


**Making Sense of Maas:  
Understanding the Expanded  
Duty to Warn in Pennsylvania**



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**Disclosures**



- No pharma/industry payments or gifts since 2007
- I receive payments from government agencies, nonprofit organizations, and non-healthcare businesses (including a firearms dealer) for consultation, training, and expert witness work
- The opinions expressed herein are those of the speaker(s) and not of UPMC or the University of Pittsburgh School of Medicine

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**To summarize:**

- Who gets warned?
  - Specifically identified individual
  - Readily identifiable individual
  - **All persons who are members of a specific and identified group that is finite, homogenous, and united by common circumstance if one member of that group is threatened but not specifically identifiable**
- What's the threshold?
  - Specific and immediate threat\*\*\*
  - Serious bodily harm
- How is the warning conveyed in complex or unclear cases?
  - Good question...
- Consult
  - 2d opinion, Leadership, Legal, Risk Management

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**As many as 80% of assailants leak or threaten** (Larkford et al 2019, Mitchell 2019 et al, Mealy & O'Toole 2011)

A **threat** is a communication to a target of intent to do harm.

**Leakage** is the communication to a third party of an intent to do harm.



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**You have to collect the dots before you can connect the dots**



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**Duties to third parties**

"I feel hopeless, I don't know what's wrong with me ... I'm building up the courage, but I'm pretty sure I'm just going to let go of the wheel and it will look like an accident"

*Duties vary by jurisdiction, profession, time, and, frankly, social context and risk tolerance*



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**Legal principles 101**

- Trial court decisions are like a lab test – you get a yes/no answer
- Appellate court decisions are like a journal club – you get discussion and interpretation
- Stare decisis: "the decision stands" (for lower courts and the same jurisdiction)
- Court opinions should restrict themselves to facts at hand and not speculate on hypotheticals
- In civil litigation, it is up to the plaintiff (injured party) to prove to a jury that, by a preponderance of the evidence, the defendants were derelict in a duty which directly caused damages

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### Untangling some ideas

- **Duty** – an affirmative responsibility; one must act and failure to act would be negligent
- **Right** – a power or entitlement that is enforceable and redressable
- **Permission** – you may act but do not have to, but if you do it is allowed even if it may be a violation of other rules. Not acting does not necessarily create liability
- **Protect** – preventing harm from occurring; this does not necessarily involve warning target / notifying others
- **Warn** – notifying a potential target of the threat; this does not necessarily protect target

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### We have no general duty to assist others, unless...



- We put them in harm's way
- We announced an intent to assist
- We have a special relationship to them
  - Clearly, to our patients
  - Less clearly, those harmed by our patients

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### Privilege

A person's right to control disclosure of confidential communications to others, especially legal authorities and processes.

It only applies to **certain communications** within **specific relationships**.



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**Exceptions to confidentiality & privilege**

- Any time consent is given to disclose information
- Child abuse reporting (and, in some states, elder abuse as well)
- Observations of severe injuries due to crimes
- HIPAA
- To some extent – third party payers (Aetna yes, parents no)
- Court orders (rules vary by jurisdiction)
- Violations necessary to prevent suicide
- Violations necessary to protect third parties\*\*\*\*\*

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**A bad worker blames his tools...**

- Mental Health Procedures Act
- HIPAA, HITECH
- 42 CFR Part 2
- 21<sup>st</sup> Century Cures Act
- FERPA
- CHRIA
- Etc...



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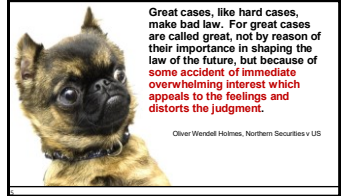
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**The murder of Tatiana Tarasoff**  
 "The protective privilege ends where the public peril begins."



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**The Tarasoff II "Standard"**  
 (551 P. 2d 334, 1976)

Health professionals have a duty:

- To take **reasonable steps**
- To **protect**
- **Identified third parties**
- From **foreseeable**
- And **serious** harm

• If **d**ereliction of this **d**uty **d**irectly causes **d**amages then there may be liability...

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**Tarasoff is a California case...**

- There is no binding or applicable
- Supreme Court case
- Federal statute or regulation
- State by state, discipline by discipline... highly variable and poorly defined

And the various Codes of Ethics remain vague

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**HIPAA: Permission to warn**  
 (Letter to Nation's HCPs, 2013)

If you read the regulations closely, we are saying...

"a health care provider **may disclose** patient information, including information from mental health records, if necessary, to law enforcement, family members of the patient, or any other persons who may reasonably be able to prevent or lessen the risk of harm."

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**Duties to third parties are about future risk, not past behavior**

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**Dunkle v Food Service East**

(400 Pa.Super. 58, 1990)

"We decline to extend the duty to protect a **non-identifiable** (in advance of her death) and **arguably non-foreseeable** third-party victim...Nor may one infer that by virtue of their cohabitation, [victim] would be the most likely target of [assailant]'s possibly violent tendencies."

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**Leonard v Latrobe Area Hospital**

(425 Pa.Super. 540, 1993)

"Not only **foreseeability** of a general danger, but the **specific identity of an intended victim**, must be brought to the attention of the physician before it can be held that a physician has a duty to warn the intended victim."

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### The murder of Teresa Hausler

- Dating GJ
- Couples therapy → parallel
- Moved out
- Ongoing homicidal fantasies
- Threats made and recanted



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### **Emerich v Philadelphia Center for Human Development** (554 Pa. 209, 1998)

- Clear facts, complex ruling
- "A mental health care professional, under certain limited circumstances, owes a duty to warn a third party of threats of harm against that third party"
- "Mental Health Professional"

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### What type of threat / imminence?



