Emerich v. Philadelphia Center for Human Development: The New Duty to Warn in Pennsylvania

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The Pennsylvania Supreme Court, in a case of first impression, recently addressed the duty of Pennsylvania mental health professionals to a non-patient third party.[1] Although the Court upheld the dismissal of the lawsuit on the pleadings prior to trial, the Court created a "duty to warn" specific, endangered third parties. The holding leaves much to be desired for mental health professionals trying to manage potentially violent patients, both in the community and the hospital.

Facts of the Case

According to the Court opinion, the underlying facts of the case were obtained by the pleadings of the parties, and the usual legal discovery process was not initiated. Thus, no depositions or interrogatories were completed, and the Court had to rely on quite limited information about the clinical and factual issues. The trial court dismissed the case prior to this discovery process, and the appellate courts (Superior and State Supreme) were asked to review the trial court's dismissal of the lawsuit.

The case arose from the homicide of a woman (Hausler) by her boyfriend (Joseph). Although they had lived together in Philadelphia prior to the homicide, they were separated by the time of the homicide. Joseph had been diagnosed as having "posttraumatic stress disorder, drug and alcohol problems, and explosive and schizo-affective personality disorders." He had a history of verbally and physically abusing both the victim and his ex-wife. He had "often threatened to murder" the victim and had homicide ideation to her. Both Joseph and Hausler had been treated by the defendant mental health agency (Philadelphia Center for Human Development). Joseph was seeing a psychiatrist and a counselor with a master's degree in divinity, and both clinicians were sued as well.

The victim ended the relationship with Joseph several weeks prior to the homicide and moved out of their joint residence. After this, Joseph "indicated dur-

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ing several therapy sessions... that he wanted to harm" her. At or about 9:25 a.m. on the morning of the homicide, Joseph called his counselor and informed him that he was going to kill the victim. The counselor held an emergency one-hour therapy session with Joseph at 11 a.m., during which time Joseph reported that he would kill her (Hausler) if she returned to their apartment to remove her belongings as she had planned to do. The counselor recommended that the patient enter a hospital but Joseph declined to do so, indicating that "he was in control and would not hurt" her. At 12:15 p.m., the counselor received a call from Hausler who told him that she was coming to Philadelphia to collect her clothing from their apartment. When she asked the counselor about Joseph's location, the counselor instructed her not to go to the residence, although apparently not providing other specific information about Joseph's threats to kill her. Nevertheless, Hausler disregarded those instructions, went to the residence, and was fatally shot by Joseph at 12:30 p.m. Joseph was subsequently convicted of her murder.

A wrongful death civil suit was filed against the clinicians and the agency alleging negligence in failing to properly treat Joseph, and in failing to properly warn the victim and others of the threats against her life. In an unusual move, the trial court granted judgment for the defense, ruling that Pennsylvania case law had not yet adopted a duty to warn third parties. The court also held that, even if there were a duty to warn third parties, the counselor's instruction to the victim adequately discharged that legal duty. The superior court, an intermediate appellate court, upheld that dismissal, and the case was appealed to the state Supreme Court. None of the courts addressed the allegations of negligent treatment of Joseph apart from the issue of the third party warning.

Supreme Court Ruling

The state's highest court took two years to issue its ruling in the case, perhaps suggesting that the Court struggled with the complex issues. The Court's majority and three concurring opinions, however, were not particularly sophisticated or thoughtful, given that the issue before it had been addressed by many other state and federal courts, as well as half of the state legislatures in the United States. The Court cited just two law review articles and none of the psychiatric literature on the subject. The Ohio Supreme Court, an adjacent state, thoroughly addressed the same issue in 1997, but the Pennsylvania Court did not even cite that opinion.[2]

The Pennsylvania Psychiatric Society, along with the Pennsylvania Medical Society, submitted an *amicus curiae* brief to the Court in support of the defendant mental health professionals, urging the Court not to create a duty to warn third parties or to carefully limit such a duty if one was created. The Court adopted the second but not the first half of the brief.

The Court (four of the six justices who participated in the case) had little trouble in adopting a legal duty for mental health professionals to warn third parties, given the ample precedent for this in other jurisdictions. The Court was not apparently

troubled with the fact that adopting such a duty creates a judicial standard of medical care, an intrusion in the practice of medicine no less objectionable than the current wave of economic intrusions via managed care. The Court analogized its adoption of the duty to warn third parties to infectious disease litigation involving physicians. Litigation both in Pennsylvania[3] and elsewhere[4] has held that physicians have a legal duty to the sexual partners of their patients when the patients infect their partners because of their physicians' negligence in diagnosing, treating, or informing the patients of their infectious conditions. These cases have not, however, typically held that the physician has a duty to directly warn the third party. The Court also noted that third party liability is already imposed in Pennsylvania for negligently discharging a patient from a psychiatric hospital.[5]

The Court did, however, make some attempt to limit the newly created duty to warn third parties. Mindful of the well known difficulty in assessing and predicting interpersonal violence, the Court explicitly stated that "we will not require a mental health professional to be liable for a patient's violent behavior because he fails to predict such behavior accurately."[6] Fumbling awkwardly for qualifiers, the Court held that "it is reasonable to impose a duty on a mental health professional to warn a third party of an immediate, known and serious risk of potentially lethal harm."[7] The duty to warn "arises only where a specific and immediate threat of serious bodily injury has been conveyed by the patient to the professional regarding a specifically identified or readily identifiable victim."[8] The Court did not decide whether the duty to warn could be adequately discharged by warning relatives and friends of the victim or warning the police.

