Department of Corrections, not in the custody of CCS. Therefore, CCS was not liable, since there was no custodial relationship.

Discussion

The main question in this case was the responsibility of mental health providers to third parties when they encounter a patient with violent propensities. In this case, Ms. Holloway asserted that Mr. Jenkins should have been hospitalized at the end of his prison sentence and that she, as well as the citizens of Omaha, should have been protected from Mr. Jenkins or warned of his potential for violence. The first case that dealt with these claims was *Tarasoff v. Regents of the University of California* (551 P.2d 334 (Cal. 1976)), which established the duty to protect third parties, a duty that could be discharged by warning the potential victim. Following the *Tarasoff* decision, many states in the United States codified the specific circumstances that required a duty to warn.

In 1980, the Nebraska District Court decided *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185 (D. Neb. 1980). This case substantially expanded the liability of physicians, as the court found that it was not necessary to have a specific foreseeable victim, rather the public at large could be defined as a foreseeable victim. Nebraska later passed a *Tarasoff*-limiting statute that limited the third parties to "reasonably identifiable victims," as seen in the case of *Holloway v. State*.

In the 40 years since *Tarasoff* was decided, states have dealt with the duty to warn third parties in many different manners. As of 2010, according to a review by Griffin Edwards, 23 states have a duty to warn or protect codified in a statute; 10 states have a duty to warn or protect supported by precedent but not codified by statute; 11 states do not have any formal duty to warn or protect but allow for the breach of confidentiality if a threat is present; and six states offer no guidance on these matters (Edwards GS: Database of State Tarasoff laws. Available at the Social Science Research Network, Abstract 1551505, 2010. http://ssrn.com/abstract=1551505. Accessed on June 18, 2016). Given the range in approaches to managing liability, psychiatrists should know the current legal standard in their states, to ensure that they practice in a manner consistent with the law.

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GPS Monitoring for Life

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Lifelong GPS Monitoring System for Sex Offenders Released from Civil Commitment Does Not Violate Fourth Amendment Rights or the *Ex Post Facto* Clause of the Constitution

In *Belleau v. Wall*, 811 F.3d 929 (7th Cir 2016), the Seventh Circuit Court of Appeals addressed whether a Wisconsin law requiring that persons released from civil commitment for sexual offenses wear a GPS monitoring device 24 hours a day for the rest of their lives violates those individuals' Fourth Amendment rights and the *Ex Post Facto* Clause of Article I of the Constitution. The court reversed a lower court decision and determined that the Wisconsin law was not a violation of Fourth Amendment rights nor an *ex post facto* law, as GPS monitoring in this case is considered to be a reasonable search with the purpose of prevention, not punishment.

Facts of the Case

Michael Belleau was convicted in 1992 in a Wisconsin state court of having sexually assaulted a boy repeatedly for 5 years, beginning when the boy was 8 years old. He was sentenced to one year in jail and probation. Before his period of probation ended, however, he was convicted of having sexually assaulted a 9-year-old girl in 1988 and was consequently sentenced to 10 years in prison. He was initially paroled after 6 years, but his parole was revoked a year later after he admitted to having sexual fantasies about two other prepubescent girls. He acknowledged that he would have molested these girls had he had an opportunity to do so.

Mr. Belleau was scheduled to be released from prison in 2005, but instead was civilly committed to the Sand Ridge Secure Treatment Center after a civil trial in 2004, where he was classified as a "sexually violent person" (*Belleau*, p 931). In 2010, he was released from the treatment center after a psychologist opined that Mr. Belleau was "no longer more likely than not to commit further sexual assaults"

(*Belleau*, p 931). Before his release, however, Wisconsin had enacted a law in 2006 requiring that persons released from civil commitment for sexual offenses wear a GPS monitoring device 24 hours a day for the rest of their lives (Wis. Stat. § 301.48 (2006)). Mr. Belleau was therefore required, from the time of his release from the treatment center, to wear an ankle bracelet containing the GPS monitoring device. The monitor was described as waterproof, so one could bathe and shower while wearing it, but it had to be plugged into a wall outlet for an hour each day while being worn to recharge it. Other than needing access to an electrical outlet to charge the device for an hour daily, there were no restrictions on where a person wearing the monitor could travel.

Mr. Belleau argued that the monitor, while mostly covered by his trousers, was visible to others as he sat down when his pants rose above his ankle, resulting in a violation of his privacy. He also argued that there was no legal basis to require him to comply with the monitoring, given that there was no sentence, probation, or commitment still in place. A suit from Mr. Belleau claimed that the Wisconsin law violated Fourth Amendment protection against unreasonable search and seizure and also claimed the law is in violation of Article I, § 10, cl. 1 of the Constitution, the prohibition of states from enacting *ex post facto* laws. The district judge held the Wisconsin monitoring statue unconstitutional on both grounds, resulting in an appeal by the Department of Corrections, which administered the monitoring statute.

