

nicians would be well served by coupling good clinical judgment with awareness of the statutes and case law relevant in the jurisdiction in which they practice.

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Duties to Protect and Control

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An Outpatient Mental Health Treatment Facility Does Not Take Charge of a Person Subject to an Outpatient Treatment Order in a Manner That Gives Rise to a Duty to Protect Others From or Control the Person's Conduct

In the matter of *Adams v. Board of Sedgwick County Commissioners*, 214 P.3d 1173 (Kan. 2009), the Supreme Court of Kansas held that an outpatient mental health center and its employees did not owe a duty to those injured by a psychiatric outpatient who became violent nine months after an outpatient treatment order was allowed to expire. Even though there was a basis to continue the outpatient commitment order, it did not equate to a duty to commit; and even if the order had been continued, it would not have given the defendants sufficient control over the patient to prevent the attack.

Facts of the Case

Adam Cummins made violent threats against family members and was admitted to a state hospital in Kansas in 1997, where his diagnosis was bipolar disorder and later was schizophrenia. Between 1997 and 1999, he was hospitalized two more times at another state hospital. Each time he was released, he began a cycle of treatment noncompliance that led to gradual deterioration in his mental status and culminated in his becoming hostile and threatening once more.

From May to July 1999, Mr. Cummins was involuntarily admitted to a state hospital after making violent threats toward his mother and other family members. Shortly after his release, the district court entered an outpatient treatment order directing him to take his medications as prescribed and keep scheduled mental health appointments. The order also required that the outpatient mental health clinic immediately report any noncompliance by him to the district court.

Soon after Mr. Cummins' release, his psychiatrist noted that he was not taking all his prescribed medications, but the noncompliance was never reported to the court. In August 1999, the outpatient treatment order was allowed to expire based on the recommendation of a nurse practitioner under the psychiatrist's supervision. Despite the expiration of the order, Mr. Cummins kept an appointment with the psychiatrist in September 1999. At that time the psychiatrist did not believe he was dangerous. In October 1999, Mr. Cummins' case manager recommended that his case be closed due to noncompliance.

Mr. Cummins' condition deteriorated after he was discharged from outpatient treatment. On May 15, 2000, he kicked down his mother's door and beat her in the head with a hammer. To save her grandmother's life, his daughter fatally shot him. His mother was permanently disabled by her injuries.

Mr. Cummins' mother and daughter named several defendants in separate suits that were eventually combined in this appeal. They alleged that under the Restatement (Second) of Torts § 315 (1965), the defendants had a "special relationship" with Mr. Cummins that gave rise to duties to control his conduct and protect the plaintiffs. The plaintiffs further alleged that the defendants had a statutory duty to report Mr. Cummins' noncompliance to the court and to file an accurate report summarizing his treatment under the Kansas Care and Treatment Act for Mentally Ill Persons, Kan. Stat. Ann. § 59-2945 et seq. (1996).

The district court did not address the question of whether a duty existed, but instead granted summary judgment to the defendants based on their claim that they were immune to liability as a government entity under the "discretionary function" exception of the Kansas Tort Claims Act, Kan. Stat. Ann. § 75-6104(e) (2008 Supp. 2000). The plaintiffs appealed, alleging that the defendants could not claim governmental immunity because they violated

well-defined statutory and common law duties that they were required to follow. The defendants asked the appeals court to affirm immunity, but first to “address the preliminary analytical step of determining whether the Defendants owed a duty to the Plaintiffs” (*Adams*, p 1178). The Supreme Court of Kansas transferred the appeal on its own motion under Kan. Stat. Ann. § 20-3018(c) (1975).

Ruling and Reasoning

The Kansas Supreme Court affirmed, ruling that the defendants had no duty to protect the plaintiffs or to control Mr. Cummins under statutory or common law. The court ruled that the Kansas Care and Treatment Act for Mentally Ill Persons (Kan. Stat. Ann. § 59-2945 et seq. (1996)), created a duty to protect the general public, but this did not imply a duty to protect specific individuals. Moreover, a statutory ability to commit a patient to outpatient treatment did not amount to a statutory compulsion to do so.

With regard to common law, the court ruled that under the Restatement (Second) of Torts §§ 315, 320 (1965), no special relationship existed between the defendants and the plaintiffs that would give rise to a duty to protect the plaintiffs. In essence, the court reasoned that such a duty is owed only in situations in which the defendant takes charge of the plaintiff in such a way as to prevent the plaintiff from defending himself. For example, in *Jackson v. City of Kansas City*, 947 P.2d 31 (Kan. 1997), the court found that police officers owed a duty to an arrestee when his girlfriend slit his throat as he sat handcuffed on the curb after a domestic incident.

Furthermore, the court found that no special relationship existed between the defendants and Mr. Cummins under Restatements §§ 315 and 319 that would give rise to a duty to control Mr. Cummins’ behavior. Among other Kansas cases, it cited *Calwell v. Hassan*, 925 P.2d 422 (Kan. 1996), in which it had ruled that Restatement § 315 liability is limited to situations “in which the party owing the duty did have the ability or right to control the third person causing the harm” (*Adams*, p 1185). The court reviewed mental health decisions from other jurisdictions and reasoned that an outpatient treatment facility has neither legal nor physical custody over a person subject to an outpatient treatment order. Thus, the order did not provide sufficient dominion over Mr. Cummins to create a duty to control him to

the degree that would have been necessary to prevent the attack.

