of whether the federal interest is predominant compared with the state interest in applying its particular substantive right such as the right to recover for wrongful death, or to obtain indemnity or contribution. The mere presence of state interests, however, should not override the need to implement federal policies. A state's interest, whether predominant or minimal, in the application of its rules of indemnity and contribution exists only so long as the laws are being applied with respect to one of its citizens. In complex, aviation litigation the conflict of law analysis can result easily in the application of laws of a state other than that of which a citizen is a resident, making moot a comparison of state and federal interests.[64] On the other hand, even when a state's law would govern the rights of its citizens, the interest of the United States in being indemnified is predominant compared to the state's interest because the "purse" of the federal government and the attendant fiscal policies should not be subjected to differing state laws.[65] Similarly, the overriding federal interest in promoting aviation commerce necessarily includes the proposition that air carriers should be able to predict business liability[66] and thus should not be subjected to differing laws of states that are not vested with any power over aviation commerce. Thus, as the instant court

62. Federal Aviation Act of 1958, 49 U.S.C. § 1423(c) (1970). For a comparison with maritime law see Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) where a unanimous Court held that an action for a death resulting from a vessel's "unseaworthiness" is maintainable under general maritime law. *See* Barhe v. Drummond, 507 F.2d 794 (1st Cir. 1974) (citing *Moragne*, court finds survival action for pain and suffering).

63. Federal Aviation Act of 1958, 49 U.S.C. § 1422 (1970).

64. *See* notes 37-45 *supra* and accompanying text.

65. *See* note 33 *supra*.

66. For example, because of differing state laws, potential liability cannot be determined accurately, requiring that insurance premiums be calculated assuming the most unfavorable circumstances, involving the highest cost for the greatest risk. Craig & Alexander, *supra* note 58, at 8.

found, the state interest is slight compared with the dominant federal interest in the application of a uniform federal rule of indemnity and contribution. Finally, even though the federal preemption of aviation is well founded, the instant case should not be used as a basis for creating other aviation law indiscriminately. Each case must be approached on its own facts, and the court must determine whether the federal government's interest in a particular substantive right, such as wrongful death, is predominant compared with the state's interest.[67]

STEPHEN K. RUSH

## Torts — Duty to Act for Protection of Another — Liability of Psychotherapist for Failure to Warn of Homicide Threatened by Patient

### I. FACTS AND HOLDING

Plaintiffs, parents of a young woman who was murdered by a former mental patient, brought a wrongful death action against the Regents of the University of California as well as four psychotherapists[1] and five policemen employed by the University. Prior to the murder of plaintiffs' daughter, the murderer had undergone psychotherapy as a voluntary outpatient at the University hospital. While in psychotherapy the patient disclosed his intention to kill a person readily identifiable as plaintiffs' daughter, but neither plaintiffs nor their daughter were warned of the patient's statement. Following an abortive commitment attempt by defendant psychotherapists and policemen,[2] the patient discontinued psychotherapy

67. The development of federal control of maritime law provides an appropriate parallel for the development of federal aviation law. Although federal maritime law is supported in part by a constitutional grant of admiralty jurisdiction, as a practical matter, little difference exists between the federal interest in promoting and regulating shipping, and promoting and regulating aviation. To deny aviation similar treatment ignores the crucial fact that when the United States Constitution was drafted, virtually all commerce moved upon water, and of course, the future development of aviation was unsuspected. *See* Craig & Alexander, *supra* note 58, at 18.

1. The term psychotherapist as used in this Comment includes clinical psychologists and psychiatrists. References to a psychologist and his client refer to a psychotherapeutic relationship and not, for example, to the relationship hetween an industrial psychologist and a company for which he is a consultant.

2. According to the complaint, the patient's therapist, a psychologist, determined after learning of his patient's intention to kill plaintiffs' daughter that the patient should be

and killed plaintiffs' daughter approximately two months after confiding his intention to his therapist. Plaintiffs contended that defendants were negligent in failing to warn plaintiffs of the patient's threat.[3] The trial court dismissed the complaint for failure to state a cause of action. The court of appeals affirmed,[4] holding in part that because no special relationship existed between defendants and plaintiffs or the victim, defendants owed no duty to disclose the patient's stated intention to kill plaintiffs' daughter.[5] The Supreme Court of California, *held*, reversed and remanded. A psychotherapist treating a mentally ill patient owes a duty of reasonable care to give threatened persons a warning necessary to avert foreseeable danger arising from his patient's condition or treatment.[6] *Tarasoff v. Regents of University of California*, 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974), *rehearing granted*, March 12, 1975.

