Expanded liability for violent acts of outpatients: The Volk decision

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On December 22, 2016, in a ruling which will have significant implications for all mental health professionals throughout our state, the Washington Supreme Court issued its ruling in the case of Volk v. DeMeerleer, expanding the potential liability of practitioners for their clients’ violent acts toward others.

The question before the court was whether a mental health professional (in this case a psychiatrist) could be held liable for their outpatient client’s violent acts toward others, were he found to be negligent in his care, when the patient did not express an overt threat to a specified potential victim as is required by Tarasoff v. Regents of the University of California case law. In a 5-3 ruling the decision of the court was in favor of the plaintiffs who had sued the psychiatrist, thus upholding the duty to protect potential victims from violent acts toward others. Here’s the specific language of the holding:

Accordingly, we hold that once a mental health professional and his or her outpatient form a special relationship ...... the mental health professional is under a duty of reasonable care to act consistent with the standards of the mental health profession and to protect the foreseeable victims of his or her patient.

The evidence showed that the psychiatrist had information about his patient’s potential for violence, and was aware that he had been struggling with his feelings about his ex-fiance, but took no action, other than recommending he stay on his medication. Several months after his last visit with the psychiatrist, the patient murdered his ex-fiance and one of her children, and then committed suicide.

Significantly, under the traditional reading of the Tarasoff rule, the psychiatrist would not be liable for the violent behavior of his patient because there was no actual threat to a named victim. In expanding that traditional liability the court said that the professional incurs “a duty to take reasonable precautions to protect anyone who might be foreseeably endangered by the patient’s condition.” (emphasis added here).

It’s important to note that the terms used — “reasonable care” and “foreseeable victims” and “protect” — are vague. Nor is it clear just what steps should have been taken to protect the victims. That is quite usual in these circumstances, as the specifics of each case will differ. The supreme court is making a ruling of law, not of fact, and is simply setting up the standards by which negligence will be determined in the lower courts.
One last point: If you do your job adequately, adhering to the accepted standards and practices of our profession, you’ll be fine. Even if your client behaves violently. That said, we as a profession need to clarify our standards and educate our members so that practitioners — and the courts — know what is an acceptable protocol of care and what constitutes negligence.

Digging Deeper: Understanding Our Duty to Potential Victims

Since this ruling expands the limits of our potential liability, it’s important that we understand clearly what the court is saying. The court is establishing and clarifying our duty toward third parties who might be harmed by our clients. That duty arises out of a “special relationship,” meaning that in other circumstances, where there was no relationship, we wouldn’t have the duty. But in our role as mental health professionals in relationship with clients who are potentially violent we have an additional duty to act appropriately under the circumstances. Specifically, our duty is one of:

1. Reasonable care
2. Consistent with the standards of our profession
3. To protect foreseeable victims.

The court is NOT saying that we need to predict the violent behavior of our clients. The court is NOT saying that we need to predict who the victim will be. The court is saying that we need to act as a “reasonable person” under the circumstances (i.e. we have a relationship with someone who might act violently) to protect foreseeable victims. A “foreseeable” victim means one that a “reasonable person” would foresee.

As the court explained:

*Without question mental health professionals face an incredibly difficult task in ascertaining whether a patient will act violently. Nevertheless the .... duty does not require that the mental health professional are the correct determination of dangerousness every time the professional forms a mental health professional/outpatient relationship. To impose such a burden not only would be untenable given medical technology and the unpredictability of the human psyche but would expose psychiatrists to insurmountable costs in defending lawsuits for each incorrect conclusion. What the current standard would require, however, is the ..... duty to act with reasonable care, informed by the standards and ethical considerations of the mental health profession when identifying and mitigating the dangerousness of psychiatric patients. (p. 36)*

Note that the duty is NOT a duty to warn; it is a duty to protect. That means that we COULD warn appropriate parties if that would be protective, or we could arrange to have the client hospitalized or otherwise constrained. Or do something else if it would be protective.
The court was careful to explain that in this ruling it is balancing competing values:

*It is our belief that this standard fairly balances the needs of protecting the public, allowing recovery for victims of psychiatric patients’ crimes, and providing the necessary protection for mental health professionals to perform their jobs.*  (p. 37)

In particular, the court articulated the following considerations:

(1) *The psychotherapist’s ability to control the outpatient*;
(2) *the public’s interest in safety from violent assault*;
(3) *The difficulty inherent in attempting to forecast whether a patient represents a substantial risk of physical harm to others*;
(4) *the goal of placing the mental patient in the least restrictive environment and safeguarding the patient’s right to be free from unnecessary confinement*; and
(5) *the social importance of maintaining the confidential nature of psychotherapeutic communications.*  (p. 24).

Importantly, the dissent, in considering those same factors, came to the opposite conclusion, so opinions vary about how best to balance the various values at stake.

**Some Closing Thoughts about the Broader Context**

As those of us in the profession are aware, most people who suffer from mental illness do not act violently. But unfortunately, some do, and those that do tend to grab the headlines. It is part of our role as mental health professionals to represent accurately the risk of violence to those in our communities who may be frightened and uninformed. We need to educate the public as well as protect them. Hopefully this ruling will open the channels for that conversation, both within our profession and in the broader society.

This ruling should provide an impetus for us as mental health professionals to hold ourselves accountable for conducting adequate assessments of the potential for violence by our clients, whether in the form of suicide, or homicide, or other acts of violence. We also need to look toward the potential victims of such violence and know what alternatives are available to keep them safe. Predicting violent behavior is impossible, and is not required. But being careful is.