possible exculpatory evidence may lie in medical records sought by a criminal defendant, due process and claims of privilege collide. Different jurisdictions resolve this collision of values in different ways. For example in *Jaffee v. Redmond*, 518 U.S. 1 (1996), the psychotherapist-patient privilege found protection in federal civil proceedings under Federal Rule of Evidence 501.

The Utah Supreme Court in *Worthen* balanced the high burden of proof it places on defendants who seek discovery, by liberalizing the definition of "mental conditions" of the patient that can count as elements of the defense. This allows at least for *in camera* review. Should the liberalization go even farther? Theoretically, a complainant in a situation similar to that of B.W. could experience feelings that have no longitudinal trajectory, that are merely fleeting, temporary emotions but that could still engender an abuse accusation. Such allegations, which might deprive a defendant of his liberty, argue for a constitutional right of a defendant to request deep discovery of evidence even if the stringent "reasonable certainty" test were not met. In considering the value of maintaining confidentiality versus the due process rights of defendants we must not be neglectful of the discovery process, as it too provides a measure of balance in the competing interests of a complainant's privacy and the defendant's rights of discovery of exculpatory evidence. Namely, *in camera* viewing of any records that are considered to be privileged should be confined to the trial judge who limits disclosure to the relevant, exculpatory communications.

Disclosures of financial or other potential conflicts of interest: None.

The Duty to Protect From Third Parties: Common Law Versus Statute

Thomas Hartwig, MD
Resident in Psychiatry

Lizette Solis, MD
Resident in Psychiatry

Craig Lemmen, MD
Director, Fellowship In Forensic Psychiatry

Department of Psychiatry
University of Michigan
Ann Arbor, MI

In Considering Third-Party Claims Against Mental Health Providers, Alabama and Michigan Courts Reach Different Results Based on Degree of Abrogation of Common Law by Enacted Statutes

Two state supreme court decisions dealt with medical malpractice cases, each based on third-party liability claims. These two decisions illustrate the relationship between common law and statutory law in resolving such duty to protect actions. In the Alabama case, *Mosley v. Brookwood Health Services*, 24 So.3d 430 (Ala. 2009), medical liability is governed by the Alabama Medical Liability Act of 1987 [Ala. Code §§ 6-5-480 to 6-5-488]. This law expressly states that it applies to any action for injury, damages, or wrongful death and thus eliminates any common law principles from use by plaintiffs. The straightforward application of the statute functions to limit liability for malpractice defendants and eases the burden on the health care system. In our second case, the statute in question comes from the Michigan Mental Health Code (MMHC) (1974) [Mich. Comp. Laws §§ 330.1100 to 2106]. The MMHC is a wide-ranging document that has the overarching purpose of protecting mental health consumers. The question in *Dawe v. Dr. Reuven Bar-Levav & Assocs.*, 780 N.W.2d 272 (Mich. 2010), is the degree to which the relevant statute, Mich. Comp. Laws § 330.1946, is intended to replace common law pertaining to a psychiatrist's *Tarasoff* duty.

Mosley v. Brookwood Health Services, Inc.

Facts of the Case

In March 2003, Ms. Sarah Mosley was an inpatient at Brookwood Medical Center in Alabama. "Patient A" (as she was referred to in court documents) was also in treatment there. Patient A had required a time out that morning at 9:15 a.m., but was subsequently quiet and calm during routine checks between 9:30 a.m. and noon. Then at 12:15 p.m., she suddenly attacked Ms. Mosley. Ms. Mosley sustained injuries and filed a medical malpractice lawsuit against the hospital as a result of being attacked. She alleged that the hospital negligently failed to seclude Patient A after her combative behavior and had negligently failed to contact a doctor for authorization to seclude. Deposition testimony by a hospital staff member established that routine unit procedures included 15-minute checks, a 15-minute time out for combative patients, and a 15-minute

seclusion period with the door locked if the time out was insufficient and a doctor so ordered. The trial court utilized the hospital policy as the standard of care, noted that Ms. Mosley produced no evidence that a violation of the standard of care had occurred, and granted summary judgment to the hospital. Ms. Mosley appealed to the Alabama Supreme Court.