## II. BACKGROUND

The general common law rule in tort is that a person owes no duty to act for the protection of another.[7] Nevertheless, two of the several major exceptions to this rule are first, that a duty to control the dangerous conduct of another with whom the actor stands in a

committed for psychiatric observation. Two hospital psychiatrists, named as defendants along with the psychologist, concurred in the psychologist's decision. The psychologist therefore orally requested of two defendant policemen that the patient be confined, and he wrote a letter to the same effect to another defendant policeman. Two other defendant policemen, joined by one of the two who had heard the oral request, briefly detained the patient but allowed him to go when he appeared rational and promised to stay away from the intended victim. A fourth defendant psychotherapist, the chief of the hospital's department of psychiatry, then ordered that no further attempt be made to confine the patient, requested that the police return the psychologist's letter, and directed that all copies of the letter and all notes taken during therapy be destroyed.

3. Plaintiffs also argued that defendants were liable for failing to detain the patient.

4. Tarasoff v. Regents of Univ. of Cal., 33 Cal. App. 3d 275, 108 Cal. Rptr. 878 (1973).

5. The court of appeals also held that defendants were not empowered under the California commitment statute to detain the patient, that defendants in any event had no mandatory duty to commit the patient, that at a trial plaintiffs would not be able to prove the death was proximately caused by the failure to detain the patient, and that defendants had statutory governmental immunity.

6. The supreme court also held that a police officer whose handling of a mental patient increases the risk of violence owes a duty to warn threatened persons. The court further held that, because of statutory immunity, none of the defendants were liable for their failure to effect the confinement of the patient.

7. W. PROSSER, THE LAW OF TORTS 340 (4th ed. 1971) [hereinafter cited as PROSSER]; RESTATEMENT (SECOND) OF TORTS §§ 314 & 315 (1965); Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887 (1934)[hereinafter cited as Harper & Kime]. Among cases dramatically illustrating the point are Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959) and Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928). For a critical appraisal of *Yania* see Seavey, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960). Under the general rule a physician has no duty to save the life of another. Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901).

special relationship may fall upon the actor[8] and secondly, that a duty to use sufficient care to avoid increasing the danger to a person in peril may be imposed upon the actor once he has begun to act for the protection of the endangered party.[9]

The first exception to the general rule — the "duty-to-control" exception[10] — includes the duty of a parent to control his child[11] and that of an owner of chattel to control one using the chattel with the owner's permission and in his presence.[12] One who takes charge of a person having dangerous propensities owes a duty under this exception to protect others by using reasonable care to control the dangerous person's behavior.[13] Thus, one court held a corporation liable when, after the corporation had undertaken to treat and quarantine an employee suffering from smallpox, the employee wandered away from the quarantine camp and infected plaintiffs.[14] A similar line of cases deals with the duty of mental hospitals to control their patients. In *Austin W. Jones Co. v. State*[15] a patient committed to a state mental hospital, while on an authorized temporary leave of absence, burned the plaintiff's property. The state was held liable for negligently granting the temporary leave. Similarly, in *Merchants National Bank & Trust Co. v. United States*[16] a mental patient was placed on a temporary leave of absence from a hospital and his outside employer was not warned to supervise him closely. The patient killed his wife and the hospital was held negligent for its failure to arrange for his control. Thus, the duty-to-control ex-

8. PROSSER 349; RESTATEMENT (SECOND) OF TORTS § 315 (1965); Harper & Kime 887.

9. PROSSER 343, RESTATEMENT (SECOND) OF TORTS §§ 321-23 (1965). Although it is generally true that a defendant who is held liahle has worsened the plaintiff's condition, this is not always the case. PROSSER 347-48. As Dean Prosser said, "It seems very unlikely that any court will ever hold that one who has begun to pull a drowning man out of the river after he has caught hold of the rope is free, without good reason, to abandon the attempt, walk away and let him drown, merely because he was already in extremis before the effort was begun." *Id.* at 348.

10. The duty-to-control exception is not the only exception to the rule that may entail a duty to control another person for the benefit of a third person. One important exception to the general rule, the duty to render aid because of a special relationship with the person in peril, was not relevant to the instant decision. This exception may, like the duty-to-control exception, give rise to a duty to control the conduct of another. The basis for this duty, however, would not lie in a special relationship with the party to be controlled but would instead be an incident of the relationship between the actor and the imperiled party. PROSSER 348.

