

**TARASOFF REVISITED: DOES A SPECIAL
RELATIONSHIP BETWEEN THE COLLEGE
AND A STUDENT ARISE FROM THE
FORESEEABILITY OF DANGER**

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Tarasoff "Revisited": Does a Special Relationship between the College and a Student Arise from Foreseeability of Danger?

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I. Introduction - A Practical Guide to Revisiting Tarasoff

Individuals in higher education know of the seminal case of Tarasoff v. Board of Regents, 551 P.2d 334 (Cal. 1976) (en banc), either by name or by the rule(s) it announces. Practically speaking, Tarasoff is most well known to educators with regard to its implications with respect to college and university psycho-therapeutic and counselling activities. Tarasoff, however, also has many significant implications for a broader range of college and university activities, particularly those involving enforcement of policies regulating student conduct.

II. Tarasoff - Implications for Psycho-therapeutic and Counselling Activities

Tarasoff has become celebrated (and controversial) for its holding that "[o]nce a therapist (here typically meaning a college or university psychologist, psycho-therapist, psychiatrist, counsellor) does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, [the therapist, as above] bears a duty to exercise reasonable care to protect [normally warn the victim or control the conduct of the patient] the foreseeable [sometimes instead the readily identifiable or the specifically identified] victim of that danger." Tarasoff, 551 P.2d 345. In spite of great controversy and some ambiguities regarding this holding, Tarasoff has been widely accepted in principle in American law. Only one court (an intermediate appellate court in Florida) has rejected Tarasoff openly on its facts. See Boynton v.

Burglass, 509 So.2d 446 (Fla. Dist. Ct. App. 1991). [Note that Florida has a relevant statute, that at the very least, permits Tarasoff-like actions. See FLA. STAT. ANN. §455.2415 (West 1989).] Also, although there are states that have essentially codified Tarasoff duties by statute, there are others that have modified or limited Tarasoff duties in the psycho-therapeutic context by statute. For helpful recent articles on this, see Michael R. Geske, Note, Statutes Limiting Mental Health Professionals' Liability for the Violent Acts of Their Patients, 64 Ind. L. J. 391 (1989); Steven Smith, Mental Health Malpractice in the 1990's, 28 HOUS. L. REV. 209 (1991). Thus although higher educators may wish to delineate Tarasoff with respect to its finer implications for college and university therapists and counsellors, in this context Tarasoff generally is a well entrenched feature of American law and promises to remain so. Over-attention to what is in the large now a settled issue -- generally whether Tarasoff is appropriate and doctrinally workable in the psycho-therapeutic and counselling contexts -- tends to distract from the fact that Tarasoff (and its progeny) is developing implications into far broader contexts, which may soon include matters involving the enforcement of college and university policies regulating student conduct.

III. Traditional Common Law, the Existence of a 'Special' Relationship and the Imposition of Duty in the Context of Enforcement of Policies Regulating Student Conduct

In general, it is largely correct to assume that apart from some areas of tort law involving specific duties or immunities, traditional general common law rules of tort liability typically impose a duty (if at all) to act reasonably under the circumstances (which includes a duty to make appropriate warnings or to make a situation, etc., reasonably safe) when (1) a

person takes affirmative actions that result in (or aggravate an) injury or (2) when a person omits to take some action for the benefit of another if that person stands in some special relationship to either the victim or a dangerous person. In practice these rules are complicated and subject to many special exceptions --creating endless problems of interpretation -- and require advanced understanding to master. See Restatement (Second) of Torts §314-328. For an extended discussion of the relationship of Tarasoff and these sections of the Restatement (Second) of Torts, see Peter Lake, Tarasoff Revisited, 58 ALBANY L. REV. 97 (1994). However, somewhat in contrast to the general rules, in the context of university liability involving enforcement of policies regulating student conduct, a number of courts have rejected a duty of a university in both contexts - act or omission — unless there is an established 'special' relationship. See Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979), cert. denied, 446 U.S. 909 (1980) (college lacks control and status *in loco parentis* sufficient to impose duty on university in incidents involving alcohol consumption even when college was apparently aware of and provided funds, planning and support for the off-campus sophomore class picnic in which the students' injuries were caused by another student); Rabel v. Illinois Wesleyan Univ., 514 N.E. 2d 552 (Ill. App. Ct. 1987) (university owes no duty to a female student abducted from dormitory in pledging ritual because of lack of custodial relationship with students). Although there is reason to question the narrow characterization of special relationships that many such courts have used, such courts have noted typically that the absence of a custodial relationship, lack of charge and control, and/or the university's loss of status in loco parentis signals the absence of a special relationship between college and student. See Bradshaw, Rabel, *supra*. These courts

then reason that the absence of a special relationship means that the college owes no tort duty to its students involving enforcement of policies regulating student conduct. *Id.*