Ruling and Reasoning

The Alabama Supreme Court found that the Alabama Medical Liability Act (AMLA) did apply to the Mosley lawsuit. The AMLA requires the claimant to demonstrate three separate tenets to establish malpractice: that a standard of care existed, that deviation from that standard occurred, and that deviation from the standard resulted in harm. They found that Ms. Mosley had not shown, through the proffered deposition testimony, that there had been a breach of the standard of care. Because there was no breach of the standard of care, the case could not proceed further and the supreme court unanimously affirmed the trial court's grant of summary judgment in favor of the hospital.

Discussion

One remarkable aspect of this case is the straightforward determination in favor of the hospital. The application of the AMLA in this case protected the hospital by dismissing other causes of action and allowing the defense to show only that a local standard of care was met, which is typically less rigorous than a national standard and which they showed by entering hospital policy into the record. That placed a high burden on the claimant. However, it was also notable that Ms. Mosley did not introduce any evidence regarding the prevailing standard of care. Such evidence typically comes in by plaintiff through the use of plaintiff expert testimony. There was nothing to contradict deposition testimony of a hospital staff member regarding hospital policy and whether it was appropriately utilized. The AMLA statute precluded the application of common law and limited the options of the plaintiffs.

Dawe v. Dr. Reuven Bar-Levav & Assocs.

The Supreme Court of Michigan ruled that a statute that defines a psychiatrist's duty to warn or protect a patient does not abrogate the psychiatrist's common law duties to a patient. The statute did define a mental health professional's duty to protect a third party, even if it is one's own patient. The statute did not, however, abrogate other common-law special-relationship duties to his or her patients.

Facts of the Case

Joseph Brooks was a former patient of Drs. Reuven and Leora Bar-Levav, the defendants, and he was also a former participant in group therapy sessions. On June 11, 1999, he entered the psychiatrists' office and shot and killed Dr. Reuven Bar-Levav. He then entered a back-office area where a group therapy session was in progress and killed one patient and wounded others, including the plaintiff, Elizabeth Dawe. Mr. Brooks then committed suicide at the scene.

Ms. Dawe sued the defendants (which included the estate of Dr. Reuven) claiming that they were liable for both common-law medical malpractice and, under Mich. Comp. Laws § 330.1946, for failure to warn her of or protect her from a threat. She argued that Mr. Brooks had made threatening statements to the defendants and had demonstrated his ability to carry out the threats when he had once previously presented to their office with a gun. Ms. Dawe also claimed that Mr. Brooks had given the defendants a "manuscript" that could be interpreted as a threat of violence against other members of the group therapy sessions, including the plaintiff. Finally, Ms. Dawe claimed that the defendants had breached the standard of care owed to their patient and committed common-law medical malpractice by negligently placing Mr. Brooks in her group therapy session, despite knowing or suspecting that Mr. Brooks was not a suitable candidate for group therapy.

The trial court denied the defendants' motion for summary judgment. The case was heard by a jury. The defendants also moved at the end of the plaintiffs' proof for a partial directed verdict on plaintiff's claim of failure-to-warn-or-protect claim under Mich. Comp. Laws § 330.1946. This was also denied. When the jury returned a verdict in favor of Ms. Dawe, the defendants moved for judgment notwithstanding the verdict and for a new trial, both of which were denied.

On appeal by the defendants, the court of appeals reversed the trial court's denial of defendants' motion for a partial directed verdict, vacated the judgment, and remanded the case for entry of an order granting defendants' motion for a partial directed verdict. The court of appeals majority ruled that Mich. Comp.

Laws § 330.1946 limited a mental health professional's duty to warn or protect third persons; as such, it abrogated all common-law claims for failure to warn or protect. The dissent argued that MCL § 330.1946 did not abrogate the defendants' common-law duty to avoid putting others in danger of harm at the hands of a patient. The court of appeals granted leave to appeal to the Michigan Supreme Court.

Ruling and Reasoning

Mich. Comp. Laws § 330.1946 is the applicable statute from the MMHC dealing with a mental health professional's duty to warn or protect. According to subsection 1 of that statute, a duty upon the psychiatrist arises when a threat of physical violence is made against "a reasonably identifiable third person" and the threatening individual has "the apparent intent and ability to carry out that threat in the foreseeable future. " It goes further and states, "Except as provided in this section, a mental health professional does not have a duty [to warn or protect a third person]" (Mich. Comp. Laws § 330.1946(1)). A straightforward reading of the above would imply that there is no duty to warn or protect an unidentifiable third party in Michigan.