- "Threats of harm"
- "Potential harm"
- "Immediate, known and serious risk of potentially serious harm"
- **"Serious bodily injury" x3**
- **"Specific and immediate threat" x3**

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**Warn who?**



- "Particular individual"
- "Specific identity"
- "Specifically identified or readily identifiable victim" x7

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**"The concept of a duty to protect by warning ... has met with virtually universal approval"**

Duty to warn, personal harm	1
Duty to protect (specific people)	6
No duty to warn or protect	2
No threat means no duty	1
Duty to protect (class of people)	1
Duty to protect (barn)	1
Duty for dangerous drivers	2
No duty for dangerous driving	1
Duty to exercise due care	1
Duty to report child abuse	1

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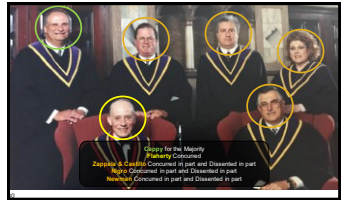
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**OMHSAS steps in to clarify**  
 (OMHSAS Bulletin 99-09)



- "a duty to warn **or otherwise protect** third parties"
- Discusses **"possibility"** that ... the duty to protect **might sometimes** be discharged by means other than warning the target" ... Which might mean commitment even though "the Emerich Court did not address that issue"
- Emphasis on **specific and immediate** threat
- "Mental health professionals and mental health facilities should **discuss the implications** of the Emerich decision **with their lawyers**, so that they can develop procedures that are consistent with it."

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**F.D.P. v Ferrara**  
 (804 A.2d 1221, 2002)

"If we allow recovery against mental health and mental retardation providers for harm caused by their patients **except in the clearest of circumstances**, we would paralyze a sector of society that performs a valuable service to those in need of mental health care."

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**The murder of Lisa Maas**  
 Extension of warning to smaller, finite, & relatively homogenous groups



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**Cert granted by PA Supreme Court**

For the specific question of who to warn

Can an "identifiable third party" for purposes of a mental health professional's duty to warn third parties consist of a group of unnamed neighbors under Emerich, which limits a mental health professional's duty to warn to specific, imminent threats of serious bodily injury made against specifically identified or readily identifiable third parties?

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**Plaintiff Brief**

- "That Barwell could ask about homicidality and not believe there was imminent risk is 'patently false'"
- Because assailant had a rep payee "Defendant's contention that TA was a 'voluntary' patient receiving only 'voluntary' outpatient care is simply not credible"
- "The practicality of Defendant's warning [assailant's] neighbors is not relevant"

*But this is the standard of care*

*And this is especially contrary to statutes and precedent...*

*Wait, what?!!?*

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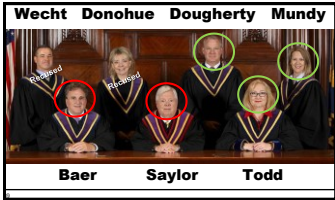
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### Maas v. UPMC (234 A.3d 427, 2020)

"The trial court and the Superior Court thus properly determined the duty to warn applies not only when a specific threat is made against a single readily identifiable individual, but also when the potential targets are readily identifiable because they are members of a specific and identified group — in this case, "neighbors" residing in the patient's apartment building."

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### The class of "building dwellers" was identifiable and distinguishable

- TA had identified not living in a PCH as a stressor
- Repeatedly made threats towards "neighbors"
- TA was "targeting residents of his apartment building specifically ... TA referred on multiple occasions to 'next door neighbors,' and a 'neighbor' who knocked on his door 'in the middle of the night'"
- Threatening to kill a "neighbor" was not ambiguous
- Yet threatening somebody in the neighborhood is not ambiguous (citing *Thompson v City of Alameda*)

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### Groups, amorphous or otherwise

"In these circumstances, the potential targets are not a large amorphous group of the public in general, but a smaller, finite, and relatively homogenous group united by a common circumstance. Surely, Lisa Maas was a member of such a group relative to [TA], and described in the complaint as 'all Hampshire Hall tenants, particularly those who resided on the same floor as Mr. A.'"



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**Is specific and immediate now diminished?**

- Plaintiff's Argument: Maas decision states that a "moment's reflection" would have revealed the specificity of the threat with these facts therefore that is what it means
- Defense 1: Cert was only granted on the identifiability element – therefore the Emerich S&I standard remains unchanged
- Defense 2: Intentionally or otherwise, the Court made a false equivocation by implying the facts of Maas as meeting S&I standard – as it was dicta, issue needs to be re-argued

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PHILADELPHIA RECORD  
 Tuesday, December 6, 2022

**Philadelphia remains the No. 1 'Judicial Hellhole,' now joined by Pa. Supreme Court**

LEADER'S  
 By Nicholas Hoffmann Dec 6, 2022



PHILADELPHIA — An editorial board report of "Judicial Hellhole" revealed early in the December Term before the justices, Philadelphia courts have been ranked the No. 1 ranking for the second consecutive year. ...

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**Never worry alone**



- Consult MH professional (or, get a second opinion if you already are a MHP...)
- Engage leadership, legal, malpractice insurer, and / or risk management
- There is no shame in PES referral or admission to gather more data, get second opinions, explore more options, formulate a better plan

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**Practice & Documentation Considerations**

- Clinician's efforts to ask the POI about the **identity of the target** (and what was learned down a class)
- Clinical team's efforts to identify or narrow down a class
- What factors made the clinician believe (or not believe) that the threat was **specific** and **imminent**
- Maybe – (im)plausibility, (im)persistence of the threat
- Who was consulted\*
- Who was warned or informed and what they were told



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**It is always risk vs. risk**

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