IV. Special Relationships - Based on Custody, Charge and Control, *In loco parentis*.

Courts like Bradshaw and Rabel define special relationship to mean that a college must (1) have "custody", as one would have over another in legal custody or admitted in a mental institution, or (2) have "charge and control", including the above, and also as in a patient admitted in a hospital or (3) be *in loco parentis*, which BLACKS' LAW DICTIONARY 787 (6th Ed. 1990) defines as "In the place of a parent; instead of a parent; charged factitiously with a parents' rights, duties, and responsibilities." Universities and colleges often argue and many courts agree, *see Bradshaw* and Rabel, that in the context of the enforcement of policies regulating student conduct the college rarely has custody, or charge and control; further as a result of the students' rights cases of the 1960's and 1970's, which recognized expanded constitutional rights of students on campus, these courts contend that the college no longer stands *in loco parentis*. *Id.* Cases that challenge the reasoning of Bradshaw and Rabel are a minority. *See Furek, infra.*

V. Student/College: Special Relationship Based on Foreseeability Alone.

Notably, most courts do not understand that a special relationship is created simply because danger to a student is known, likely, highly probable, or foreseeable. Courts have often emphasized factors relating to control of student conduct, as opposed to factors relating to the foreseeability of harm, to enhancement of risk caused by college or university conduct,

to the failure to discharge reasonably an assumed duty, or to knowledge of a particular danger to a student or set of students arising from student misconduct. See Bradshaw, Rabel, *supra*. This may be changing where a university has actual or constructive knowledge of specific risk, and/or has assumed a duty to or with respect to a particular group of students. E.g., Furek v. University of Delaware, 594 A.2d 506 (Del. 1991) (university owes duty to student permanently blinded and scarred as a result of pledging ritual wherein oven cleaner was poured over student's head, when the university has assumed a duty to students by promulgating hazing policy).

Also, there is reason to believe that Tarasoff is making subtle but important conceptual changes in this area of the law in ways that will alter or challenge the no-duty position.

VI. Tarasoff Revisited - Special Relationships Premised on Foreseeability

In Tarasoff v. Board of Regents, the California Supreme Court held that a university can be liable for failure to warn a foreseeable (in that case a specifically identified individual) victim of a dangerous patient with whom the university shared a special relationship. The university did not have the dangerous person in custody, or under its charge and control (and no issue of *in loco parentis* was germane). Importantly, the court determined that the therapist/non-admitted patient relationship was sufficiently special to impose a duty to take reasonable protective measures for the benefit of a foreseeable third party victim. In its broader implications, Tarasoff suggests that knowledge of danger to a foreseeable victim itself creates the appropriate special relationship. Tarasoff has spread beyond its therapist/patient

context to include cases involving parole officers and high school counsellors, *inter alia*. See Eisel v. Board of Education of Montgomery County, 597 A.2d 447, 455 (Md. 1991) (high school counsellor has duty to warn parents of high school student of suicidal tendencies, and to act reasonably so as to prevent suicide of student). Tarasoff has also resulted in a number of decisions in the non-university context that suggest that knowledge or foreseeability of harm itself creates a duty to act reasonably for the protection of others. See Soldano v. O'Daniels, 190 Cal. Rptr. 310 (Ct App. 1983) (Tarasoff relied upon in case imposing duty on a bar to allow a person to use a phone in public portion of the bar to make a call to attempt to avert imminent danger to another party not in the bar). Also, following Tarasoff some courts have begun to discard the special relationship requirement(s) for affirmative duties altogether. See Schuster v. Altenberg, 424 N.W. 2d 159) (Wisc. 1988) (*citing Tarasoff*, court averts analytical gymnastics of special relationship analysis in imposing Tarasoff type duty in factual setting similar to Tarasoff). Such reasoning appears similar to that in Furek, and the possibility that this area of the law will grow is very real.

VII. Foreseeability of Danger Alone Imposing Obligation on University?

Courts do not seem inclined to require that a university or college affirmatively investigate potential dangers involving the regulation of student conduct with respect to the general class of students for all types of potential injury arising from student misconduct. However, the imposition of a duty involving student misconduct becomes more likely if there is a reasonable basis to know (particularly from sound professional judgment or from a specific set of regulations involving student conduct that are aimed to protect a class of

students from a certain type of harm) of a danger arising from student misconduct to a foreseeable class of students, or worse yet, to a readily identifiable (or specifically identifiable) student or set of students. Duty is even more likely to arise if there is actual knowledge of a danger arising from student misconduct posed to a foreseeable class of persons, or worse still, to a readily identifiable student or set of students or to a specifically identified student or set of students. In many ways, this later context is not unlike the facts of Tarasoff itself. Unlike the facts of the Tarasoff case itself, however, such duties may arise even if the endangered student is one who has been involved in misconduct or injured by their own misconduct.