that point were clearly observable. From a mental health professional's perspective, this definition may set the bar for necessary treatment too high, leaving open the question of whether less overt symptoms would also be considered serious by the court. For example, if Mr. DePaola had expressed suicidal ideation without making an attempt, would the court have found his allegation of deliberate indifference sufficient to move forward with the suit? Furthermore, if suicide had been prevented (e.g., by using safe rooms or restraints) without providing treatment for the underlying mental illness, would the prison officials still be deliberately indifferent? Based on the court's decision in *DePaola*, these important questions remain unanswered.

The court's assessment of Mr. DePaola's symptoms that developed while in solitary confinement is also interesting. The district court initially dismissed Mr. DePaola's allegations, reasoning that some of his mental health symptoms (e.g., staying in bed for days on end) were expected behaviors in segregation and thus did not represent a serious medical need. The appellate court did not specifically address this issue, remaining silent on whether symptoms resulting from solitary confinement were serious enough to require medical attention. From a psychiatric standpoint, although research is mixed on whether segregation can cause *de novo* mental illness, most mental health organizations agree that prisoners in that setting are at risk of deteriorating mental health and should be monitored closely (Kapoor R: Taking the solitary confinement debate out of isolation. J Am Acad Psychiatry Law 42:2–6, 2014). It follows, then, that ignoring psychiatric symptoms that arise in solitary confinement or misinterpreting them as a normal consequence of segregation could result in a failure to provide adequate health care. In *Depaola*, however, the Fourth Circuit chose not to address the issue directly.

A Duty to Protect Without a Clearly Communicated Threat?

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When a Patient Does Not Directly Communicate a Threat, a Psychiatrist May Still Have a Duty to Protect If a Threat is Conveyed Through Other Sources

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In *Rodriguez v. Catholic Health Initiatives*, 899 N.W.2d 227 (Neb. 2017), the Nebraska Supreme Court ruled that the district court erred in finding that the psychiatric facility owed no duty to warn or protect in a case in which threats were communicated indirectly, rather than by the patient directly, to his mental health providers. This ruling may create ambiguity for mental health providers in knowing when they have a duty toward third parties.

Facts of the Case

Between June and August 2013, the Omaha Police Department (OPD) responded to Ms. Melissa Rodriguez's assault, battery, and false imprisonment complaints against Mr. Mikael Loyd on numerous occasions. On August 7, Mr. Loyd was formally charged with misdemeanor assault and battery, and a warrant for his arrest was issued. On August 8, Mr. Loyd voluntarily met with the Omaha police. During this meeting, he expressed to the police a desire to kill his mother. The police deemed Mr. Loyd dangerous, placed him under emergency protective custody, and transferred him to the Lasting Hope psychiatric facility.

Nebraska law requires individuals in emergency protective custody to undergo a mental health evaluation within 36 hours of being admitted to a mental health facility and to be released unless assessed as mentally ill and dangerous to self or others (Neb. Rev. Stat. Ann. § 71–919 (2013)). Mr. Loyd was evaluated at Lasting Hope on August 11 by a psychiatrist from the University of Nebraska Medical Center (UNMC). He was assessed as not dangerous but was not discharged from the facility. During his hospitalization, Mr. Loyd made multiple phone calls to Ms. Rodriguez, and on August 12 he called the OPD to turn himself in on his outstanding arrest warrant. When police officers arrived at Lasting Hope, the staff refused to release Mr. Loyd into their custody on the grounds that his emergency protective hold was still in effect. On August 14, Mr. Loyd left Lasting Hope and killed Ms. Rodriguez. Later that day, he returned to the facility, where he was arrested two days later and charged with murder.

Following Ms. Rodriguez's murder, her parents filed a negligence and wrongful death suit in the Nebraska District Court of Douglas County against three groups of defendants: the Lasting Hope facility and its parent company, Catholic Health Initiatives; UNMC, which employed the evaluating psychiatrist; and the City of Omaha, the employer of two of the police officers involved.

In July 2015, Ms. Rodriguez's parents filed their second amended complaint, alleging that the defendants were negligent in failing to provide Mr. Loyd with adequate mental health treatment and in failing to protect their daughter. In response, all the defendants filed motions to dismiss for failure to state a claim for which relief can be granted, as well as motions to stay discovery. In October 2015, the district court granted all the defendants' motions to dismiss, addressing only whether any of the defendants owed a duty to Ms. Rodriguez. Relying on an earlier case (*Munstermann v. Alegent Health – Immanuel Med. Ctr.*, 716 N.W.2d 73 (Neb. 2006)) in which the criterion for a psychiatrist's liability for failing to protect is predicated on the patient communicating to the psychiatrist a "serious threat of physical violence against a reasonably identifiable victim" (*Rodriguez*, p 239), the district court ruled that no duty was owed to Ms. Rodriguez as the appellants did not allege Mr. Loyd indicated any specific threats against her.

Ms. Rodriguez's parents subsequently sought to alter their second amended complaint, requesting that the district court determine that the defendants owed a duty to Ms. Rodriguez. They specifically sought to add a complaint against the UNMC defendants, alleging that Mr. Loyd sufficiently communicated to them a serious threat toward a reasonably identifiable victim, Ms. Rodriguez. In November 2015, the district court denied the motion to alter the second amended complaint on the grounds of futility and dismissed the complaints against the police.

