Forty years ago, the California Supreme Court decided the landmark case of Tarasoff v. Regents of Univ. of California, 17 Cal. 3d 425, 551 P.2d 334 (1976). In that case, the court held that when a psychologist knows, or should know, that a patient presents a serious risk of violence to another person, a duty arises to use reasonable care to protect the intended victim against the danger. There was an immediate outcry from mental health professionals who were concerned, rightly, that they might be legally responsible for unforeseeable events and would be required to violate patient confidentiality to avoid liability.

The Tarasoff decision resulted in years of litigation, court decisions, legislation, commentary, and scholarly writing around the country. In the ensuing years, most states adopted some form of a mandatory or permissive duty to warn law. These laws generally included a degree of immunity for providers who acted in good faith. Until recently, there were relatively few new developments in the area of the liability of mental health and other medical professionals for violent acts by their patients.

Recent appellate cases suggest that liability for mental health professionals may now be expanding, in spite of state laws intended to limit liability.

**RECENT CASE LAW**

In a decision that expands the liability of mental health professionals, the Washington Court of Appeals ruled in Volk v. DeMeerleer, 337 P.3d 372 (Wn. Ct. App. 2014), that a psychiatrist could be liable for homicides committed by a patient, even though the patient never identified the victims as targets of violence. The case involved a double murder-suicide in July 2010, in which the patient, who had received outpatient treatment for his mental illness with the same psychiatrist for nine years, killed his former girlfriend and one of her children, and attacked another of her children with a knife. The patient last saw his psychiatrist three months before the killings, and although he reported that he had suicidal thoughts when he was depressed, the patient had not expressed any intention to harm his then girlfriend or her children.

The trial court granted summary judgment in favor of the defendant health care providers. The Washington Court of Appeals reversed the trial court, holding that a jury should decide whether the psychiatrist met the standard of care. The court noted that “[u]nder Tarasoff and its offspring, [the psychiatrist] would be granted summary judgment” because the patient never identified his former girlfriend and her children as a target of violence. Despite Tarasoff, the court chose to extend a mental health provider’s duty of care to all foreseeable victims, rather than only victims identified by the patient. The court explained that because Washington decisions have not placed limitations as to who is foreseeably endangered, there was a jury question.

Similarly, in Graham v. Valueoptions, Inc., 2010 WL 5054442 (Ariz. Ct. App. Oct. 28, 2010), the trial court held that the defendant mental health providers could owe a duty to unknown victims after their patient killed two men he did not know. The case proceeded to trial and the jury awarded $11 million in compensatory damages and $25 million in punitive damages. Interpreting prior Arizona case law that relied on Tarasoff, the Arizona Court of Appeals affirmed the trial court result. The court held that even though the mental health professional’s duty under Arizona law was limited to foreseeable victims, there was nothing in prior case law that held or implied that that duty “could never extend to cases involving foreseeable victims who were previously unknown to the patient.” Rather, whether victims previously unknown to the patient and his mental health providers were foreseeable was a question for the jury.

In many states, foreseeability has been a gradually expanding concept, with appellate courts allowing juries to decide whether
bad outcomes should be predicted and prevented. Those states may see results like those in Washington and Arizona, with potential liability even when the victim is unidentified. However, there are recent court decisions that are more sympathetic to the idea that mental health providers cannot protect the general public.

In January of this year, the Montana Supreme Court held in *Woods v. State ex rel. Montana State Hosp.*, 2015 WL 161830 (Mont. Jan. 13, 2015), that Montana State Hospital did not violate a statutory duty to warn a patient’s former girlfriend of a risk of his violent behavior following his release from involuntary commitment at the hospital. Because the patient had not made a specific threat of future violence by specific means toward the former girlfriend, the mental health professional’s duty to warn was not triggered. The decision was based on a law enacted in 1987 in response to *Tarasoff*, through which the Montana Legislature specifically declined to impose the common law principles of foreseeability adopted in *Tarasoff*.

The *Woods* court refused to extend a mental health provider’s duty beyond the “extremely narrow” language of the statute requiring a clearly identified or reasonably identifiable victim. In reaching its decision, the *Woods* court relied on a Kentucky Supreme Court case in which the court held that a mental health professional’s statutory duty to warn arises “only when the patient has communicated to the mental health professional, directly or indirectly, by words or gestures, that he will commit an act of physical violence. Simply being a threat of physical violence does not constitute communicating a threat of physical violence.”

Similarly, in *Fredericks v. Jonsson*, 609 F.3d 1096 (10th Cir. 2010), the Tenth Circuit held that a psychologist did not violate her duty to warn under Colo. Rev. Stat. § 13-21-117. Although the psychologist’s patient was convicted of stalking the plaintiff neighbors and had reported frequent violent fantasies involving the neighbors, prior to the incident he reported to the psychologist that he no longer had violent thoughts directed at them. The court held that the statutory duty to warn was triggered “only when the patient himself predicts his violent behavior (by communicating – that is, expressing – his threat to the mental health provider).”

**COMMENT**

The decisions in *Volk* and *Graham* suggest a trend that will alarm mental health and other providers in the same way the profession reacted to the *Tarasoff* decision in 1976. The trend would be toward increasing liability for health professionals for the violent acts of their mental health patients, even in states with duty to warn laws, and even when there is no specific threat to a victim. If foreseeability is the only issue, in many states juries will define the scope of liability, often in cases involving shocking facts and tragic outcomes.

Defending these cases will be challenging, but it is critical to focus on confidentiality considerations that are at the heart of the therapist-patient relationship, the known limitations on predicting violence, state laws limiting duties to warn, and the difficult judgments that healthcare professionals must make every day.