Dangerous Patients – Duty to Warn / Duty to Protect

written by Richard Leslie | March 1, 2017

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I have written extensively on this topic in this Avoiding Liability Bulletin and elsewhere. Over the years, statutes may have been enacted or amended and court decisions rendered in various states that have tweaked, changed, or clarified the duties of practitioners in dangerous patient situations. Each state treats the subject matter of dangerous patients (and duty to warn/duty to protect) according to its own statutes and case law. The California Supreme Court's decision in the famed Tarasoff decision of 1976 (see below) has significantly influenced state courts and legislatures nationwide. Be sure that you know what the precise duty is in your state, when the duty is triggered, whether or not there is an immunity from liability statute in your state, and if so, what actions must be taken in order to be entitled to the immunity available. Knowledge of state confidentiality laws is also important because they may inform practitioners of when the law permits or requires disclosures in dangerous patient situations.

Recently, the Supreme Court of the State of Washington decided a case (Volk v. DeMeerleer) that has caused considerable concern for mental health professional associations and practitioners practicing in that state. The Court stated that society has a strong interest in protecting itself from mentally ill patients who pose a substantial risk of harm and that society relies upon mental health professionals to identify and mitigate such risks. The Court essentially held that practitioner liability for breach of the duty to protect extends to any foreseeable victim(s) of the patient's violence, not just those victims who are identified or readily identifiable. The court said that whether a particular victim is foreseeable is "a question of fact appropriately resolved by the fact finder" (generally a jury). Seemingly, from my reading of the decision, the precise identity of the victim does not have to be foreseeable – it can be any possible victim – any member of the public that the practitioner may have a duty to protect from the patient's threatened violence or violent propensities (dangerousness). Rather, it is the foreseeability of the patient's violent acts that juries and judges will likely be considering.

The concern is that psychotherapists in Washington will now be exposed to greatly increased liability because the victim of a patient's violence may be any member of the public – that is – someone who was not threatened by the patient or identified by the patient as the intended victim. When the target of the patient's anger or threatened violence is identified or readily identifiable, one of the several options available to the practitioner is to make reasonable attempts to warn the intended victim. Such a warning is more difficult, sometimes not possible, when the patient's anger or violent propensities are more generalized or are not yet apparent to the practitioner. Liability to victims of a patient's violence should not ordinarily occur unless the therapist is found to have negligently failed to identify or address (mitigate) the patient's anger and violent propensities by failing to take one or more actions. The

action(s) taken in any particular case will depend upon the particular circumstances extant.

Potential victims in Washington (and elsewhere) can be protected in the first instance by the actions of the practitioner in properly assessing, diagnosing, and treating the patient. If the practitioner in Washington is negligent in addressing the patient's anger or violence issues (does not exercise reasonable care in identifying and mitigating the patient's dangerousness), the therapist may be held liable for the harm caused to those who are the victim(s) of the patient's violence – even though the victim(s) are not identified or readily identifiable. There was an additional issue in Washington as to whether the duty to protect foreseeable victims extended to outpatient settings, and the court concluded that it did – based primarily upon the special relationship that exists between a patient and a mental health professional.

Actions (in addition to warning or making reasonable efforts to warn the intended victim) that practitioners may take include notifying law enforcement, arranging for hospitalization of the patient (either voluntary or, if necessary, involuntary), increasing the frequency and intensity of treatment, including referral for a psychiatric evaluation and possible medication, psychological testing, and clinical consultation regarding assessment, diagnosis, or treatment issues. Of course, it is entirely possible that a patient will commit an act of violence against one or more persons in a situation where the therapist has not yet become aware of the patient's violent propensities. The question in such cases is whether the therapist should have known of the patient's violent propensities. The answer in such cases is dependent upon the practice standards of the mental health profession involved and whether or not the therapist acted reasonably – that is, like the prudent practitioner of the same licensure would have acted under the same or similar circumstances – in assessing, diagnosing, and treating the patient.

The phrase "duty to warn" can be misleading – depending upon the nuances of state law. For example, many (in California and elsewhere) have long believed that the famed Tarasoff decision of the California Supreme Court (1976) created a "duty to warn." Such long held belief is not correct – although there is good reason for this incorrect belief (discussed previously in this Bulletin). Warning the identified victim was seen by the Court as one of the several options (not an absolute duty) available to the therapist. The actual duty articulated by the Court was for the therapist to *use reasonable care to protect the intended victim* against the serious danger of violence presented by the patient. The Court stated that "the discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." This duty arises, as per the Court's decision "when the therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another."

In California, and in other states, warning the identified victim, or making reasonable efforts to warn the identified victim, may be one of several steps necessary in order to achieve immunity from liability in dangerous patient situations. Immunity from liability statutes typically specify that one or more specific actions be taken by the therapist – such as, but not limited to, notifying law enforcement and making

reasonable efforts to warn the identified victim – in order for immunity from liability to apply. Some immunity statutes may also provide, in part, that there is no liability, and no cause of action shall exist, unless the patient communicates to the therapist a serious threat of physical violence. Such a provision limits the burden upon therapists to "predict" violence. Without a strong immunity statute, practitioners are vulnerable to claims from victims of patient violence that the therapist knew or should have known of the danger that the patient posed and did not take reasonable actions to prevent the violence. Second guessing the treating therapist, after the fact of a violent act, is not difficult for plaintiff's lawyers – with the help of expert witnesses.

As stated above, practitioners should know whether or not there is an immunity statute in their respective states, and if there is, the specific breadth of the statute and the actions required to be taken. I have counseled therapists who ultimately decided not to seek immunity from liability (in California) because they felt it was not in the best interests of their patient to take one of the actions required by the statute (for example, notifying, and thus involving, the police). Instead, they decided to take other actions that they deemed clinically appropriate (hospitalization, for example) and felt comfortable defending in the event that there was a claim or lawsuit alleging negligence and breach of the duty to protect. When immunity from liability does not exist because of the practitioner's decision, the therapist's attorney simply defends a claim or lawsuit on the basis that competent and reasonable care was provided and that the duty to protect was properly exercised. A well-documented treatment record can help in that defense – assuming that the practitioner used good clinical judgment and that one or more expert witnesses agree!