On review of the case, Ms. Dawe was never identified to the psychiatrists as a target by Mr. Brooks. Therefore, a strict reading of the statute implies that there could not be, under the statute, any duty to warn or protect Ms. Dawe. This conclusion is consistent with the reasoning of the court of appeals.

The Michigan Supreme Court noted that Michigan case law has considered a psychiatrist-patient relationship to be a special relationship imposing a duty on the psychiatrist to take reasonable action to protect one's own patients and also to protect a third party from harm. The court noted that common law remains in force until modified or preempted by statute. The question before the court was thus whether the statute was intended to abrogate the common law duty that would have included making reasonable efforts to protect even unidentifiable third parties. The court held that the statute limited its own scope, as it states that, "except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection or to protect the third person" (Mich. Comp. Laws § 330.1946(1)).

The Michigan Supreme Court thus held that the statute was limited to only those situations in which a threat was made known to the psychiatrist of physical violence to an identified third party and an apparent ability and intent to carry out the threat. The court held that those specific circumstances were not met by the facts in this case and that therefore the statute did not abrogate the common law duty of a psychiatrist to protect a third party. The court reversed the court of appeals' affirming of the trial court's grant of summary judgment, thus allowing the plaintiff to go forward with a common law suit against the defendants.

This decision also sets a precedent for a narrow and selective reading of the language of the MMHC. The majority's protective stance toward the application of the common law may not limit the liability of mental health professionals as much as the legislature may have intended when it enacted Mich. Comp. Laws § 330.1946.

Discussion

The 1976 *Tarasoff* case (*Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976)) was groundbreaking in establishing a duty for psychotherapists to warn third parties of threats made against them by a patient in a therapeutic session. For more than 30 years, state legislatures have struggled with the *Tarasoff* concept. Some have created statutes attempting to define practitioners' responsibility and limit their liability, while some states have remained silent and have not adopted *Tarasoff*-like legislation. Writing such legislation requires a balancing act, weighing the risk of harm to society and the compensation of victims on the one hand against the loss of confidentiality for patients and liabilities for therapists on the other. If the *Tarasoff* duty to warn is exercised, it could damage rapport or even create an adversarial environment in the therapeutic session. More broadly, medical liability legislation presents a similar balancing act. There must be an avenue for redress of wrongs committed resulting in harm to patients. However, there has to be some reasonable boundaries to liability, since malpractice lawsuits and excessively large awards can result in increased costs for medical care and preventive medical practices undertaken merely to avoid malpractice claims.

A comparison of *Dawe* and *Mosley* shows an evident similarity in the enactment by their respective states of legislation that appeared intended to protect treatment providers by limiting their medical liability exposure. There were also important differences.

In the Alabama case, the AMLA has a long Legislative Intent section describing the urgent need for legislation to limit the costs of health care in Alabama (Ala. Code § 6-5-540) and seems to be expressly intended to protect health care providers. The statute specifically abrogates common law claims, and thereby limits liability exposure. Conversely, in Michigan, Mich. Comp. Laws § 330.1946 was thought by the Michigan Court of Appeals to abrogate common law claims, but this statute was found by the Michigan Supreme Court to be more limited. The court therefore allowed a common law claim to survive and go forward and also thereby maintained exposure for Michigan mental health professionals.

The states are confronting escalating medical care costs, of which malpractice claims are seen as one source. States have implemented various approaches to manage these costs. In Alabama, a strict statutory scheme has been adopted expressly excluding all common law remedies for medical malpractice claims and placing procedural and evidentiary hurdles in the path of would-be plaintiffs. Michigan has adopted a more complex and hybrid approach by placing statutory limits on liability for some plaintiff claims, but leaving some common law avenues in place. It remains to be seen whether Michigan's hybrid approach will survive cost-containment pressures, or whether it goes the way of Alabama, substituting statutory regulation for equity relief.

Disclosures of financial or other potential conflicts of interest: None.