11. PROSSER 350; RESTATEMENT (SECOND) OF TORTS § 316 (1965); Harper & Kime 893-95.

12. PROSSER 349-50; RESTATEMENT (SECOND) OF TORTS § 318 (1965); Harper & Kime 888-93.

13. PROSSER 350; RESTATEMENT (SECOND) OF TORTS § 319; Harper & Kime 897-98.

14. Missouri, K. & T. Ry. v. Wood, 95 Tex. 223, 66 S.W. 449 (1902).

15. 122 Me. 214, 119 A. 577 (1923).

16. 272 F. Supp. 409 (D.N.D. 1967).

ception is commonly applied when the defendant has custody of a dangerous person. Even in the absence of a custodial relationship a "duty-to-warn" variant of the duty-to-control exception is imposed upon a physician who treats a patient for a serious contagious disease. In *Jones v. Stanko*,[17] for example, the court held that the physician of an unhospitalized smallpox victim owed a duty to warn "other persons known by the physician to be in dangerous proximity" to the patient. Thus, a defendant's special relationship with a dangerous person may impose a duty to control the dangerous person if the relationship is custodial, and a duty to warn if the relationship is noncustodial.

The second exception to the general rule — the "increased-danger" exception — is founded on the distinction between nonfeasance and misfeasance.[18] For example, a physician is not required to accept a patient who cannot afford to pay him, but the physician who does so will be liable for negligent treatment of the patient.[19] Thus, one who begins to act incurs a duty to act with care to avoid increasing the danger to the imperiled person.

Although a duty to act for the protection of others has been established under one of the exceptions to the general rule, that duty may conflict with a countervailing duty not to disclose confidential communications. In most states, the patient in a physician-patient relationship has been given a statutory privilege to prevent his physician from disclosing confidential communications in court.[20] Moreover, some courts have held that a general public policy favors confidentiality in the physician-patient relationship. In developing this public policy, the courts have looked to the phsyician-patient testimonial privilege,[21] medical licensure requirements,[22] and statements of professional ethics.[23] In jurisdictions

17. 118 Ohio St. 147, 160 N.E. 456 (1928) (syllabus by the court); *accord*, Davis v. Rodman, 147 Ark. 385, 227 S.W. 612 (1921) (dictum); Hofmann v. Blackmon, 241 So. 2d 752 (Fla. App. 1970); Skillings v. Allen, 143 Minn. 323, 173 N.W. 663 (1919); Wojcik v. Aluminum Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (Sup. Ct. 1959).

18. PROSSER 343. An illustration of the distinction between nonfeasance and misfeasance is that a truck driver is not obliged to signal a car behind him to pass but may be liable for resultant injury if he negligently signals. Shirley Cloak & Dress Co. v. Arnold, 92 Ga. App. 885, 90 S.E.2d 622 (1955).

19. Napier v. Greenzweig, 256 F. 196, 198 (2d Cir. 1919); PROSSER 343. Some state statutes give physicians immunity from negligence suits when they render aid in an emergency. *See* PROSSER 344.

20. C. MCCORMICK, THE LAW OF EVIDENCE 212-13 (2d ed. E. Cleary 1972).

21. Hammonds v. Aetna Cas. & Sur. Co., 237 F. Supp. 96 (N.D. Ohio 1965); Clark v. Geraci, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960); Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (1958).

22. Hammonds v. Aetna Cas. & Sur. Co., 237 F. Supp. 96, (N.D. Ohio 1965); Horne v. Paton, 291 Ala. 701, 287 So.2d 824 (1973); Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920).

23. Horne v. Paton, 291 Ala. 701, 287 So. 2d 824 (1973).

adopting this confidentiality policy the patient has a cause of action when a physician unjustifiably discloses his patient's confidences.[24] In several cases, however, the courts have found justification for disclosures. For example, a physician's "concept of duty to his government" in one case justified his disclosure that a civilian Air Force employee was an alcoholic.[25] Another court expressly held that, notwithstanding the public policy favoring confidentiality, a physician is justified in warning others about a patient whom he reasonably believes to be suffering from a serious contagious disease.[26] Further, other courts have said in dicta that the "supervening interests of society"[27] or a "sufficiently important interest to protect"[28] would justify disclosure.