On appeal, Ms. Rodriguez's parents challenged the district court's decision with regard to the Lasting Hope and UNMC defendants. They contended that the district court erred when it granted a motion to dismiss the Lasting Hope defendants, due to their custodial relationship with Mr. Loyd and a common law duty to protect their daughter, and when it denied their request to amend their allegations against the UNMC defendants.

Ruling and Reasoning

The Nebraska Supreme Court reversed the dismissal of the appellants' complaint against the Lasting Hope and UNMC defendants and reversed the denial of the motion to file an amended complaint.

The supreme court first addressed whether a legal duty to protect Ms. Rodriguez existed for the Lasting Hope defendants, ruling that the district court erred when it determined that no duty was owed to her. The court opined that a duty to protect third parties exists when a custodial relationship, such as the one between a hospital and a psychiatric inpatient, is established. The supreme court held that Lasting Hope established a custodial relationship with Mr. Loyd. They did not discharge him after they found him not dangerous; nor did they release him into the custody of the police when they arrived at Lasting Hope to arrest him on his outstanding warrant, even though at that time emergency protective custody had expired.

Second, regarding the UNMC defendants, the Nebraska Supreme Court reviewed *de novo* the district court's decision that amending the appellants' complaint to allege that Mr. Loyd sufficiently communicated a serious threat toward a reasonably identifiable victim would be futile. The state supreme court found that the district court erred when it denied the appellants' motion to add allegations to their claim, as the motion was filed before discovery was complete and before a motion for summary judgment had been filed. The state supreme court further said that a duty to warn and protect exists if a patient communicates to a psychiatrist a serious threat against a reasonably identifiable person. Given the context of a psychiatric evaluation of Mr. Loyd by a UNMC physician, allegations that Lasting Hope was aware of Mr. Loyd's misdemeanor charge for prior violence to Ms. Rodriguez, the fact that his protective custody commitment to the facility was based on threats to kill, and his placing multiple calls to Ms. Rodriguez while hospitalized, the proposed additional claim, which directly addresses the issue of communication of a threat toward an identifiable victim, would not be futile. Therefore, the Nebraska Supreme Court ruled that the district court erred when it denied the appellants' motion to amend their complaint and erred when it dismissed the action against the UNMC defendants.

Discussion

One of the most challenging situations for a psychiatrist is working with patients who may be dangerous to others. In such cases, in addition to performing a risk assessment, the law and professional ethics may require that psychiatrists take additional actions to protect or warn others. Duties to protect or warn are typically framed as exceptions to confidentiality, i.e., a patient's right to not have communication that has been imparted to treaters in confidence revealed to third parties. Such a right is protected by state legislatures and professional guidelines, and unauthorized breaches can result in legal action against the clinician or lead to adverse actions by state licensing boards and professional organizations.

The legal concept of a psychiatrist's duty to protect others from dangerous patients was first articulated in the California Supreme Court's landmark decision in *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976). *Tarasoff* recognized the duty of mental health professionals to use reasonable care to protect their patients' foreseeable victims. Subsequently, concerns about excessive civil liability for clinicians (and its negative consequences for public policy) resulted in setting a high threshold as to what triggers the duty to third parties in many states, generally requiring a threat toward an identifiable victim communicated directly to the clinician.

In its decision, the Nebraska Supreme Court referenced the Mental Health Practice Act (Neb. Rev. Stat. Ann. § 38–2137(1) (2013)), the language of which limits the duty to warn and protect (and the liability for failing to do so) to the "limited circumstances" where a patient has communicated to the provider a serious threat of physical violence to a reasonably identifiable victim. A critical factor, therefore, in determining whether a clinician has a duty is whether the patient has communicated a threat and whether the victim is identifiable.

In *Rodriguez*, however, strict adherence to the statute would not seem to permit breach of confidentiality based on a failure to meet the "communication" requirement. The ruling in *Rodriguez* increases decision-making ambiguity (and anxiety) for Nebraska mental health practitioners because the court's decision portends a distancing from the protections built into Nebraska statute regarding interpretation of what triggers the clinician's duty.

The Value of an Expert Witness and the Utility of Psychological Diagnoses

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Cross Examination of a Psychiatric Expert Without Presenting an Opposing Expert May Be Insufficient to Challenge Deficits in Psychiatric Diagnoses

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In *Richardson v. Belleque*, 406 P.3d 1074 (Or. 2017), the state appealed to the Supreme Court of Oregon, challenging the findings of the trial post-conviction court and the Oregon Court of Appeals, which determined that ineffective assistance of counsel in sentencing prejudiced Mr. Richardson and contributed to his being sentenced as a "dangerous offender" (Or. Rev. Stat. Ann. § 161.725(1)(a) (2005)), resulting in a significantly longer sentence. The state supreme court affirmed the appeals court's findings, vacating the sentence determination and remanding the case to the trial court for sentencing.

Facts of the Case

In 2006, Charles Edward Richardson argued with his wife in a local bar. As he left the bar, an elderly man followed. Mr. Richardson struck the man, who fell and hit his head. The victim died the next day of a head injury.

At a jury trial, Mr. Richardson was convicted of manslaughter and assault; the state petitioned for and was granted a presentence hearing to determine if Mr. Richardson qualified for dangerous-offender sentencing. Under Oregon statutes, a defendant being sentenced for a Class A felony who is found to have a severe personality disorder indicating a propensity to endanger others through criminal behavior can be sentenced to an indeterminant sentence of 30 years (Or. Rev. Stat. Ann. § 161.725, § 161.735, and §161.737 (2005)). The typical sentencing for manslaughter in Oregon is 10 to 20 years.