Discussion

Regardless of jurisdiction, courts hearing cases involving duty to protect and control often rely on the Restatement of Torts, a treatise on tort law with which psychiatrists may not be familiar.

For example, in addition to this case, Restatement § 315 and related sections were discussed in *Tarasoff v. Regents, of University of California*, 551 P.2d 334 (Cal. 1976); in *Tedrick v. Community Resource Center, Inc.*, 920 N.E.2d 220 (Ill. 2009) (another case summarized in this issue’s Legal Digest); and in countless intervening cases also dealing with duty to protect.

The Restatement of Torts is part of the much broader set of treatises known as Restatements of the Law. Published by the American Law Institute and based on the principle of *stare decisis*, the Restatements are drafted by lawyers, judges, and professors to “restate existing common law into a series of principles or rules.” Although they are not legally binding, courts often consider the Restatements to be authoritative. (Restatements of the Law: Restatements Defined. Harvard Law School Library. Available at http://web.archive.org/web/20080506173846/http://www.law.harvard.edu/library/services/research/guides/united_states/basics/restatements.php. Accessed December 18, 2010.)

When psychiatrists encounter Restatement of Torts § 315, they should understand that it refers to the legal theory of duty arising from a special relationship (American Law Institute, Restatement (Second) of Torts (1965)):

There is no duty to control the conduct of a 3rd person as to prevent him from causing physical harm to another unless:

a. a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the 3rd person’s conduct OR

b. a special relationship exists between the actor and the other which gives the other a right to protection.

Restatement § 319 clarifies circumstances that give rise to a duty to control:

... [O]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

By contrast, Restatement (Second) of Torts § 320 describes the circumstances that create a duty to protect:

. . . [O]ne who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

- a. knows or has reason to know that he has the ability to control the conduct of the third persons, and
- b. knows or should know of the necessity and opportunity for exercising such control.

Despite a common reliance on the principles articulated in the Restatements of Torts § 315 and related sections, comparing *Adams* with decisions from other states, such as California's *Tarasoff*, demonstrates the widely divergent approaches that courts have taken to interpreting special relationships as they relate to controlling psychiatric patients and protecting third parties in different jurisdictions. Although the instant case may be comforting to psychiatrists, the take-home message, now as ever, is that they must know the law in jurisdictions where they practice.

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Suicide by Cop Mental Health Expert Testimony Meets Daubert Standards

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In a Wrongful Death Suit Involving a Police Shooting, Mental Health Expert Testimony on a Defense Theory of Suicide by Cop Was Found to Meet the Daubert Standard

In *Boyd v. City & County of San Francisco*, 576 F.3d 938 (9th Cir. 2009), the Ninth Circuit U.S. Court of Appeals held that the district court's admission of mental health expert testimony on a suicide by cop defense theory did not constitute an abuse of discretion, as this testimony met the *Daubert* standard and was admissible under Federal Rule of Evidence 702.

Facts of the Case

On May 5, 2004, Cammerin Boyd attempted two separate kidnappings at gunpoint. One victim contacted a San Francisco police officer, leading to a high-speed chase, during which Mr. Boyd leaned out of the window of his vehicle and fired twice at the pursuing officers. He eventually stopped his vehicle and was quickly surrounded by San Francisco police officers, who ordered him to exit his vehicle, put his hands up, and lie down on the ground. According to witnesses, he exited the vehicle and put his hands up, but he did not get on the ground. Instead, he walked toward officers and then back toward his vehicle. San Francisco police officer Timothy Paine reportedly perceived Mr. Boyd to be reaching back into his vehicle, at which point he fired three shots, striking Mr. Boyd twice and fatally wounding him.

Two weeks before Mr. Boyd's death, Oakland police officers had performed an investigative stop on his vehicle, during which they discovered rap lyrics and a newspaper article regarding the murder of an Oakland police officer. Three days before Mr. Boyd's death, Oakland police had arrested him for reckless driving. Officers ordered him out of his car and then commanded him to show his hands and get down on the ground, all of which he did without assistance, despite having two prosthetic legs. His legs had been amputated following a motor vehicle accident in 1993, in which he ran into a light pole while attempting to evade a California Highway Patrol officer. During his arrest by Oakland police, Mr. Boyd reportedly struggled with officers, repeatedly screaming "kill me" and calling them "filthy white racists."

Mr. Boyd's family brought a wrongful death suit against the city and county of San Francisco under 42 U.S.C. § 1983 (2006). The defense presented the expert witness testimony of Dr. Emily Keram, a forensic psychiatrist. Dr. Keram stated that her analysis of the circumstances surrounding Mr. Boyd's death determined that he had attempted to commit suicide by cop and had purposefully drawn police fire to accomplish that end. The Boyd family objected to the admission of Dr. Keram's testimony, as well as to other evidence regarding Mr. Boyd's past. However, the district court allowed her testimony, and after a six-week trial, a jury ruled in favor of the city and county of San Francisco. The Boyd family appealed the judgment on the basis that the district court abused its discretion in allowing the admission of