In some jurisdictions the client in a psychologist-client relationship, like the patient in a physician-patient relationship, has been given a statutory privilege to prevent his psychologist from testifying to confidential communications.[29] Nevertheless the case law establishing a cause of action for out-of-court breaches of physician-patient confidentiality has not yet been expanded to include the psychologist-client relationship. The California Evidence Code, however, appears to impose a general duty of confidentiality upon psychologists as well as psychiatrists.[30] Also, the California Supreme Court has said in dictum that the relationship between either a psychiatrist or a psychologist and his patient in psychotherapy is entitled to a certain degree of constitutional protection.[31] Moreover,

24. *E.g.*, Felis v. Greenberg, 51 Misc. 2d 441, 273 N.Y.S. 2d 288 (Sup. Ct. 1966). A recent case involving a psychiatrist is Schaffer v. Spicer, ___ S.D. ___, 215 N.W.2d 134 (1974).

25. Clark v. Geraci, 29 Misc. 2d 791, 794-95, 208 N.Y.S. 2d 564, 569 (1960). The court also held that plaintiff patient had waived confidentiality by previously authorizing the physician to issue medical certificates to the Air Force.

26. Simonsen v. Swenson, 104 Neh. 224, 228-30, 177 N.W. 831, 832-33 (1920).

27. Horne v. Paton, 291 Ala. 701, 709, 287 So. 2d 824, 830 (1973).

28. Berry v. Moench, 8 Utah 2d 191, 196, 331 P.2d 814, 817 (1958).

29. R. SLOVENKO, PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATIONS 93 & 133 n.13 (1966).

30. The California Evidence Code establishes a "psychotherapist-patient privilege" and certain limitations upon the privilege. CAL. EVID. CODE §§ 1014, 1016-26 (1966). The term "psychotherapist" encompasses both physicians who practice psychiatry and nonmedical specialists including licensed psychologists, authorized school psychologists, licensed clinical social workers, and licensed marriage, family, and child counselors. CAL. EVID. CODE § 1010 (Supp. 1974), *amending* CAL. EVID. CODE § 1010 (1966). It appears that the California statute not only establishes a testimonial privilege but also imposes upon the psychotherapist a general duty of confidentiality. *See* Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1061-62 (1974).

31. The court said that "the confidentiality of the psychotherapeutic session" falls within a zone of constitutionally protected privacy. The patient's interest in confidentiality,

a suit for invasion of privacy might lie against a psychologist who widely airs private facts.[32]

Thus, immediately prior to the instant case, a psychotherapist owed no duty of absolute confidentiality. A limited legal duty of confidentiality, apart from any testimonial privilege, increasingly had been applied to physicians, including psychiatrists, but not to psychologists. Furthermore, traditional rules of tort law continued to define the duties owed to persons outside the therapeutic relationship.

## III. The Instant Decision

The court in the instant case first acknowledged the general common law rule that an individual owes no duty to control the conduct of another or warn persons endangered by another. The court pointed out as exceptions to the rule, however, the duty of a defendant to control a dangerous person when a special relationship exists between the defendant and the dangerous person,[33] and the duty of a defendant to avoid increasing the danger once he has undertaken to aid the imperiled individual.[34] Examining first the duty-to-control exception, the court recognized the duty of a hospital to control its dangerous patients, and the duty of physicians not having custody over their patients to warn others of the contagious diseases from which their patients suffer.[35] Citing *Merchants National Bank*,[36] and analogizing a mental patient with dangerous proclivities to a carrier of a communicable disease, the court reasoned that the relationship between a psychotherapist and his patient, like the relationship between a physician and his physically ill patient, could support a duty to warn. Turning to the increased-danger exception, the court inferred that defendants' bungled commitment effort increased the danger to the victim because the patient subsequently discontinued therapy that, if continued, might have caused him to abandon his plan of murder.

In response to defendant psychotherapists' first argument that those who express thoughts of violence rarely carry them out, the

said the court, "draws sustenance from our constitutional heritage." *In re* Lifschutz, 2 Cal. 3d 415, 431-32, 467 P.2d 557, 567, 85 Cal. Rptr. 829, 839 (1970).

32. *See* Prosser 809-12.

33. This is the duty-to-control exception. *See* text accompanying note 8 *supra*. The court mentioned the exception founded upon a special relationship between the actor and the imperiled person but found this exception to be inapplicable to the facts of the instant case. *See* note 10 *supra*.

