

Notebook on Ethics, Legal Issues, and Standards for Counsellors
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Duty to Warn

In our Code of Ethics we have the following declaration:

B3. Duty to Warn

When counsellors become aware of their client's Intent or potential to place others in clear or imminent danger, they use reasonable care to give threatened persons such warnings as are essential to avert foreseeable dangers.

This duty has emerged in recent years as both an ethical obligation and a legal principle. However its status as a legal duty remains somewhat unclear in Canadian case law and there is no general overarching statutory provision to assist us. However, since the landmark Tarasoff duty to warn case in the United States in 1974 that country has developed an extensive body of case law and has enacted many duty to warn legislative statutes. This difference between the two countries may reflect our different legal traditions with Canada influenced by the reluctance of English courts to accept the concept of vicarious liability in which professionals can be held liable for injuries inflicted by clients on third parties.

Very briefly, the Tarasoff case involved Dr. Thomas Moore, a psychologist working at the Counselling Centre of the University of California at Berkeley. One of his clients at the Centre was a 26 year old graduate student who during his counselling sessions disclosed his wish to kill Taliana Tarasoff, his girlfriend. Dr. Moore took his clients disclosure seriously and reported his concerns to the campus police and expressed his intention to proceed with committal of his client for a psychiatric evaluation. The campus police interviewed the student but released him from custody when he promised to stay away from Ms. Tarasoff. Neither the police nor Dr. Moore warned Taliana Tarasoff of the threat and the student did not return to see his counsellor. Just two months later he fatally stabbed her on the steps of her parents' home. Her parents initiated a lawsuit against Dr. Moore, the police, and the Board of Regents of the University. Although the Tarasoff claim was dismissed twice in the lower courts, when it went to the Supreme Court of California it concluded that Dr. Moore had a duty to warn Ms. Tarasoff or her parents of the threat. The court stated that confidentiality must yield to the duty to prevent danger to others when that danger is foreseeable. This frequently referenced case gave rise to the now well known maxim expressed by the judge at the time "the protective privilege ends when the public peril begins."

A number of court cases in Canada have referred to the Tarasoff decision and it has been mentioned in a number of legal judgements. Although there has been no exact example of this case in Canadian law, Picard and Robinson, authors of Legal Liability of Doctors and Hospitals in Canada, express the following view:

Despite the dearth of Canadian case-law, it seems likely that, faced with a true Tarasoff issue, a Canadian court would endorse the general principles underlying the California Supreme Court decision. At some point the need to protect the public from imminent danger becomes paramount, and at that point the doctor's duty of confidentiality ends and is replaced by a duty to warn the person or persons at risk. (1996, p. 34)

In 1999 the Supreme Court of Canada, in the case of *Smith v. Jones*, did rule on the appropriateness of breaking confidentiality in a particular public safety circumstance. In this case, Jones was referred to Dr. Smith by his defence lawyer for a psychiatric evaluation following his being charged with the aggravated sexual assault of a prostitute in Vancouver. During the evaluation Jones disclosed to Dr. Smith, in some detail, his plans to kidnap, rape and kill prostitutes. Dr. Smith was not called to testify at Jones's trial at which he pleaded guilty to aggravated assault.

The psychiatrist felt that he had to disclose, for the sake of public safety, what he knew of Jones' expressed intentions and he made application to the British Columbia Supreme Court for permission to disclose the information to the Crown and to the police. The court ruled that he had a duty to make such a declaration, Jones' lawyer argued that such a disclosure would be a breach of his lawyer-client privilege since he had referred Jones to Dr. Smith. Dr. Smith made the disclosures.

Jones took the case to the Supreme Court of Canada. It unanimously ruled that not even solicitor-client privilege is absolute but may have to be breached in certain circumstances in which there is a danger to public safety. The nine justices found that Dr. Smith had acted appropriately in the particular circumstances. However, they, unlike the B.C. Supreme Court, did not clarify if the duty to warn in this case was mandatory or discretionary. However, the court set out the following three factors that must be considered when deciding when the concern for public safety could warrant the breaching of lawyer-client privilege. They are:

1. Is there a clear risk to an identifiable person or group of persons?
2. Is there a risk of serious bodily harm or death?
3. Is the danger imminent?

(*Smith v. Jones*, 1999, scc.)

Despite the fact that Canadian law is not yet crystal clear with respect to our duty to warn, this Supreme Court decision goes a long way to clarify this ethical/legal obligation. It is clear that these three factors as the test of the risks to public safety apply not only for lawyers and psychiatrists but for all other professionals who have fiduciary obligations. This includes all of us as counsellors and it is for this reason that we have provided on page 9-10 of our Standards of Practice for Counsellors steps and actions to be taken should any of us have to act on this challenging ethical duty. I invite you to read it carefully, and to seek opportunities to discuss it with colleagues.