Dangerous Patient

written by Richard Leslie | May 24, 2016

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Once again, following the mass shooting at an Oregon community college, there is much public discussion about mental health treatment, mental health reform, the dangers that some of those in need of treatment or those in treatment may pose to society, the restrictions that prevent disclosure of information by psychotherapists, and the restrictions that limit the ability of concerned family members to access information about the patient. With respect to the discussion about mental health more broadly, there is a strong sentiment to examine the role that mental health plays in these mass shootings and other displays of violence; and to examine what can be done within and by the mental health field to help lessen or prevent these mass attacks. One commentator wryly noted that "it's not what is in their hands, but what is in their heads" when arguing that various aspects of the mental health system must be thoroughly reviewed and reformed.

The issues are many, and they are diverse. Part of an examination of the various mental health issues would likely include the common proposal to ban guns to those who suffer from serious or severe mental illness. The parameters of any such ban, and the precise "qualifiers" for the ban, would be hotly contested, especially when the proposal is from Congress and would create a federal standard. State laws often cover this area, and they may be re-examined. Typically, the focus has been upon those who have been involuntarily committed for evaluation and possible treatment because they are considered to present, for example, an imminent danger of violence to self or others, or to be gravely disabled. However, discussions about casting a broader net are occurring.

Another part of possible reform would include trying to make mental health treatment more acceptable (the stigma issue) and more available (the parity and affordability issues, in part). With respect to both availability and acceptability, perhaps it would be good public policy to require insurers and HMOs to cover mental health treatment for 12 sessions (or some other number to be agreed upon), without the necessity of a diagnosed mental disorder. This might encourage the public to seek counseling or therapy as a preventive measure, without the "threat" of being tagged with a named mental disorder.

A portion of any necessary examination that does not get much public discussion is the issue of a therapist's duty, if any, to protect others from the threatened physical violence of the patient – whether or not a gun or other weapon is involved. So many questions are raised when thinking about this issue – some examples follow. Does the therapist have an actual duty to warn an intended victim or victims under certain circumstances? If not a duty to warn, what precisely is the duty? Is the duty specified in statute? Must there be a threat of violence articulated by the patient? What if a patient (a commercial airline pilot) reveals during therapy that he occasionally uses cocaine or simply that he is depressed – is there a duty to protect third parties? What if the therapist warns an intended victim even though the

patient never directly communicated the threat to the therapist – would a breach of confidentiality suit by the patient be successful when the threat may have been inferred by the therapist from the facts and circumstances extant? Does the law provide immunity from liability to the practitioner who takes specified action in dangerous patient situations? Should a therapist ever take a gun from the patient if the patient asks for such help or permits such action? What liability does the therapist have if he or she does not take the gun and it is soon thereafter used in an act of violence?

Perhaps this is a good time to think about some or all of these questions. Because of the increased attention from the public and from policymakers regarding mental health issues related to gun violence committed by those with a mental health treatment history, the dangerous patient issue is once again in full public view. Whenever the next incident occurs, especially where the patient has been in treatment shortly before a violent act occurs, intense scrutiny may fall upon the treating mental health practitioner. Some may attempt to judge the practitioner with the benefit of hindsight when the right (or wrong!) case comes along, claiming that the therapist should have known of the dangerous propensity of the patient. Are therapists required to predict dangerousness? Is there immunity from liability for therapists in “failure to predict” cases?

Some of the questions asked above, and others, have been discussed in articles I have written for past issues of this Avoiding Liability Bulletin. I believe there are ten articles in the “archives” (dating back to 2005) that address the issue of dangerous patient in one way or another. For those interested in exploring the dangerous patient issue further, I encourage you to go to the”Client Death, Suicide Risks or Criminal Acts” or “Avoiding Liability Bulletin” categories within the “Avoiding Liability > Mental Health” section of the CPH & Associates website. It is important to remember, as I so often say, that state law varies, sometime in fine nuance (especially on this issue). Knowledge about the fine nuances in the law (case law included) related to the dangerous patient issue is necessary.