34. This is the increased-danger exception. *See* text accompanying note 9 *supra*.

35. The cases cited by the court on this point are those cited at note 17 *supra*.

36. 272 F. Supp. 409 (D.N.D. 1967); *see* text accompanying note 16 *supra*.

court stated that psychotherapists nevertheless must single out for disclosure those threats by patients that constitute real dangers to the public. Recognizing the difficulty of making this judgment, the court reasoned that the psychotherapist would be held only to the traditional standard of professional care, which in California is the same for psychologists as for physicians.[37] The court also found unpersuasive defendant therapists' second argument—that confidentiality is essential to effective psychotherapy. Although recognizing the public interest in the effective treatment of mental illness and the protection of patients' privacy, the court emphasized the countervailing public interest in safety from violence, and noted that both the California Evidence Code[38] and the Principles of Medical Ethics of the American Medical Association[39] permit disclosure of patient confidences when necessary for the safety of the community.

The court concluded that the special relationship of a psychotherapist to his patient and the therapists' role in the bungled commitment attempt that may have increased the risk of violence imposed a duty upon defendant therapists, not vitiated by any countervailing policy considerations, to warn the victim of their patient's homicidal intent.[40]

While agreeing with the majority that a duty to warn should be imposed when a psychotherapist's acts leading to the termination of treatment increase the risk of violence, the two dissenting justices did not agree that the duty to disclose threats of violence could be based solely on a prior therapist-patient relationship. Expecting that the effectiveness of psychiatry would be crippled, the dissenters predicted a net increase in violence as a result of the majority decision.[41]

## IV. COMMENT

The instant court's reliance on the duty-to-control and

37. Tarasoff v. Regents of Univ. of Cal., 13 Cal. 3d 177, ___, 529 P.2d 553, 560, 118 Cal. Rptr. 129, 136 (1974). The court's application of the same standard to physicians and psychologists was probably influenced by the statutory recognition of both medical and nonmedical therapists as psychotherapists. *See* note 30 *supra* and accompanying text. Other states may not apply the same standard of negligence to both physicians and psychologists.

38. CAL. EVID. CODE § 1024 (1966).

39. AMA PRINCIPLES OF MEDICAL ETHICS § 9, in D. SHARPE & M. HEAD, PROBLEMS IN FORENSIC MEDICINE 389 (2d ed. 1970).

40. Devoting only one sentence to defendant campus policemen, the court held that a cause of action could also he maintained against them on the theory that their conduct increased the risk of violence. The court did not limit its holding to campus police, nor did it limit its holding on the psychotherapists to therapists employed by the state.

41. The dissenters suggested that the new duty imposed upon police by the majority would be almost impossible to perform. They also speculated that the court's decision might require jail and prison officials to issue warnings whenever a prisoner is released.

increased-danger exceptions to the general rule was misplaced. The duty-to-control exception, broadly defined to include both custodial and noncustodial ("contagious disease warning") cases,[42] is inapplicable to the instant case. The custodial cases are inapplicable because defendant psychotherapists in the instant case, unlike the authorities of a state mental hospital, did not have custodial responsibilities. Given the distinction between defendants' ability to control patients in custodial and noncustodial relationships, it is not surprising that no reported case exists in which a private psychiatrist has been held liable for his failure to control the behavior of an unhospitalized patient. The noncustodial or "contagious disease warning" cases are inapplicable because physical ailments are unlike mental, emotional, and behavioral problems. A recent survey of research on the reliability of psychiatric judgments reveals overwhelming evidence that psychiatrists cannot reliably predict future violent behavior.[43] Thus, the court's assertion that the danger posed by a mental patient is as foreseeable as that posed by the carrier of a contagious disease[44] is simply not borne out by research data. Indeed, the *Merchants National Bank*[45] case, which the instant court viewed as a duty-to-warn case, actually was founded on the duty of a hospital to arrange for the control of a patient who, although on leave of absence, had not been discharged. Because future violent behavior cannot be successfully predicted with consistency, while contagious disease can be successfully and consistently diagnosed, the prudent psychotherapist, even when exercising due care, cannot know in a given case whether to issue a warning. If he issues a warning, an action for breach of confidentiality might lie;[46] if he does not, he may face a negligence suit.[47]

By applying the increased-danger exception to defendant psychotherapists[48] the court defeats its own expectation that effective psychotherapy might curb murderous desires. On one hand, the

42. *See* notes 15-17 *supra* and accompanying text.

43. Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 711-16 (1974). Of course, psychiatrists involved in civil commitments do purport to predict violent behavior. The expert testimony of these psychiatrists, however, is definitely less reliable than polygraph results, which generally are not allowed into evidence. *Id.* at 736. Psychiatrists generally overpredict dangerous behavior, but also label as nondangerous some people who do later behave violently. *See id.* at 711-16.