Beyond adopting the duty to warn using a specific threats to specific persons rule, the Court upheld the lower courts' dismissals of the suit. It held that the counselor's instructions to the victim were an adequate warning to her as a matter of law, especially since she knew of his history of violence to her. Two dissenting opinions disputed whether the counselor had adequately discharged his legal duty to warn when he had only instructed the victim not to go to the apartment. Although the factual record is incomplete, the clinician may not have explicitly told her that her life had been threatened. The Court did not rule on the issue of whether the victim, who was also receiving mental health services, had the mental ability to comprehend the counselor's instructions to her, which question had been raised by the appellant.

Discussion

The Pennsylvania Supreme Court explicitly stated that it was not considering whether it would hold mental health professionals "to a broader duty to protect or commit to inpatient treatment." This omission is the major failure of the Court's ruling for mental health professionals. The Court apparently disregarded or misunderstood the history of the *Tarasoff* litigation in California, which involved two decisions by the California Supreme Court. In its 1974 decision, that Court adopted a duty to warn endangered

third parties.[9] In its 1976 decision, which withdrew the earlier decision, the California Court instead adopted a duty to protect third parties.[10] Many clinicians have not appreciated the difference between these respective duties and have operated under the belief of the existence of a universal duty to warn rather than protect.

The Pennsylvania high court failed to discern the difference between the existence of a duty to a third party and the discharge of that duty. The Court wrongfully conceived of a duty to protect as a broader (i.e., more demanding) duty than the duty to warn; both warning and protecting are methods of discharging the duty, rather than expressions of the underlying duty itself. The Court may have believed that it was helping clinicians by adopting a "narrower" duty to warn, but actually the opposite obtains. Of course, a duty to protect the general public is broader than a duty to protect, or warn, a specific individual, and mental health professionals can be grateful for that limitation of liability in the Court's opinion. But the Court could simply have adopted a duty to protect only identified or readily identifiable third parties.

In adopting a specific duty to warn rather than protect third parties, the Pennsylvania Court has unduly tied the clinician's hands, perhaps even at the public's peril. The Court has completely ignored the fact that mental health professionals often are able to manage a patient's threat, even of lethal and imminent harm, by clinical means alone. It may be unnecessary and counterproductive for a clinician to issue a warning, which is a nonclinical task, rather than hospitalize or otherwise treat a potentially violent patient. Clinicians can also arrange for the removal of firearms, without having to warn a third party. The Court ignored the possibility that routinely warning victims can precipitate violence rather than mitigate it. The Court ignored the commonplace situation in which a patient threatens violence but has no actual means of executing the threat (i.e., has no weapon or the victim is inaccessible). Mental health professionals are trained and experienced in using their clinical judgment to manage complex situations, and they should not be compelled to issue mindless warnings to third parties when clinical management best serves to protect the third party. The Court raised but did not resolve the issue of whether there is a duty to warn in the case of the patient who recants a threat, as did Joseph in the present case.

In its clumsy attempt to circumscribe the new duty, the Court gave no indication that it understood the components of dangerousness, which include the imminence of the possible violence, likelihood of the violence, and the type of harm to the third party. The Court failed to consider that most clinical assessments or predictions of potential violence to others are conditional in nature, and dynamic (i.e., fluctuating)[11] over time. Finally, the Court failed to understand the importance of the therapeutic alliance with the patient in managing a patient's potential violence to others.

Although the Court stated that it would immunize clinicians against the failure to accurately predict violence, and apparently did limit liability to situations in-

volving specific threats to specific individuals, it left clinicians with the *Tarasoff* holding of liability when the clinician "should [have] determine[d]. . . that his patient presents a serious danger of violence" to another.[12] The opinion does not appear to recognize the inherent contradiction of these holdings. The Pennsylvania Supreme Court could have limited the third party duty to those situations in which the clinician does in fact predict violence, as urged by Justice Mosk in his dissenting opinion in *Tarasoff*.[13] This problem could surface when a patient recants an earlier made threat, and no warning is issued, but the patient becomes violent and the third party alleges that the clinician should have determined that the patient was dangerous. Note that in *Emerich*, the victim initiated the contact with the counselor rather than vice versa, as is usually the case. The Court did not state its view of the counselor's liability had the victim not called the counselor and had the counselor not warned the victim.

In conclusion, this decision by the state's highest court is potentially troublesome for practicing mental health professionals. It demands that clinicians shun clinical judgment and intervention in favor of mandatory, nonclinical, and perhaps contraindicated warnings. This requirement may lead to the practice of defensive medicine at its worst, in the service of the clinician rather than the patient or others. The decision reduces the potential therapeutic utility of a third party duty when properly discharged with the patient's cooperation. Worse yet, the Court deliberately left open the door in the future to a "wider" duty to third parties, without defining such duty. But how clinicians actually implement this new legal requirement, and whether they change their manner of practice, remains to be determined.[14–17]

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