Ruling and Reasoning

The Seventh Circuit Court of Appeals reversed the lower court decision and found that the Wisconsin law did not violate either the Fourth Amendment or the *Ex Post Facto* Clause of the Constitution. In ruling on the Fourth Amendment question, the court noted that historically the Supreme Court had read into the Fourth Amendment a qualified protection against invasion of privacy. However, the Supreme Court also decided in *Grady v. North Carolina*, 135 S.Ct. 1368 (2015), that subjecting sex offenders to electronic monitoring qualifies as a search under the Fourth Amendment. This warrantless search is not unconstitutional, because the Fourth Amendment prohibits only unreasonable searches. The Supreme Court noted in *Grady* that "The reasonableness of search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations" (*Grady*, p 1371). The appeals court noted several cases referenced in *Grady* including, *Samson v. California*, 547 U.S. 843 (2006) and *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), as examples of how to consider the totality of the circumstances. In *Samson*, the Court addressed the reasonableness of a search, absent suspicion and a warrant, of a parolee by a law enforcement officer. In *Vernonia*, the Court ruled on random drug testing of student athletes. Both cases used the "totality of the circumstances" approach, and in both cases, the search was considered reasonable after weighing the intrusion of an individual's privacy interest with the nature and immediacy of legitimate government concerns.

The Seventh Circuit, in considering the totality of the circumstances in the *Belleau* case, noted that sex offenders who target children pose a unique threat to public safety, given the nature of the crimes and the high rates of recidivism. There was, in contrast, an incremental additional loss of privacy from having to wear the ankle monitor for Mr. Belleau, especially given that Wisconsin already made sex offenders' criminal records and home addresses public (*Belleau*, p 934). The court acknowledged and considered the incremental loss of individual privacy as well as the advantage to society that the ankle monitor provided and found that such monitoring of sex offenders is permissible as it satisfies the reasonableness test applied in parolee and special-needs cases.

Regarding Mr. Belleau's second contention, the Seventh Circuit noted that a statute is an *ex post facto* law only if it imposes punishment. They found that the Wisconsin GPS monitoring law does not constitute punishment, as the primary thrust of the law is preventative in nature. They concluded that the aim was not to increase the sentence for Mr. Belleau's crimes, but to deter him from molesting children in the future. The Seventh Circuit noted that the Supreme Court case *Kansas v. Hendricks*, 521 U.S. 346 (1997) held that civil commitment of sex offenders who have completed their prison sentences but are believed to have a psychiatric compulsion to repeat such offenses is not punishment as understood in the Constitution; it is prevention. The Seventh Circuit found the purpose of the Wisconsin GPS monitoring statute to be the same and noted that if civil commitment is not considered punishment, then it follows

that having to wear an ankle monitor is not, either (*Belleau*, p 937).

Discussion

Belleau begins to answer the question left to the lower courts in light of the Supreme Court's ruling in *Grady*. The court opined, in the *Belleau* case, that Wisconsin's GPS monitoring program is reasonable, after considering numerous factors, including the purpose of the program, the invasiveness of the search that a GPS poses, studies on sex offender recidivism, and the reasonableness of the sex offender's expectation of privacy. In short, the court made clear, after considering the individual's civil liberties and the safety of the general public, that the scale of justice, as applied to this case, tilted in favor of public safety.

Forensic psychiatrists or psychologists involved in sex offender evaluations must be aware of the increasing reach of a search such as the one illustrated in this case of GPS monitoring. In conducting risk assessments, evaluators may have to include opinions on the likelihood of recidivism, as well as the risk to public safety if the person is released into the community, taking into account the totality of the circumstances related to that risk. As this may include the risk to the public, with and without GPS monitoring, it would be helpful for forensic experts to have a greater understanding of the vicissitudes of GPS tracking. Furthermore, over time, more research data related to the proficiency of GPS monitoring in mitigating risks of recidivism in community settings would be helpful in supporting such opinions.

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Distinguishing Physician Misconduct from Physician Disability

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Physician's License Suspension Reversed Absent Finding of Impairment in Accordance with the Disabled-Physician Act

In *Mena v. Idaho State Board of Medicine*, 368 P.3d 999 (Idaho, 2016), the Idaho Supreme Court examined the process by which Dr. Mena had sanctions imposed against his license by the State Board of Medicine. They reversed the findings of the district court and remanded on the grounds of lack of substantial evidence of mental illness, as well as inappropriate conflation of legislation dealing with disability and legislation for managing physician misconduct.

Facts of the Case

Before 2007, Robert M. Mena, MD, was a practicing family medicine physician with an unrestricted medical license. He was reported by staff at his hospital of employment for possible drug abuse in March 2007. There were also complaints about his "record keeping, late dictations, and possible inadequate medical care" (*Mena*, p 1000). Evaluators thought that there was no evidence of chemical dependence but concluded that he displayed signs of "burnout" and "co-dependency issues." He was referred for treatment and deemed unfit for active medical practice, and it was recommended that he limit his work hours. Subsequent evaluations supported return to work (in a clinic setting, with supervision) and neuropsychological testing. The testing revealed no impairments preventing him from working, but an evaluation of Dr. Mena's clinical skills suggested that he undergo remediation of obstetrics skills, given "significant deficiencies in his approach" (*Mena*, p 1000) in this area.

The Board of Medicine expressed concern regarding Dr. Mena's providing care for obstetrics patients and those with chronic pain. Pursuant to this, the Board entered into a stipulation and order with him. The Board stated that he had violated the Medical Practice Act (MPA) by failing to provide care to a required standard. It ordered a permanent cessation of Dr. Mena's providing care for both obstetrics patients and those with chronic pain and also that he pursue mental health treatment.

Dr. Mena's hospital of employment terminated his privileges, and Dr. Mena replied with a "rambling and disjointed" (*Mena*, p 1000) 13-page letter. An examining committee appointed by the Board was asked to determine whether, under the Disabled Physician Act (DPA), additional licensure restric-