44. Tarasoff v. Regents of Univ. of Cal., 13 Cal. 3d 177, ___, 529 P.2d 553, 559, 118 Cal. Rptr. 129, 135 (1974).

45. 272 F. Supp. 409 (D.N.D. 1967); *see* text accompanying notes 16 & 36 *supra*.

46. *See* notes 24 & 32 *supra* and accompanying text.

47. The courts might alleviate the psychotherapist's dilemma by holding that a warning is justified whenever the patient discusses homicidal thoughts. This development, however, would increase the likelihood that such thoughts would not be brought into psychotherapy. *See* notes 50 & 51 *infra* and accompanying text.

48. In also applying the increased-danger exception to defendant campus policemen the

court claims that the danger was increased because, after the commitment attempt, the patient discontinued psychotherapy that, if continued, might have led the patient to abandon his plan to kill. On the other hand, the court establishes a rule of law requiring psychotherapists to stand ever-ready to shatter the confidentiality that is essential to effective psychotherapy.[49] Just as the commitment attempt caused the patient to discontinue therapy, so might the duty to warn, by forcing breaches of confidentiality, "tend to keep murderous impulses out of the therapeutic relationship."[50] A person who is thinking of killing another might be deterred from seeing a psychotherapist or, if he does see a therapist, might be reluctant to reveal his homicidal thoughts.[51]

If the murderer in the instant case had confided to his bartender that he intended to kill plaintiffs' daughter and if the bartender had remained silent, the law would have been clear: plaintiffs would have had no cause of action against the bartender. Yet, a court would be more justified in intruding upon the bartender-customer relationship, for example, in which confidentiality is rather unimportant, than the psychotherapist-patient relationship, in which confidentiality is all-important. Given the inability of psychotherapists to predict acts of violence and psychiatrists' lack of special training in the prediction of dangerous behavior,[52] no reason exists for psychotherapists to be singled out for a special duty apart from that imposed upon laymen.

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court places the police in a difficult situation. To ask that police not make on-the-spot judgments on whether to arrest or not to arrest, to release or not to release, fails to recognize the reality of modern police work. Conversely, asking police to warn persons who may face greater danger as a result of on-the-spot judgments imposes, as the dissent said, an almost impossible duty.

49. *See* M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 272 (1952); M. HOLLENDER, THE PRACTICE OF PSYCHOANALYTIC PSYCHOTHERAPY 53-54 (1965); T. SZASZ, THE ETHICS OF PSYCHOANALYSIS 172-73, 220 (1965).

50. Interview with William D. Kenner, M.D., Assistant Professor of Psychiatry at the Vanderbilt University School of Medicine, in Nashville, Tenn., Feb. 21, 1975.

51. *Id.* It may well be that a chilling effect on a person's going to a therapist or revealing homicidal thoughts in therapy is already being caused by the civil commitment laws. On the other band, the instant case and any cases following its holding could extend the chill by frightening psycbiatrists who otherwise would not commit a patient or breach a confidence. Althougb there appears to be no reported case holding a private psychiatrist liable for failing to seek tbe commitment of a patient, there is now the instant case that would impose the duty to warn on any psychotherapist. Given both the extreme difficulty inherent in deciding whether to issue a warning and the tendency to overpredict dangerousness, the issuance of a warning might frequently accompany a patient's mention of homicidal thoughts. As the dissent noted, "[P]redictive uncertainty is fatal to the majority's underlying assumption that the number of disclosures will necessarily be small." Tarasoff v. Regents of Univ. of Cal., 13 Cal. 3d 177, ___, 529 P.2d 553, 568, 118 Cal. Rptr. 129, 144 (1974) (dissenting opinion).

52. Ennis & Litwack, *supra* note 43, at 733.

The Supreme Court of California has seized upon the relationship between a psychotherapist and his patient to develop another mechanism of social control in our "risk-infested society."[53] It is both unfair and unwise to ask the psychotherapist to perform a societal function that he can not perform, that no one else is expected to perform, and that conflicts with his primary duty — to serve his patient.

JOSEPH AL LATHAM, JR.

53. Tarasoff v. Regents of Univ. of Cal., 13 Cal. 3d 177, ___, 529 P.2d 553, 561, 118 Cal. Rptr. 129, 137 (1974). Although the instant case is of the noncustodial type and has its greatest impact on the noncustodial relationship, it may also affect custodial cases. For a recent custodial case that cites *Tarasoff* see Hicks v. United States, No. 73-1929 (D.C. Cir., April 11, 1975).